

# Dilemmas in Promoting Global Economic Justice through Human Rights Law

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## 1. Introduction

What is the value of ideas of international human rights in the struggle against global poverty and economic inequality? This question is not new, but recently a new aspect to it has emerged: what contribution might international human rights law make, on the basis of an ‘extraterritorial’ orientation, as far as state obligations are concerned? Such an enquiry has been foregrounded by a major international initiative by experts and activists: the 2011 ‘Maastricht Principles on the Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights’ (the ‘Principles’).<sup>1</sup>

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<sup>1</sup> Various authors, Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, adopted 28 September 2011, available at multiple places online including <http://www.maastrichtuniversity.nl/web/Institutes/MaastrichtCentreForHumanRights/MaastrichtETOPPrinciples.htm> (last accessed 23 July 2015) (hereinafter ‘Principles’). The official commentary to the Principles is De Schutter, Eide, Khalfan, Orellana, Salomon and Seiderman, ‘Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights’, 34 *Human Rights Quarterly* (2012) 1084 (hereinafter ‘Commentary’). For other academic writing on the Principles, see F. Coomans and R. Künnemann, *Cases and Concepts on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights* (2012) (hereinafter ‘Coomans and Künnemann’); M. Langford *et al.* (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (2013) (hereinafter ‘Langford *et al.*’); De Schutter, ‘Foreword’, in F. Coomans and R. Künnemann (eds), *Cases and Concepts on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights* (2012) v (hereinafter

The present chapter offers a critical evaluation of this enquiry, by considering a set of dilemmas or tensions that are implicated in the topic, and exploring how they play out in how the substantive contours of the law are understood, and more broadly illuminate the potential and the limitations of the law in this area. It does so by using the Principles, the Commentary, and what has been said about this topic by some of the signatories to the Principles, as a case study, given that the Principles and the Commentary aspire to be an authoritative and detailed codification of the law in this area and, more broadly, illustrate how the value of this normative framework is viewed by many in the field of international public policy.

Section 2 establishes the context for the present study—‘extraterritorial’ human rights obligations, and the history of the treatment of issues of international economic justice in international law. It then explains the method adopted in this chapter for evaluating the tensions and dilemmas involved in efforts seeking to use international human rights law to address such issues. The subsequent two sections identify and explore related sets of tensions: in Section 3, the tensions between hope and reality, and in Section 4, the tensions between a statist and a global focus. Attention then turns to the normative regime of international human rights law, as set out in the Principles and the Commentary, analysing the potential and limitations of this regime informed by an appreciation of the dilemmas and tensions identified earlier. This begins in Section 5 with an explanation of the general contours of the legal framework, and the broader issues at stake when its merit is to be assessed. Subsequent sections then explore how this framework addresses two central issues implicated in the topic. Firstly, Section 6, ‘power’, considers how the projection of power is framed extraterritorially so as to conceive particular triggers for applicability. Secondly, Section 7, ‘cooperation’, considers how the idea of the economically advantaged being required to engage in resource and technology transfer to the economically less advantaged is approached.

‘De Schutter: Foreword’); Coomans and Künnemann, ‘General Introduction’, in *ibid.*, 1 (hereinafter ‘Coomans and Künnemann: General Introduction’); Langford *et al.*, ‘Introduction: An Emerging Field’, in Langford *et al.* (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (2013) 3 (hereinafter ‘Langford *et al.*: Introduction’); Gibney, ‘On Terminology: Extraterritorial Obligations’, in *ibid.* 32 (hereinafter ‘Gibney’); Langford and Darrow, ‘Moral Theory, International Law and Global Justice’, in *ibid.* 419 (hereinafter ‘Langford and Darrow’); Vandenhole, ‘Beyond Territoriality: The Maastricht Principles on Extra-Territorial Obligations in the Area of Economic, Social and Cultural Rights’, 29 *Netherlands Quarterly of Human Rights* (2011) 429 (hereinafter ‘Vandenhole 2011’); Salomon and Seiderman, ‘Human Rights Norms for a Globalized World: The Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights’, 3 *Global Policy* (2012) 458 (hereinafter ‘Salomon and Seiderman’); Vandenhole, ‘Emerging Normative Frameworks on Transnational Obligations’, EUI Working Paper RSCAS 2012/17 (2012), available online at <http://cadmus.eui.eu/handle/1814/21874> (last accessed 23 July 2015) (hereinafter ‘Vandenhole 2012’); Salomon, ‘The Maastricht Principles on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights: An Overview of Positive “Obligations to Fulfil”’, *EJIL: Talk!* (16 November 2012), available online at <http://www.ejiltalk.org/author/msalomon/> (last accessed 23 July 2015) (hereinafter ‘Salomon 2012’); Coomans, ‘Situating the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights’, *Maastricht Faculty of Law Working Paper* (2013), available online at <http://ssrn.com/abstract=2256836> (last accessed 23 July 2015) (hereinafter ‘Coomans 2013’).

## 2. Context and Method

The ‘extraterritorial’ dimension of state obligations in international human rights law concerns the question of norms addressing the relationship between people located in one part of the world, and people located in other parts of the world, when these differences are conceived in terms of territorial title. The ‘extraterritorial’ approach classifies people and their rights, and states and their obligations, according to the legal status of the territory within which the people reside, and the nature of the connection between that status and the legal identity of the state concerned. Human rights are ‘territorial’ when opposable to the state in whose territory the individuals reside. They are ‘extraterritorial’ when opposable to a foreign state lacking sovereignty-as-title over the territory where the individuals reside.

Attempting to address global poverty and economic inequality through this approach involves challenging an exclusively ‘territorial’ conception of state obligations in human rights law, so as to include ‘extraterritorial’ obligations, especially where the territorial and the extraterritorial distinction map on to, respectively, places in the world where people are relatively economically advantaged, and places in the world where people are relatively economically disadvantaged. In other words, put more crudely, seeking to make economically advantaged states obliged to address the economic position not only of people within their territory, but also of poor people extraterritorially.

International law has for some time been a site of efforts to challenge global poverty and economic inequality, notably in the period during the main wave of post-Second World War decolonization, where newly independent, former colonial and relatively economically disadvantaged states sought to promote a ‘New International Economic Order’ (NIEO). This period saw the promotion of a ‘right to development’ which would oblige economically advantaged states to enable, including through resource and technology transfer, economic development in economically disadvantaged states. Such efforts were hampered by general resistance by wealthier states, with articulation and codification efforts residing largely in General Assembly resolutions at the UN, vulnerable to the challenge that such ‘soft law’ is insufficient by itself, absent the necessary developments in treaty and/or customary law, to be normative.

By contrast, international human rights law, also being established at this time, met the standard test for normativity, being articulated not only in the Universal Declaration of Human Rights (UDHR), but also in a range of treaties and other instruments. Although many of these instruments address economic rights and contain provisions that speak to issues of international economic justice, the main focus of attention with respect to understandings and interpretations of all human rights instruments began as territorial, being concerned predominantly with the relationship between individuals and the state within which they are located.<sup>2</sup>

<sup>2</sup> See e.g. Coomans and Künnemann, ‘General Introduction’, *supra* note 1, at 1.

Internationally, efforts to promote international economic justice were dominated by initiatives outside international human rights treaty-based mechanisms, building on the earlier NIEO-focus in the UN political organs. The Bretton Woods institutions (BWIs), the World Bank and the International Monetary Fund (IMF), became the leading multilateral bodies concerned with 'development', cohabiting with *sui generis* political initiatives such as the 0.7 per cent of GNP target for the provision of development assistance (which came out of the 'right to development' initiatives), campaigns for debt relief and the elimination of tariffs and subsidies, and the adoption of the 'Millennium Development Goals' (MDGs). The World Bank, the IMF and later the World Trade Organization (WTO) became sites of resistance for social movements seeking different, more radical and transformatory approaches to global poverty and economic inequality.

Later into the lifespan of post-World War II international human rights law, however, it is possible to identify greater receptiveness to addressing extraterritorial situations when human rights treaties are discussed, interpreted and applied by expert bodies, courts and tribunals, states, non-governmental organizations (NGOs) and independent experts. The earliest and most prominent trend in this regard is contained in the jurisprudence relating to the European Convention on Human Rights (ECHR) (notably in decisions about the Turkish presence in Northern Cyprus), and subsequent decisions relating to the International Covenant on Civil and Political Rights (ICCPR) and other regional and global human rights instruments. This development was heightened by a greater critical focus in the international public consciousness with respect to the impact on human rights of US-led extraterritorial activities associated with/occurring during and continuing after the 'War on Terror'. Courts and expert bodies being called upon by petitioners to bring these activities within the regulation of human rights treaties have considered this through the aforementioned device of 'extraterritoriality': conceiving the spatial reach of human rights obligations as being either 'territorial' or 'extraterritorial', and setting out tests for when the latter form of obligations would be triggered.<sup>3</sup>

The push towards the affirmation and delineation of extraterritorial human rights treaty obligations can be seen perhaps to have been most prominent and developed in the field of civil and political rights when this set of rights is compared with economic, social and cultural rights. The relative difference can be explained in part due to the aforementioned prominence given to certain concerns relating to rights in the former category in the period after the attacks on the United States on 11 September 2001, both territorial and extraterritorial. Equally, it is partly explicable because of the greater opportunity for and significance of international expert review regarding civil and political rights resulting from the more long-standing existence and state acceptance of jurisdiction of bodies engaged in such review exclusively, notably the European Commission and Court of Human Rights and the UN Human Rights Committee. Also, of the only three

<sup>3</sup> On the case law relating to civil and political rights, see e.g. the discussion and sources cited in Wilde, 'The Extraterritorial Application of International Human Rights Law on Civil and Political Rights', in N. Rodley and S. Sheeran (eds), *Routledge Handbook on Human Rights* (2013) 635.

bodies that operate as courts and issue binding judgments with respect to complaints, the two applying instruments that cover economic, social and cultural rights—the Inter-American Court of Human Rights and the African Court on Human and Peoples’ Rights—have had less opportunity to contribute to case-law compared to the European Court of Human Rights, and although the International Court of Justice, as part of its general move into human rights law, has made important pronouncements on the extraterritorial application of human rights law, including certain instruments covering economic, social and cultural rights, this has happened only recently, and in only a few instances, with significance more in the arena of norm-clarification than norm-enforcement.<sup>4</sup>

Whatever the cause, it is clear that when the extraterritorial application of human rights law has been addressed, whether before international interpretation bodies as in the jurisprudence mentioned above, or in popular discourse, or in academic literature, there had been until relatively recently a tendency for civil and political rights to be given greater and sometimes even exclusive focus when compared with economic, social and cultural rights. Writing in 2007, Alan Boyle and Christine Chinkin observed that ‘despite human rights reports setting out the adverse impact of neo-liberal economic ideology and globalization on the human rights of the poor, of women and of other vulnerable peoples, there has been little real attempt to address these issues within the framework of international law’.<sup>5</sup>

There is now an effort to alter the balance of the agenda of extraterritoriality within international human rights law in favour of economic, social and cultural rights, building on important but sparse developments in this field, from certain statements made by international expert bodies and important early academic interventions. This is being spearheaded by a group of experts and activists (as will be discussed further below, not, of course, categories that are mutually exclusive), including members of international human rights expert bodies, NGO staffers and university professors. They are backed up by a broader expert/activist network including many NGOs working in the field of human rights generally and rights in the area of international economic justice and equality in particular, called the ‘Extraterritorial Obligations Consortium’, or ‘ETO Consortium’ for short.<sup>6</sup>

In 2011, 40 members of this movement adopted the ‘Maastricht Principles on the Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights’, hereinafter referred to as the ‘Principles’.<sup>7</sup> This was followed a year later by a detailed and lengthy legal ‘Commentary’ by the six members of the

<sup>4</sup> See e.g. the discussion and sources cited in Wilde, ‘Human Rights Beyond Borders at the World Court: The Significance of the International Court of Justice’s Jurisprudence on the Extraterritorial Application of International Human Rights Law Treaties’, 12 *Chinese Journal of International Law* (2013) 639.

<sup>5</sup> A. Boyle and C. Chinkin, *The Making of International Law* (2007), at 18.

<sup>6</sup> Information available online at <http://www.etoconsortium.org> (last accessed 23 July 2015). I am an academic member of the Consortium, which I joined after the Maastricht Principles had been adopted (an overview over the academic members is available online at <http://www.etoconsortium.org/en/about-us/academic-members> (last accessed 23 July 2015)). I played no role, formal or informal, in the process that led to their adoption.

<sup>7</sup> Principles, *supra* note 1.

drafting committee of the Principles, issued as an authoritative explanation for what was meant in each of the Principles.<sup>8</sup>

Backed up by this Commentary, the Principles stand alone as an effort to codify comprehensively in a series of treaty-like provisions the main contours of an international human rights law regime with respect to the actors and subject matter in its title. This is a landmark development in international law. It reflects an initiative that seeks to give efforts to promote international economic justice across borders in human rights law a boost when compared to similar efforts in the field of civil and political rights. Also, it seeks to set out authoritatively the substantive contours of a normative regime on this topic that may well prove highly influential in how the law in this area is understood.<sup>9</sup>

Such an initiative is worthy of close attention and detailed critical scrutiny, from a range of perspectives. The present chapter aims to make one contribution in this respect. However, the focus herein is tangential to the enterprise of appraising the Principles and Commentary. It will provide an appraisal of certain aspects, but as a by-product, not the main focus of attention. The aim is to consider more broadly the dilemmas that exist when seeking to use the obligations of states in international human rights law to pursue an agenda to promote international economic justice and equality, using the Principles and the Commentary as a case study of such an effort. What might these instruments indicate about such dilemmas, in what they say about the significance and content of the law? I will suggest that they are as significant for what they illuminate on this broader question as they are when it comes to being assessed on their own terms.

This chapter is not, therefore, a general assessment of the Principles on their own terms, for example providing a comprehensive appraisal of the merit of their substantive doctrinal position on what the extraterritorial application of international human rights law obligations of states in the field of economic justice is (though such an appraisal will be made in certain areas). Apart from any other consideration, there is already a significant body of scholarship on both the broader doctrinal topic in general and the Principles in particular, much of it (e.g. the Commentary) written by those involved in drafting the Principles, others who merely signed them, and yet others who are broader members of the Consortium.<sup>10</sup> What is considered instead are the background policy preferences embedded in the legal framework as it is described in these instruments, and, in the light of this, the potential and limitations of seeking to use international human rights law in this way to change the international economic system for the better. This is done through an analysis of the Principles, the Commentary, and a consideration of what has been said about them and/or the law they encapsulate more broadly in separately published work by some of the individuals who drafted and/or signed the Principles.<sup>11</sup>

<sup>8</sup> Commentary, *supra* note 1. On the connection between the members of the drafting committee and the authors of the Commentary, see *ibid.*, at 1084, footnote (unnumbered).

<sup>9</sup> On this, see Salomon and Seiderman, *supra* note 1, at 459 and Vandenhoele 2012, *supra* note 1, at 9.

<sup>10</sup> See the sources cited Salomon and Seiderman, *supra* note 1.

<sup>11</sup> See *ibid.*

When it comes to the question of the relationship between the obligations of states in international human rights law and the quest for global economic justice, there is only one generalized activist initiative currently on the international policy agenda: the Principles. This initiative has been conceived to be, and is now being forcefully advocated as, the best way of thinking about the role of state obligations in international human rights law in the field of international economic justice. Those involved in their adoption, and the ETO Consortium, have been and are involved in advocacy for the affirmation, adoption and citation of the Principles by states, IGOs, NGOs, courts, tribunals and expert bodies, as authoritative benchmarks against which the role of all states in efforts to combat global poverty and economic inequality should be judged.<sup>12</sup>

Why are such efforts being made? For some commentators, it is simply a matter of filling a normative gap between what is happening as a matter of fact, and what human rights law if understood exclusively territorially would cover. Since human rights law has usually been concerned predominantly or even exclusively with the territorial state, yet globalization is indicating the role of other states also being determinative of human rights, the regime needs to be expanded out to take in the latter actors.<sup>13</sup> According to Wouter Vandenhoe, the fact that the territorial state may not be an adequate exclusive focus when it comes to promoting international economic justice poses:

fundamental challenges to human rights law. In *practice*, human rights law may not be able to properly address these . . . situations, and therefore runs a risk of marginalization in endeavours to bring about social justice . . . [n]ew duty bearers such as foreign States . . . can be integrated into the human rights legal regime.<sup>14</sup>

For Vandenhoe, '[h]uman rights law . . . needs to be re-thought, so as to make it responsive to realities on the ground . . . Economic globalisation has so far not been paralleled by a "globalisation of human rights law". But it should.'<sup>15</sup> One reading of these statements is that human rights law must apply extraterritorially simply for the sake of human rights law itself—to avoid the law becoming marginal.

But behind such statements are assumptions about the substantive merit of human rights law as a regime for regulating economic globalization. This is presumably held on the basis that its merit in the domestic economic context is similarly assumed, and that a transfer to the extraterritorial context will necessarily bring with it the same or equivalent benefits to those which operate domestically. So human rights law should not be marginalized, not for its own sake but because of the important positive difference that will be lost.

The current campaign for the acceptance and implementation of the contents of the Principles is based on the proposition that international human rights law has an important, perhaps even pre-eminent, positive role in combatting global poverty

<sup>12</sup> On this, see Coomans 2013, *supra* note 1, at 4 and 20; Coomans and Künnemann, 'General Introduction', *supra* note 1, at 4; Vandenhoe 2011, *supra* note 1, at 433.

<sup>13</sup> See, e.g. Vandenhoe 2012, *supra* note 1, at 2.

<sup>14</sup> Vandenhoe 2011, *supra* note 1, at 430. See also Vandenhoe 2012, *supra* note 1, at 1–2.

<sup>15</sup> Vandenhoe 2012, *supra* note 1, at 1–2 (footnote omitted).

and economic inequality, and/or in somehow having a beneficial effect in regulating economic globalization. This forms part of a broader discourse about the purported benefits of international law generally, in providing global solutions to global problems. For Alan Boyle and Christine Chinkin, 'international law... is fundamental to a globalised world: the movement of people, goods and capital across state borders demand international standards'.<sup>16</sup>

Such ideas can be identified in statements by those who signed the Principles, and the broader ETO Consortium. The webpage of the latter asserts that:

ETOs [extraterritorial obligations] are a missing link: Without ETOs, human rights could not assume their proper role as the legal bases for regulating globalization. With ETOs, an enabling environment for ESCRs [economic, social and cultural rights] can be generated, the primacy of human rights can be implemented, climate [change] and eco-destruction can be stopped, the dominance of big money broken, TNCs [transnational corporations] regulated, and IGOs [intergovernmental organizations] made accountable.<sup>17</sup>

A similar claim is made by Fons Coomans and Rolf Künemann.<sup>18</sup> Reflecting a commonplace assumption within international human rights law policy, the suggestion is that the operation of human rights law extraterritorially will have substantive, even transformatory beneficial effects. This is why the 'proper role' of this normative system is 'regulating globalization'.<sup>19</sup>

As the above statement from the ETO website, with its claim that extraterritorial human rights obligations will 'end the dominance of big money', indicates, for some, there is the claim that human rights law is somehow anti-capitalist, and so in the context of economic globalization its extraterritorial application is going to assist in efforts to challenge the liberal international economic order.<sup>20</sup> Thus the Principles can be invoked as response to Alan Boyle and Christine Chinkin's aforementioned 2007 criticism about the scant efforts within international law to address issues of the 'adverse impact of neo-liberal economic ideology and globalization'.<sup>21</sup>

For others this positive benefit of human rights law extraterritorially is associated with ideas of legitimacy. Olivier De Schutter twins the benefit to human rights of its extraterritorial application with the benefits to that which it would apply, in terms of the conferral of legitimacy, thus:

[t]he Maastricht Principles... contribute to... [the] renewal of human rights: they invite us to see human rights as global public goods, and a guide for the reshaping of the international legal order. As these norms and procedures develop, human rights gradually can turn into... a 'global public standard' to assess the normative legitimacy of global governance institutions—i.e., the 'right to rule' of these institutions, which cannot ensure compliance

<sup>16</sup> Boyle and Chinkin, *supra* note 5, at 19.

<sup>17</sup> Quote from the ETOs webpage, *supra* note 6.

<sup>18</sup> See Coomans and Künemann, 'General Introduction', *supra* note 1, at 2–3.

<sup>19</sup> On this, see also *ibid.*, at 1, 6 and 14, and Vandenhoe 2011, *supra* note 1, at 2.

<sup>20</sup> See e.g. Coomans and Künemann, 'General Introduction', *supra* note 1, at 14.

<sup>21</sup> Boyle and Chinkin, *supra* note 5, at 18.



with their decisions unless they are perceived as legitimate by those, including States, whom such decisions are addressed to.<sup>22</sup>

A related perspective on the potential beneficial effect of extending the applicability of human rights law is to understand it as introducing ‘accountability’ to the arena of economic globalization that is currently lacking in this regard. Olivier De Schutter asserts that ‘if we accept to build on the extraterritorial obligations of States, the accountability gap that economic globalization has created can be closed’.<sup>23</sup> But do ‘we accept’ to do this, and on what basis—and who is the ‘we’? The potential for this positive difference cannot be assumed. The merits of human rights law even in the domestic economic context are contested. Moreover, even if a case can be made in this context, it cannot be assumed that whatever benefits are considered to operate there will automatically be transferred to the very different extraterritorial context. The question, then, is whether an effort to avoid human rights law being relegated to the ‘margins’ when it comes to regulating economic globalization will itself make a significant, or marginal, positive difference in substantive economic rights. The case for making this effort depends in large part on the case on the latter question of the substantive difference. Without the latter case being proven, efforts such as these are vulnerable to the charge that they are a time-consuming distraction away from activities that might face a better chance of making a real difference, promising much but delivering something more limited. The stakes are high, and capacities for activism not unlimited. Does an effort such as the present one deserve a place on the agenda, and an allocation of time and resources, in the movements for global economic justice—and, if so, on what basis?

It is important to ask, therefore, what is at stake in all of this. What vision or visions for the economic future of the world are implicated and mediated, whether explicitly or implicitly—promoted, supported, affirmed, resisted, hampered, concealed—by the campaign to apply human rights law extraterritorially to combat economic injustice? What might the choices made as to how to frame the normative regime in the Principles and elaborate on their meaning in the Commentary indicate about the potential, limitations, compromises and anxieties that go into a legal project of this kind? Olivier De Schutter sees human rights law as having the potential to serve as a benchmark of ‘legitimacy’ against which global economic governance can be assessed, enabling the introduction of ‘accountability’ to economic globalization. But what of the substantive nature and merits of this benchmark? Who would win, and who would lose, in its operation? Standards of legitimacy and accountability can be used, of course, to ‘legitimate’ that which is objectionable, to make more difficult, not easier, more transformatory beneficial changes, and/or, at their least worst, to serve as very thin substantive benchmarks with only marginal positive benefits. One cannot assess the worth of such an enterprise without moving beyond formal notions of legitimacy and accountability to look at the substance.

<sup>22</sup> De Schutter, ‘Foreword’, *supra* note 1, at viii.

<sup>23</sup> *Ibid.*, at v. See also Salomon and Seiderman, *supra* note 1, at 458, and Coomans 2013, *supra* note 1, at 2.

In the introduction to their edited volume on the 'extraterritorial scope of economic, social and cultural rights in international law', with the main title 'Global Justice, State Duties' (encapsulating a cosmopolitan/statist duality that will be considered further in due course), Malcolm Langford, Wouter Vandenhole, Martin Scheinin and Willem van Genugten state that they are not aiming to 'articulate a moral or normative basis for extraterritorial obligations' nor do they have an 'express reformist agenda which seeks to articulate how existing treaties or mechanisms could be improved or supplemented. Rather, this book seeks principally to interpret existing law.'<sup>24</sup> Implicit in this statement is that considerations of a 'moral' or 'normative' nature are exclusively relevant to questions of the existence, improvement and supplementing of obligations in this field. Since the authors are only concerned with mapping out the law as it is, such considerations are not to be addressed. But this assumes that the law *as it is* has merit. Otherwise, why bother with efforts to describe it? Yet such an assumption cannot be made and, moreover, 'moral' or 'normative' approaches are needed in order to appraise substantive merit.

Actually, the authors do address briefly some normative approaches to the topic. Here, they invoke and describe Martti Koskenniemi's critique of international human rights law thus: transforming human rights into law risks dissipating its moral power, with that power 'placed in the hands of bureaucrats and lawyers to depoliticize the rights and interpret them technically, cautiously and conservatively'.<sup>25</sup> The authors observe that:

[t]hese critiques should be taken seriously, but they arguably underestimate the potential of human rights as legal norms. International human rights law, jurisprudence and procedures have shown the potential to partly adapt to the new scenario of enhanced extraterritorial power. Moreover, the language of human rights law is found increasingly at the forefront of civil society demands for global justice.<sup>26</sup>

Setting aside whether this description of Koskenniemi's ideas is actually authentic, it does offer a rebuttal to an absolutist assumption that law will always lead to a depoliticized, technical, cautious and conservative approach: in substance, there has been potential for 'adaptation' demonstrated, and the significance of the continued invocation of human rights law by civil society activists has to be acknowledged and reckoned with. But this is surely only the start of the analysis. One then has to turn to the substance: is human rights law up to delivering that which it promises, the existence of such promises being the reason why civil society turns to it? The language of the law having 'partly adapted' is, of course, redolent of the kind of caution and conservatism that the authors' description of Koskenniemi's criticism raised, yet is invoked as somehow a rebuttal to this criticism. What is the merit of this partial adaptation? Readers, including those civil society activists whose continued reliance on human rights law, something we are reminded of by the authors,

<sup>24</sup> Langford *et al.*, 'Introduction', *supra* note 1, at 9–10.

<sup>25</sup> *Ibid.*, at 29, citing Koskenniemi, 'Human Rights Mainstreaming as a Strategy for Institutional Power', 1 *Humanity* (2010) 47.

<sup>26</sup> Langford *et al.*, 'Introduction', *supra* note 1, at 29.

is at stake, are not told. With no further consideration of this matter in the piece, we are left to take this crucial matter on trust. So, it seems, we are not to assume that human rights law applied extraterritorially will lead to outcomes that are depoliticized, technical, cautious and conservative, but on no evidence beyond a statement that ironically uses language actually suggestive of outcomes of this type. The making of one set of assumptions is being rebutted with the making of another.

In the final main chapter in the book, chapter 14, placed tellingly under an overall banner of an 'afterword', Malcolm Langford and Mac Darrow explore 'Moral Theory, International Law and Global Justice' as they relate to the topic. It is possible, then, for the introduction and 13 chapters to engage in a detailed mapping exercise of the law before any treatment is given to the broader normative questions that need to be addressed in considering whether and to what extent that which is mapped is of substantive merit. Moreover, even this treatment avoids the substance. The authors focus on the entry level question of whether human rights legal obligations should exist without an evaluation of the substance of that which would operate were the obligations to be in play. This approach is determined by the limits of the range of approaches they review, which runs between 'skeptical, modestly supportive, and strongly supportive of global justice obligations'.<sup>27</sup> So the 'skeptical' approaches include, as one would expect, ideas of communitarianism situated within a debate about whether states should have moral and political commitments outside their own bounded communities. What is missing from all this, which would involve moving beyond 'skepticism' to more radical 'critique', demonstrated by the description of Koskenniemi's ideas earlier, is an enquiry into the substance of that which would apply were human rights to be applicable.

The present chapter seeks to address some of the issues of substance that the approaches reviewed earlier seem determined to avoid. It does so by way of 'immanent critique', considering these important texts in terms of the broader policy ideas embedded in, and left out, of them, as an impressive and authoritative codification of the state of international human rights law in this area.<sup>28</sup> Such ideas can be identified, and are implicated, whether or not this was intended by the individual drafters and signatories. The present chapter is about the ideas suggested, or excluded, by the text, as a description of the law, regardless of whether the drafters and signatories intended such suggestions and exclusions, and/or supported (or rejected) that which is so suggested (or excluded). Indeed, in any collective drafting effort such as the one under evaluation, the resultant text is not only more than the sum of its individual contributor-parts. Also, because of the compromises needed to

<sup>27</sup> Langford and Darrow, *supra* note 1, at 421.

<sup>28</sup> This approach is inspired by 'ideology critique' developed from certain ideas of Marx by social theorists such as John Thompson, Terry Eagleton and Slavoj Žižek, and further explicated and applied in the context of international legal discourse by Susan Marks. See J. B. Thompson, *Ideology and Modern Culture: Critical Social Theory in the Era of Mass Communication* (1990); T. Eagleton, *Ideology—An Introduction* (1991); S. Žižek (ed.), *Mapping Ideology* (1994); S. Marks, *The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology* (2000), in particular Chapter 1; S. Marks, 'Big Brother is Bleeping Us—With the Message that Ideology Doesn't Matter', 12 *European Journal of International Law (EJIL)* (2001) 109.

achieve consensus, it is invariably divergent, to greater or lesser extent, from the personal views of each individual contributor to it.<sup>29</sup> Moreover, the Principles and the Commentary now have a life of their own, as texts requiring analysis in their own right because of the prominence they have had and will have as canonical documents, quite separately from the individuals with whom they were originally associated. These texts aspire to address comprehensively and in detail all the main areas of public international law relevant to the topic, notably international human rights law, the law of the UN Charter, customary international law and general norms of state responsibility. A consideration of them is, therefore, a means of addressing more generally the potential and limitations of international human rights law when it comes to the global quest to combat poverty and economic inequality.

This is an activist project that aims to deploy the existing mechanisms and structures of global governance to a particular end, promoting economic equality and combatting global poverty. In what follows, it will be argued that a series of tensions are embedded within any project for global governance of this kind. Such tensions are revealed by an evaluation of this particular project, just as the dilemmas of the project are in turn illuminated by a consideration of these tensions.

### 3. Tension 1: Hope versus Reality

#### A. Introduction: Apology versus Utopia

The Principles and the movement behind them aim to work pragmatically to deploy international legal and political structures to counter global poverty and economic inequality. This project implicates the tension that Martti Koskenniemi has identified in international legal thought, between elements of ‘apology’ and ‘utopia’, in seeking to both work within, and transcend, the status quo.<sup>30</sup>

The present section considers two sets of related tensions that reflect this broader apology/utopia dialectic, and which also raise further distinct challenges of their own: firstly, the tension between being an ‘expert’ and being an ‘activist’; and secondly, the tension between elitism, imperialism and patriarchy, on the one hand, and representativeness in its many forms, on the other.

As mentioned earlier, the present study is not about the personal views of people who drafted and signed the Principles and commented on them but, rather, the ideas contained in these documents and by association the state of international human rights law. That said, what the documents say about the identity of authors, and how this corresponds to other evidence in this regard, and implicates broader ideas, is significant because it speaks to important questions about the nature and legitimacy of an initiative of this kind. Two particular aspects of this identity will be considered: firstly, what is said, and not said, about the professional

<sup>29</sup> See Vandenhoele 2011, *supra* note 1, at 432.

<sup>30</sup> M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (reissue, 2005); Koskenniemi, ‘The Politics of International Law’, 1 *EJIL* (1990) 4.

orientation of the signatories to the Principles; secondly, what is said, and not said, but clearly evident, about the national origin/base and gender of the signatories to the Principles and the authors of the Commentary.

## B. Experts/Activists

The Preamble states that the Principles were adopted ‘at a gathering convened by Maastricht University and the International Commission of Jurists’<sup>31</sup> by ‘a group of experts in international law and human rights . . . who came from universities and organizations . . . and include current and former members of international human rights treaty bodies, regional human rights bodies, and former and current Special Rapporteurs of the United Nations Human Rights Council’.<sup>32</sup> Thus the signatories are described as ‘experts’ only.<sup>33</sup> The text indicates that the gathering was convened by a university and an entity, the International Commission of Jurists, with a professional-sounding name. When it provides detail on the bodies to which the signatories are affiliated, these are described as expert bodies, the UN or vaguely-titled ‘organizations’. Sometimes when the identities of the signatories are described by those writing about the Principles, it is with reference to the ‘expert’ members only.<sup>34</sup>

Significantly, in the Principles document, the signatories are not also described as ‘activists’. The role of the aforementioned activist ETO Consortium is not mentioned.<sup>35</sup> The identity of some of the ‘organizations’ that some of the signatories work for as civil society/campaigning NGOs is left off, even though relatively more detail is provided when it comes to expert bodies and the UN.<sup>36</sup> Someone unfamiliar with the International Commission of Jurists might not, on simply reading its title, think that it is not only a professional body but also a campaigning organization.<sup>37</sup>

The categories ‘expert’ and ‘activist’, ‘professional’ and ‘campaigning’, are, of course, not mutually exclusive. Moreover, if one looks at the list of signatories at the end of Principles, the NGO-affiliation of some is clearly indicated. Equally, one might not assume that the International Commission of Jurists does not have an activist orientation and would find out that it does have such an orientation from a brief investigation.<sup>38</sup> The earlier discussion of what some of those who signed the Principles say about the supposed normative benefits of the Principles, in terms of regulating globalization generally, and in particular introducing much-needed benchmarks of legitimacy and accountability, clearly indicates that for such people—including Olivier De Schutter, who at the time when he signed the Principles

<sup>31</sup> Principles, *supra* note 1, Preamble.

<sup>32</sup> *Ibid.*

<sup>33</sup> See also De Schutter, ‘Foreword’, *supra* note 1, at v; and Coomans and Künnemann, ‘General Introduction’, *supra* note 1, at 3.

<sup>34</sup> See e.g. Coomans 2013, *supra* note 1, at 3 and 20; Salomon and Seiderman, *supra* note 1, at 458.

<sup>35</sup> On the Consortium, see *supra* note 6.

<sup>36</sup> For this information on their affiliations, see Principles, *supra* note 1, Annex.

<sup>37</sup> See the Commission’s website, available online at <http://www.icj.org/about/> (last accessed 23 July 2015).

<sup>38</sup> For example by looking at the website, referred to in the last footnote.

and when his works reviewed above were published was the UN Special Rapporteur on the Right to Food, i.e. an ‘expert’—there is a normative agenda being advanced.<sup>39</sup> The initiative is, as described at the start of this chapter, an expert-activist one, in terms of both the formal matter of professional affiliations (signatories include members of treaty bodies and NGO staffers), and substantive abilities and views (all signatories could be understood to be both legal experts and people in possession of normative positions on the merits of the enterprise).

Nonetheless, the language of the Preamble has the effect of downplaying, even concealing, and certainly not expressly acknowledging, the activist side of things. The Preamble could have been more comprehensive and revealing in framing the professional orientation (activists as well as experts) and describing the professional affiliations (NGOs, not just ‘organizations’, as well as expert bodies and the UN). The reference only to expertise suggests a claim to authority on the subject matter; without anything further, however, there is potentially the suggestion of an unwillingness to declare the operation of an agenda when this expertise is deployed. So, for example, when Fons Coomans discusses the identity of the signatories and the significance of this in terms of expertise and activism, only the former is mentioned, and this is combined with a reference to ‘authority’: ‘among the participants who adopted and endorsed the Principles were key human rights scholars and experts. This gives authority to the document.’<sup>40</sup> Continuing this theme, Coomans states:

The experts which [sic] finally adopted and endorsed the Maastricht Principles did not do so on behalf of the ETO Consortium, but in their personal capacity. Among the 40 participants were 12 experts who had not been involved in the work of the ETO Consortium, among them former and present members of UN Treaty bodies, former and present UN Special Rapporteurs. The text is a legal expert opinion and not a Consortium document.<sup>41</sup>

Of course, just as the endorsement of the Principles by the ‘experts’ may not, we are told, have been on behalf of the ETO Consortium, presumably also, given the existence of obligations of independence and impartiality that they owed to the bodies they worked for, this endorsement was not formally ‘on behalf of’ these bodies either. Such a statement invokes ‘personal capacity’ only in the context of it somehow being a shield protecting from the (presumed) taint of activism implied by acting on behalf of the Consortium, failing to acknowledge that this capacity also prevents any formal connection being made between the signatories and the expert bodies they worked for. When such an omission is taken together with the omission of any mention of the affiliation of the other signatories, some of whom working for NGOs, and a discussion of the capacity in which these people signed the document, it is difficult not to wonder whether there is not a deliberate effort to foreground the expertise elements and downplay the activist elements.

<sup>39</sup> Olivier De Schutter was UN Special Rapporteur on the Right to Food from 2008 to 2014. Information available online at <http://www.ohchr.org/EN/Issues/Food/Pages/FoodIndex.aspx> (last accessed 23 July 2015). As one of the drafters, he signed the Principles in 2011 and co-authored the Commentary in 2012; the piece by him quoted herein was published in 2012.

<sup>40</sup> Coomans 2013, *supra* note 1, at 20.

<sup>41</sup> *Ibid.*, at 3.

Why does this matter? Such a way of describing expertise—not acknowledged to be also allied to activism—has the potential to suggest a claim to be impartial and neutral. The point is not that such impartiality and neutrality is, in the final analysis, sustainable, but, rather, that the language used seems to suggest so. This has substantive significance, because it creates the potential for an impression that the content of the Principles is somehow to be understood outside a particular agenda for what the law is and should be, and more fundamentally, outside an agenda concerned with the value of the law itself. If activism is not even properly acknowledged, there is no place for an explanation and defence of the particular agenda being advanced in preference to potential alternative agendas, whether this agenda is to promote law alongside and even prioritize law in relation to other strategies, or to promote this particular view of the law in preference to alternative views. On the latter question, it can be taken even as a suggestion that there is only one ‘legal’ approach to be adopted, which can be identified and described neutrally through a scientific process of expert analysis.

Actually, of course, there are multiple choices to be made in any project seeking to describe what the law is and should be, and more broadly the value of focusing on, and advocating for, the acceptance and enforcement of the law. Broader ideas that map onto the intellectual palette of and therefore overlap with the substantive work of the ‘activist’ are clearly implicated in the choices made here, whether or not acknowledged, either fully or at all, by those involved. This is demonstrated by the bold normative claims made about the Principles by some of the ‘experts’ as discussed earlier. But as that earlier discussion revealed, the claims made have tended to be made by way of assumption only, without a treatment of their foundation. An emphasis on neutral, apolitical ‘expertise’ is certainly compatible with such an approach and, indeed, a shift towards the activist, normative side of things reveals, as discussed above, that much is missing from the current analysis.

The selective emphasis on expertise shorn of activism is also clearly potentially helpful in the objective of seeking the affirmation and adoption of the legal standards contained in the Principles by those to whom they would apply: states. A tone can be struck that emphasizes neutrality and impartiality in what is a field of hugely contested issues. Moreover, it is significant that, as reviewed above, those behind the Principles view extraterritorial human rights obligations as having the potential to introduce constraints—‘accountability’—on the behaviour of states in economically privileged positions that are new. It can be speculated that there is deemed to be pragmatic utility in making the case for such constraints from the standpoint of neutral expertise rather than partisan activism.

The exclusive or predominant focus on the ‘expert’ side of the ledger is not the only account, however. It cohabits with other explanations, sometimes by the same people, which place more, even sometimes exclusive, emphasis on the ‘activist’ side, stressing the role of the ETO Consortium, and describing the identity of those involved exclusively as NGO staffers and scholars, not also IGO ‘experts’.<sup>42</sup>

<sup>42</sup> See Salomon and Seiderman, *supra* note 1, at 458; Coomans 2013, *supra* note 1, at 2–3; Vandenhole 2012, *supra* note 1, at 3–4.

As will be explored more in due course, the combination of expertise and activism embedded in the Principles is at once a tension that runs through the initiative, and also, when emphasis is, as reviewed above, placed selectively on one more than, or even to the complete exclusion of, the other, the source of a productive device for addressing different audiences and deploying different arguments that are, taken together, broader in range than would be possible otherwise.

### C. Elitism, Orientalism and Patriarchy

... are there obligations to ensure strangers are not hungry, poor, without access to the necessities of healthcare and education?

Margot Salomon and Ian Seiderman<sup>43</sup>

The second important aspect of the way in which the identity of the signatories to the Principles and the Commentary is described, or not, is in terms of national origin or base and also in terms of gender. Beginning with national origin or base, as already mentioned, the Preamble to the Principles states that the signatories ‘came from universities and organizations located in all regions of the world and include current and former members of international human rights treaty bodies, regional human rights bodies, and former and current Special Rapporteurs of the United Nations Human Rights Council’.<sup>44</sup>

Like the earlier reference to ‘experts’, here language is deployed to create an impression about the identity of the signatories in terms of where they are from. The bodies they are affiliated with are from ‘all regions of the world’ and include entities with an international and regional orientation. It is hard not to escape the conclusion that this language is being used to have normative import, implying a claim to be globally representative. Why mention the global reach of the signatories’ affiliations if it does not matter? And if it does matter, how, exactly?

The notion of being globally representative in connection with an initiative relating to international human rights law implicates long-standing debates about universalism and cultural relativism in connection with this area of law. More broadly, it foregrounds the significance of ideas that have been developed in the context of anti-colonialism, the legacy of colonialism, and neo-colonialism: ‘post-colonial studies’.<sup>45</sup> Elements of ideas from this body of work have been invoked and applied to international law, including international human rights law: ‘third world approaches to international law’ (TWAIL).<sup>46</sup> What is the relevance of these ideas to the question of the extraterritorial application of international human rights law?

<sup>43</sup> Salomon and Seiderman, *supra* note 1, at 459.

<sup>44</sup> Principles, *supra* note 1, Preamble.

<sup>45</sup> See the sources cited in R. Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (2008), List of Sources, Section 5.3.3.

<sup>46</sup> See the sources cited in the following: <http://waynemorsecenter.uoregon.edu/conferences-symposia/twail/twail-primer> (last accessed 23 July 2015); Gathii, ‘TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography’, 3 *Trade Law and Development* (2011) 26; Wilde, *supra* note 45, List of Sources, Section 5.3.4.



Adopting the territorial/extraterritorial axis that is the frame of reference for the present study, the dominant strand of focus of the universalism/cultural relativism debate in international human rights law has been an exclusively territorial one. The main point of the debate has concerned whether the supposed 'universal' standards of international human rights law are actually of universal purchase in each national situation to which they purport to apply, when that national system is understood in terms of the relationship between the state and the people in its territory exclusively. The question is whether the same standards are legitimate in each national situation, or whether these standards are in some way better understood to be of more particular relevance in some national contexts than others, *viz.* those states in the global North/the West/Europe, and are therefore culturally relative and of questionable legitimacy when it comes to their operation globally, notably in the global south. For cultural relativists, one aspect of this debate concerns the way in which ideas of universalism are deployed to mask particularism.

These issues cut differently when the extraterritorial context is considered. The question is not whether universal standards are of common legitimate purchase in every country as far as the internal operation of each national system is concerned. Rather, it is whether universal standards on the relationship *between* national or territorially-based systems further an agenda that is of interest to all people in the world in a just and equal fashion. Who wins, and who loses, across the globe, in the normative regime of the extraterritorial application of economic, social and cultural rights, and to what extent do the winners and the losers map onto broader distinctions that are foregrounded by post-colonial analysis: the global north and global south; European states and former colonial states, for example? Indeed, this question of the legitimacy of the standards that operate extraterritorially might be seen as more acute and complex than in the exclusively territorial context, because unlike that context it implicates broader questions about how the global economy should be structured, how states should relate to each other, how historical and contemporary causal relationships across boundaries should be understood and addressed, etc.

This general question is of particular significance to the topic of the extraterritorial application of *economic* rights, because of the economic dimensions of post-Renaissance European colonialism, and the way in which distinctions in economic grounds, which would form the basis for extraterritorial obligations (e.g. the more economically privileged bearing obligations with respect to the economically disadvantaged) often map onto the global north/global south divide that in many ways finds its origins in the earlier colonial divisions of the world. Indeed, as will be discussed further, one particular ethical basis for extraterritorial obligations in the economic sphere, beyond ideas concerned with combatting inequality, is the notion of reparation for earlier colonial domination, exploitation and abuse.

Furthermore, post-colonial ideas remind us that contemporary initiatives of advocacy for norms to promote economic justice across borders, from the rich to the poor, can be traced directly to colonial-era ideas of trusteeship over people and the civilizing mission. They invite us to consider how the humanitarians of today are engaged in a project that bears important connections back to the

humanitarianism of a century and more ago. Post-colonial thought, including the history of colonialism, reveals a long tradition of those in economically privileged parts of the world seeking to articulate what is in the best interests of others in less economically privileged parts of the world, and seeking to further this through the notion of obligations, including international legal obligations, borne by their own states to save/assist/develop the 'other'. In the colonial era, this was furthered by some through the advocacy of trusteeship: the idea of taking over direct control of people deemed incapable of running their own affairs, ostensibly in their own interest.<sup>47</sup> When this idea of trusteeship over people was supposedly repudiated by the post-Second World War turn against colonialism and in favour of self-determination for colonial peoples, such ideas morphed, into, for example, the projects for international economic governance and 'development' in the aforementioned BWIs and into ideas relating to the provision of development aid/assistance. So, then, post-colonial thought is relevant to the present project because of the link between the nature of the contemporary enterprise, and the ideological ideas and legal norms associated with colonial trusteeship.

Earlier it was observed that the language of exclusive 'expertise' used in the Principles risked concealing the activist agenda being promoted by this initiative. When such an agenda is acknowledged, the next step is, of course, to ask important critical questions about it. Such questions are foregrounded when post-colonial ideas are brought into the frame. It might be said that this activist effort is in sync with a post-colonial critique of international law, because it is concerned with the economic obligations of the global rich to the global poor. At the very least, it can be seen, as mentioned earlier, to follow from earlier trends within international law where former colonial states sought to promote the NIEO.

But to stop at this superficial treatment would not do justice to the more challenging questions raised by post-colonial ideas, some of which, indeed, placing the legitimacy of the NIEO efforts into question and potentially leading to an opposing conclusion from that arrived at when viewing things more superficially. Such ideas require a consideration of more profound questions concerning the structure of the world into sovereign states, and the substantive agenda being furthered, beyond a general idea of extraterritorial economic obligations. Which obligations of what kind? What difference will they make? Is international human rights law a legitimate and important means through which global economic inequality and poverty can be addressed? According to whom?

Of course, just as narratives of exclusive 'expertise' could be deployed, as discussed earlier, in efforts to bring states on board, here an emphasis on them could be effective in closing down such questions, by deploying ideas of neutral impartiality to underscore assumptions that the substantive content of project, as objectively discernible by anyone with the necessary 'expertise,' is of universal purchase. Thus in one sense claims to exclusive expertise can be deployed to resist claims by both states and civil society.

<sup>47</sup> See e.g. Wilde, *supra* note 45, ch. 8, and sources cited therein.

But if one is to take seriously what post-colonial scholars have observed about how universalism has often worked to conceal particularism, one has to look behind the formal invocation of universalism and face up to the importance of the question of who decides and who describes what the agenda is and should be. The claim to universalism has to be considered in the context of the existence of social movements across the world, many of whom being engaged in issues that implicate extraterritoriality, human rights and economic justice, involving individuals with expertise in international human rights law, and located in places where the economic situation is such that the stakes are high. The term 'globalization', invoked by some of the proponents of the Principles as reviewed above, has of course been used to describe the interconnected nature of the global economy and the international structures of law and institutions, such as the WTO and the BWIs that enable it to operate: the broader context in which the extraterritorial obligations in human rights law that are the subject of the present study would operate. In this context these movements of resistance and advocacy for international economic justice have sometimes been termed 'globalization from below'.<sup>48</sup>

As mentioned earlier, despite the exclusive language of 'expertise' used in the Preamble to the Principles, actually a significant number of the signatories come from activist NGOs working on human rights and issues of global poverty and economic justice. In this sense, the narrative of exclusive expertise conceals an aspect of the project that is relevant, in a potentially positive manner, to its claims of legitimacy when considered through the lens of post-colonial thought. Here, then, is demonstrated the significance of the alternative accounts that foreground the role that NGOs played in the adoption of the Principles. Just as, earlier, the emphasis on neutral 'expertise' potentially does work in the context of bringing states on board, here, by contrast, foregrounding 'activism' and in particular the role of civil society is significant when it comes to the legitimacy of the project as far as the needs of those who are supposedly its primary beneficiaries, people in the world at the sharp end of economic globalization, especially the very poor.

This element of the enterprise feeds into broader arguments that are invoked to imply the normative value of the substantive content of human rights law. It will be recalled that when reviewing the significance of critical approaches to human rights law to the extraterritoriality project, Langford, Vandenhoe, Scheinin and van Genugten caution against the view that human rights law will always lead to depoliticized, conservative and cautious approaches, because 'the language of human rights law is found increasingly at the forefront of civil society demands for global justice'.<sup>49</sup> The claim is that activity of civil society organizations in invoking human rights law legitimates the substantive merit of the law. Such a claim about human rights law generally then feeds into moves that foreground the role of NGOs in this particular initiative concerning its extraterritorial applicability.

<sup>48</sup> On the international law aspects of 'globalization from below' see e.g. B. Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (2003).

<sup>49</sup> Langford *et al.*, 'Introduction', *supra* note 1, at 29.

Such involvement can be deployed as means of resisting post-colonial critiques: the present initiative is, in part, a manifestation of ‘globalization from below’.

Here it is instructive to situate the claims to global diversity made in the Preamble, and the ‘activist’-emphasized accounts of the provenance of the Principles, in the light of further aspects of the identities of the signatories. Internet searches of the individuals who signed the Principles indicate the following about where the people were from originally and, if different, were based at the time of signature. In most cases, this information was subsequently verified through direct enquiries with the individuals involved. Of the 40 signatories, 26 have European/US/Canadian/Australian/New Zealand nationality.<sup>50</sup> Of the 14 signatories who have nationality from outside the aforementioned parts of the world at the time the Principles were adopted, 7 (i.e. half) were based in western countries, not their countries of origin or nationality;<sup>51</sup> of the other half, 2 were based in South Africa, and 1 was based in each of the following countries, namely the Philippines, India, Uganda, Argentina (and Switzerland) and the Republic of Korea.<sup>52</sup> Of these seven, three were university academics, one was a UN official, two were members of UN treaty bodies, and one was a member of a global network of civil society organizations.<sup>53</sup> Of the six drafters of the Principles and co-authors

<sup>50</sup> Catarina de Albuquerque (Portugal), Theo van Boven (Netherlands), Fons Coomans (Netherlands), Olivier De Schutter (Belgium), Julia Duchrow (Germany), Asbjørn Eide (Norway), Cees Flinterman (Netherlands), Mark Gibney (USA), Thorsten Göbel (Germany), Paul Hunt (United Kingdom/New Zealand), Rolf Künemann (Germany), Malcolm Langford (Australia), Nicholas Lusiani (USA (not verified with signatory)), Claire Mahon (Australia and New Zealand), Maija Mustaniemi-Laakso (Finland), Gorik Ooms (Belgium), Sandra Ratjen (France), Aisling Reidy (Ireland), Margot Salomon (Canada (not verified with signatory)), Martin Scheinin (Finland), Ian Seiderman (USA), Sigrun Skogly (Norway), Philippe Texier (France), Wouter Vandenhoe (Belgium), Duncan Wilson (UK) and Michael Windfuhr (Germany).

<sup>51</sup> Meghna Abraham (country of origin India, at the time of signature based in the UK), Maria Virginia Bras Gomes (country of origin India, at the time of signature based in Portugal), Ashfaq Khalfan (country of origin Kenya, at the time of signature based in the UK), Marcos Orellana (country of origin Chile, at the time of signature based in the USA/Switzerland (not verified with signatory)), Magdalena Sepúlveda (country of origin Chile, at the time of signature based in Switzerland), Ana María Suárez Franco (country of origin Colombia—but has also German nationality, at the time of signature based in Switzerland), Sisay Yesanew (country of origin Ethiopia, at the time of signature based in Finland).

<sup>52</sup> Lilian Chenwi (country of origin Cameroon, at the time of signature based in South Africa), Danwood Chirwa (country of origin Malawi, at the time of signature based in South Africa), Virginia Dandan (Philippines is country of origin and base at the time of signature), Miloon Kothari (India is country of origin and base at the time of signature), Christopher Mbazira (Uganda is country of origin and base at the time of signature), Fabián Salvioli (country of origin Argentina, at the time of signature based in Argentina/Switzerland (not verified with signatory)) and Heisoo Shin (country of origin the Republic of Korea, at the time of signature based in the Republic of Korea).

<sup>53</sup> Lilian Chenwi (was working at the University of Witwatersrand/Johannesburg), Danwood Chirwa (was working at the University of Cape Town), Christopher Mbazira (was working at the Makerere University, Kampala), Virginia Dandan (was serving as UN Independent Expert on Human Rights and International Solidarity), Fabián Salvioli (was serving as a member of the UN Human Rights Committee), Heisoo Shin (was serving as a member of the UN Committee on Economic, Social and Cultural Rights), Miloon Kothari (was working as coordinator of the South Asian Regional Programme of the Habitat International Coalition’s (HIC) Housing and Land Rights Network, a global network of civil society initiatives for rights related to habitat).

of the Commentary, all are based in the West, four having western nationality originally.<sup>54</sup>

Obviously these figures suggest that as a group the signatories were dominated by people from the global north (more than half) and people based in that part of the world (more than three quarters). People for whom, as the above quotation from Margot Salomon and Ian Seiderman (two of the drafters) indicates, the supposed beneficiaries of the Principles are ‘strangers’. As far as where people were based is concerned, the entire continent of Africa was represented by three people (two based in South Africa and one based in Uganda); Central and South America/Latin America was represented by one person who was based partly in Argentina and partly in Switzerland. There was no one from China, nor was an area stretching from central Europe through to central Asia represented either by nationality or base. By contrast, within a much larger European grouping there were three people based in each of Belgium and the Netherlands and four people based in Germany.<sup>55</sup> Although, as mentioned, there was significant NGO representation in the group, actually as far as people based outside the West who worked for civil society organizations were concerned, there was a single representative (although many of the other organizations for which the other officials work do operate outside the West). Six of the seven people based outside the West were either university professors or UN officials.

These characteristics of elitism and global imbalance of course map onto some of the distinctions highlighted earlier, between richer states and poorer states and between states that had colonies and states formed of territories that were colonies. As mentioned earlier, there is no suggestion in the Principles that the states which would be bound by these obligations had a formal role in their formulation or adoption. That said, certainly as far as the states in relation to whom the obligations would potentially have the most significance in terms of requirements to change behaviour, *viz.* relatively economically advantaged states (which are, for example, in a position to transfer some of their wealth to the global poor), they are disproportionately represented (with the glaring exceptions of Brazil, Russia and China—one might see this as a G7 rather than G20 view of the world’s more economically advantaged countries) as far as the countries where the signatories are based is concerned. These characteristics of elitism reflect a broader feature of international law-making, as discussed by Alan Boyle and Christine Chinkin, that whereas non-state actors are involved in the process of identifying fundamental norms, especially those associated with a notion of an ‘international community’ (a cosmopolitanist

<sup>54</sup> Olivier De Schutter (Belgium), Asbjørn Eide (Norway), Ashfaq Khalfan (country of origin Kenya, at the time the principles were signed based in the UK), Marcos Orellana (country of origin Chile, at the time the principles were signed was based in the USA/Switzerland (not verified with signatory)), Margot Salomon (country of origin Canada, at the time the Principles were signed based in the UK (not verified with signatory)), Ian Seiderman (country of origin USA, at the time the Principles were signed, was based in Switzerland).

<sup>55</sup> At the time of signature, based in Belgium: Olivier De Schutter, Gorik Ooms and Wouter Vandenhole. At the time of signature, based in the Netherlands: Theo van Boven, Fons Coomans and Cees Flinterman. At the time of signature, based in Germany: Julia Duchrow, Thorsten Göbel, Rolf Künnemann and Michael Windfuhr.

idea that will be addressed further below), ‘international law-making remains unrepresentative as participants are largely drawn from elite groups within and across societies. The input of those who remain stranded at the peripheries... remains minimal.’<sup>56</sup>

Why does this matter? Might these all be well-meaning people capable of stepping outside their personal circumstances and national identities or bases to articulate an agenda that is universally legitimate? One way into this question is to consider two separate but related ideas from the canon of post-colonial thought: Edward Said’s ‘orientalism’ and Gayatri Chakravorty Spivak’s work on the ‘subaltern’. Said defined ‘orientalism’ as ‘the corporate institution for dealing with the Orient—dealing with it by making statements about it, authorizing views of it, describing it, by teaching it, settling it, ruling over it’.<sup>57</sup>

Said argued that the nature of the perspective of the commentator—rooted in an identity ‘other’ than the identity of those whose experience is being described—creates the danger that representations will be mediated by a desire on the part of the commentator to understand him or herself through their conception of an alienated, oriental ‘other’. As Said revealed, narratives of the colonial encounter in Western literature are replete with representations of the colonial ‘other’ that reveal much more about the self-image of those crafting the representation than the reality of those being represented.<sup>58</sup> These insights require us to question whether efforts by the predominantly globally privileged to articulate an agenda for the globally underprivileged might similarly be faulty as far as their claim to legitimately articulate what is in the interests of the underprivileged is concerned. They remind us that such efforts might be illuminating as to the self-image of those who would wish their own states, or at least the states in which they are based, to do more to end global poverty, and have an idea of what it would be appropriate for those states to do, from the perspective of the states taking action. But Said requires us to speculate whether the agenda being pursued might have been different had the voices of those whose interests these efforts are supposed to serve—articulated, as mentioned, in social movements throughout the world—had been more prominent. I will return to the significance of this in due course, when certain aspects of the substantive content of the law is reviewed.

There is, moreover, a further problem with the representational imbalance manifest in the drafters of and signatories to the Principles, and more generally the elite grouping that the signatories are drawn from. Even if the legitimacy and accuracy of the agenda being furthered by the Principles is somehow not considered to have been compromised because of the self-realizing nature of the act of representing the interests of ‘other’, nonetheless the representational act itself is problematic because it necessarily involves, in the words of Said, ‘dominating,

<sup>56</sup> Boyle and Chinkin, *supra* note 5, at 17.

<sup>57</sup> E. W. Said, *Orientalism: Western Conceptions of the Orient* (1995 edn), at 3.

<sup>58</sup> *Ibid.*

restructuring and having authority over' that which is represented.<sup>59</sup> As theorists such as Gayatri Chakravorty Spivak suggest, in such circumstances, the story of those subject to domination is told through a process that is itself a form of intellectual domination, in that it is crafted mostly by those in a privileged position coming from outside the community being represented, and/or elites within that community.<sup>60</sup> Regardless of whether such representations can somehow be considered to be 'accurate', they are problematic because of the nature of domination involved in having one's story told by someone else or in telling someone else's story. Any international effort that seeks to articulate the needs of those who it does not involve in a significant manner is vulnerable to the charge that it is compounding the economic and physical domination it seeks to combat, with intellectual domination of its own.

Critiques of domination are also of course central to certain feminist approaches to ideas, and, indeed, a further significant feature of the identity of the individual signatories to the Principles and authors of the Commentary is gender. Although, as mentioned, reference is made to both the professional orientation ('experts') and geographical reach ('all regions of the world') of the signatories to the Principles, there is no express statement about gender balance. In one respect, this is perhaps as well, because just as the signatories are, despite their suggestions, not only experts but also activists, and not geographically representative, they do not include an equal number of women and men. Out of 40 signatories to the Principles, 15 are women and 25 are men, constituting a 37.5/62.5 percentage split. Women constitute over half the world's population, but are represented in only just over one third of the signatories to the Principles. The imbalance in the drafters, and the authors of the commentary, is even more acute; of its six authors, five are men and one is a woman—Margot Salomon, the co-author of the quotation at the start of this section. It is striking that whereas the Principles at least acknowledge the significance of being geographically representative, albeit in a manner that appears hollow if one moves from the formal language used to consider the substantive demographics of the personnel involved, the notion of gender balance is not even mentioned, let alone substantively realized.

These statistics map onto the gender imbalance in international law and institutions, in terms of the demographic features of the elites who run the international system.<sup>61</sup> Chakravorty Spivak's point about intellectual domination is equally valid here: a project seeking to vindicate the economic rights of women as well as men has not been crafted with their equal involvement. Problematic in its own terms, it also raises a question as to the legitimacy of the normative regime in terms of economic rights of women in particular. Indeed, feminist work on international law/development and poverty has foregrounded how global poverty disadvantages

<sup>59</sup> Ibid.

<sup>60</sup> G. Chakravorty Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (1999).

<sup>61</sup> On feminist approaches to international law and institutions, see e.g. H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (2000), *passim*, and sources cited therein.

women more than men, because of a range of factors ranging from unequal pay to the disproportionate representation of women in low-paid and unremunerated work, the reduced access women have to assets such as property, land and credit, and the way in which liberal economic policies of reducing welfare, food subsidies, social provision and state services disproportionately affect women because of their greater involvement in childcare, domestic economics, and the public employment sector.<sup>62</sup> Whereas efforts to bring about international economic justice are in the interests of all, the stakes are higher for women, who are disproportionately represented amongst the world's poor.<sup>63</sup> Moreover, there is a documented track record of development assistance being provided in a manner that discriminates against women, for example, as Hilary Charlesworth and Christine Chinkin point out, targeting 'household heads, usually assumed to be men', or providing 'aid to sectors from which women are excluded'.<sup>64</sup> The significance of this will be revisited in due course.

#### 4. Tension 2: 'Global Justice, State Duties'

##### A. Introduction

As previously mentioned, a book was published after the Principles were adopted, which was edited by, and includes contributions from, many of those involved in the process of drafting, adopting and commenting on the Principles, and is entitled 'Global Justice, State Duties'.<sup>65</sup>

The global/state distinction and combination illuminates two important aspects of the present topic, which will be addressed in turn.<sup>66</sup> In the first place, it foregrounds how the topic of the extraterritorial obligations of states operates on the basis of, but also seeks to transcend, territorial boundaries. In the second place, it implicates broader ideas concerned with statism/sovereignty, on the one hand, and cosmopolitanism/globalism, on the other, which are embedded in the topic.

##### B. Retaining and Crossing Boundaries

The title 'Global Justice, State Duties' epitomizes the two different spatial orientations implicated in an approach to promoting global economic justice through state obligations in international human rights law. On the one hand, the aspiration to economic freedom is global in reach, for all people, everywhere in the world, regardless of territorial boundaries. On the other hand, the actors who are the exclusive focus of attention when it comes to realizing this aspiration, i.e. 'states',

<sup>62</sup> *Ibid.*, at 6–7.

<sup>63</sup> On this, see, e.g. *ibid.* at 8, and sources cited therein.

<sup>64</sup> *Ibid.*, at 7.

<sup>65</sup> Langford *et al.*, *supra* note 1.

<sup>66</sup> A further aspect, not addressed here, is the way in which a project concerned with transnational activities is concerned exclusively with the duties of states, not addressing also non-state actors such as corporations and international organizations.



are defined on the basis of a division of the world, via territorial boundaries, into mutually exclusive sovereign states. This approach is commonly associated (not without dissenters) by theorists and historians with the Treaty of Westphalia and is therefore sometimes referred to in shorthand as a ‘Westphalian’ approach to the world.

The latter, sovereign-state-focused approach is, of course, inevitable when the starting point is international human rights treaty law, the stuff exclusively of states as concerns the identity of both those who are parties to the treaties, and, according to the orthodox position (adopted in the Principles and the Commentary), those who are subject to obligations under them. But whereas, on the one hand, the global boundaries between sovereign states are adopted and affirmed as an essential component of working through public international law, on the other hand the substantive features of this particular area of law at issue disrupt these boundaries, being concerned exclusively with extraterritoriality, the focus of which is the direct opposite of a world-view of entirely mutually exclusive sovereign units. As will be illustrated in the following sections, an appreciation of this enterprise informed by its combination of statism and globalism is illuminating as far as the nature, potential and limitations of the enterprise are concerned.

### C. Statism versus Cosmopolitanism

The question of the role of international legal rights and obligations in efforts to combat global poverty and economic inequality implicates broader ideas about the dialectic between narrow state interest and a global cosmopolitan public interest. On the one hand, a certain set of ideas places emphasis on the notion of states and their governments being concerned with and responsible to their own people and ‘interests’, often classified in terms of ‘sovereignty’ and associated with realist thought, whether Thomas Hobbes in the Enlightenment era or Hans Morgenthau in the 20th century. On the other hand, cosmopolitan ideas reference an ‘international community’ of shared values that include concerns relating to the welfare of all people everywhere, associated with Immanuel Kant and Hugo Grotius in the Enlightenment era and David Held and Mary Kaldor in the late 20th century. In international law, this dialectic is implicated in the positivist/natural law distinction; Martti Koskenniemi’s critique of the apology/utopia tension in international legal thought is, in a sense, a critique of a fundamental tension within Enlightenment ideas as they have been brought to bear on the ‘international’ by what from the 20th century has been called the discipline of ‘International Relations’.

In international law, norms conceived in a manner that enshrines a cosmopolitan ethic can be identified in several different areas, including the concept of ‘community obligations’ and obligations operating *erga omnes*—where all states have a legitimate interest to see them complied with everywhere—and debates about so-called ‘humanitarian intervention’ and the ‘responsibility to protect’—both concerned with the question of the legitimacy of states taking action with respect to individuals who are not their own (cf. Nicholas Wheeler’s description of the

former as 'saving strangers').<sup>67</sup> This said, that these norms are conceived to be exceptional suggests a default position locating interests more exclusively at the individual state level, and even in their relatively narrow field of operation the norms themselves are often highly contested and their content uncertain, further reinforcing the predominantly sovereign-state-centric dimension to international law.

The dialectic between statism and cosmopolitanism is of central significance to the present topic; the question of whether and to what extent states owe obligations concerned with the economic position of people outside their own territories is by definition a statist/cosmopolitanist *problématique*. Thus, as will be addressed further later in this chapter, the Commentary invokes the idea that 'the preservation of human rights is in the interests of all states', and the concept of *erga omnes*, to undergird its assertions about extraterritorial applicability.<sup>68</sup> The more things are tilted in favour of such obligations, the more 'cosmopolitanist' the enterprise; equally, a tilt in the opposite direction brings things more closely to a 'statist' focus on the state's relationship to the people in its own territory. More fundamentally, the aforementioned dialectical enterprise of seeking to work on the basis of a division of the world between sovereign states, and focusing on the obligations of states not also those of non-state actors, on the one hand, but also seeking to disrupt territorial boundaries by advocating 'extraterritorial' obligations, on the other hand, reflects a paradoxical attempt to combine statism with cosmopolitanism. Equally, as in the previously mentioned link to Koskenniemi's apology/utopia dialectic, the two elements can be identified in the expert/activist tension: experts, in this context, being of the world of states (cf. the detail given on membership of state-appointed treaty bodies), and activist international NGOs being the world of transnational cosmopolitan non-state civil society actors. Similarly, the elitist tenor to the list of signatories enables certain claims to authority that resonate with the state elites, whose support is needed to ensure the norms are accepted by those to whom they apply but, equally, the claims to be internationally representative are important in efforts to resist the charge that the agenda being furthered is not cross-culturally legitimate.

One general tension relevant to the present topic flows from the statism/cosmopolitan dialectic: debates in rights discourse about how the relationship between the individual and the state is conceived so as to form the basis for a normative regime of rights and obligations between the two. The statist orientation places emphasis on a relationship bounded by the state's borders, delineating the limits of the state itself and so, for present purposes, the primary focus in terms of individual human welfare. Political ideas, whether liberal social contractarian ideas or international legal concepts of self-determination, root the legitimacy of the state in terms of its purpose of serving the interests of the people within its territory. An extreme and simplistic application of such ideas would necessarily rule out any extraterritorial obligations, whether in the sphere of economic justice or any other

<sup>67</sup> On *erga omnes* see *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment, 24 July 1964, ICJ Reports (1970) 3, para. 79. For 'saving strangers', see N. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (2000).

<sup>68</sup> Commentary, *supra* note 1, at 1103.

issue, apart from, perhaps, situations where a state's own nationals are outside its territory. Put differently, extraterritorial obligations require an alternative political conception of the individual and the state, operating in a radically different fashion from that which operates within a state's own territory. Moreover, present efforts seek to include obligations operating in this different way within the existing arrangements, co-habiting with 'territorial' obligations operating on the basis of the orthodox statist approach.

'Extraterritoriality' is not the displacement of statism with cosmopolitanism, then, but, rather, an effort to combine the two. Significantly, this is not a matter of the two elements operating in mutually exclusive contexts but, rather, an issue of their interplay in overlapping contexts where the reach of one is bound up in the extent of the other. Because, as previously discussed, these efforts simultaneously operate on the basis of and seek to transcend a world divided by state boundaries, so the substantive outcomes they aspire to bring about are determined by a multi-faceted matrix of statist/communitarian dialectics. This is indicated in the quote from Salomon and Seiderman above, which asks about extraterritorial obligations concerning poverty and hunger—a cosmopolitan enquiry—using a statist conception of the individual beneficiaries of such obligations, as 'strangers' (echoing the language used by Wheeler in relation to 'humanitarian intervention').

These general tensions are illustrated in key passages from the Principles and the Commentary. On the one hand, the Preamble to the Principles asserts that '[s]tates have recognized that everyone is entitled to a social and international order in which human rights can be fully realized and have undertaken to pursue joint and separate action to achieve universal respect for, and observance of, human rights for all'.<sup>69</sup> This affirms a cosmopolitan orientation when it comes to the substantive obligation (notably combined with an express reference to a statist form of authority ('states have recognized'), a quintessential *apology-utopia* formulation). On the other hand, the Commentary pulls things back from absolute cosmopolitanism, stating that '[t]he obligation to comply with internationally recognized human rights . . . should not be understood as implying that each state is responsible for ensuring the human rights of every person in the world'.<sup>70</sup>

In Principle 4, the statist and cosmopolitan elements are combined and differentiated from each other: 'Each State has the obligation to realize economic, social and cultural rights, for all persons within its territory, to the maximum of its ability. All States also have extraterritorial obligations to respect, protect and fulfil economic, social and cultural rights as set forth in the following Principles.'<sup>71</sup>

The oblique language in the second sentence reflects the *lingua franca* of international human rights law—the tripartite conception of 'respect, protect, fulfil'—when placed in the context of the first sentence, with its relatively clear language of an obligation to realize within the territory, is to be understood as a reference to the extraterritorial context (of course, the tripartite concept of obligations would also apply in the territorial context). In this way, then, both the

<sup>69</sup> Principles, *supra* note 1, Preamble.

<sup>70</sup> Commentary, *supra* note 1, at 1090.

<sup>71</sup> Principles, *supra* note 1, Principle 4.

territorial and the extraterritorial contexts are referenced, but the nature of the obligation in each is conceived using different language—to realize rights, and to respect, protect and fulfil rights, respectively. There is a movement out to cosmopolitanism while retaining statism and, moreover, establishing important (although vaguely articulated) differences in the nature and scope of substantive obligations as between the two arenas of normativity.

These differences, on the one hand, and the aforementioned interplay between statism-cosmopolitanism-statism in the way the cosmopolitan obligations of one state to the people of another state are mediated by the statist obligations of the latter state to the same people, on the other hand, are illustrated by the proviso in the Commentary that ‘the existence of extraterritorial obligations of other states to contribute to the realization of human rights throughout the territory of one state in no way detracts from the latter state’s obligation to ensure economic, social, and cultural rights within its territory to the maximum of its ability’.<sup>72</sup>

Similarly, the Commentary reinforces the distinction between the substantive requirements in the territorial and the extraterritorial contexts articulated in the above extract from Principle 4:

[e]xtraterritorial obligations differ from territorial obligations, however, in that such obligations can be shared with other states. A state does not bear extraterritorial obligations to individually realize the economic, social, and cultural rights of all people everywhere; rather it is bound by obligations to people outside its borders under the conditions, and in the circumstances set out in these principles.<sup>73</sup>

One might read the first sentence as a *non-sequitur*: clearly, the other side of the coin from the existence of *extraterritorial obligations* resulting in human rights obligations being ‘shared’ by the territorial and the extraterritorial state is that, for the territorial state, its *territorial obligations* co-exist with the extraterritorial obligations of the extraterritorial state, a mirror situation of ‘shared’ obligations. The agenda of extraterritorial human rights obligations necessarily creates the possibility of ‘shared’ obligations in all contexts. The conception of difference makes sense, however, with an appreciation of the different statist/cosmopolitan concepts of rights that inform the aforementioned difference in the way territorial obligations are articulated when compared to extraterritorial obligations. All things being equal, these two sets of obligations are being conceived to be profoundly different; where they overlap, then, it is not a simpler matter of even-handed ‘shared’ obligations. Thus, although in any given situation, in a more general sense human rights obligations are being ‘shared’, because territorial obligations are being conceived to be substantively different from extraterritorial obligations, and in any given place the former only (usually) reside in one state whereas the

<sup>72</sup> Commentary, *supra* note 1, at 1096. In the particular context of the obligation to ‘fulfil’, which includes for foreign states the provision of development assistance, the Commentary stresses that ‘the duty of all states to contribute to the fulfilment of economic, social, and cultural rights in other states should not be interpreted as limiting the scope of the obligation of any state to discharge its obligations towards all individuals located on its territory’. *Ibid.*, at 1146.

<sup>73</sup> *Ibid.*, at 1097.

latter can potentially reside in a number of states, when obligations are disaggregated between the territorial and the extraterritorial, only the latter are ‘shared’.

As will be demonstrated in due course, elements of the dialectic between the two different political conceptions of the relationship between the individual and the state play out as discrete elements of the normative regime for extraterritorial obligations, and an appreciation of them can illuminate the challenges jurists have in seeking to conceive such obligations.

## 5. Law: What It Is and What Is at Stake

### A. Introduction

As reflected in the Principles and the Commentary, and the broader ETO Consortium activist network promoting the Principles and other writing about this initiative, it is suggested by some that international human rights law sets out a substantive normative framework that speaks in a valuable way to the position of states as far as the realization of economic, social and cultural rights outside their territories is concerned, and more broadly in efforts to combat global poverty and economic inequality. Thus the law is invoked to intervene in a highly contested area of public policy, where a broad range of very different preferences could be adopted and promoted, and/or avoided and ignored, and/or undermined, through and by it. It is important, then, to ask: which policies are given preference over the alternatives by international human rights law? What is possible, what is prevented, what is included, what is excluded, in the wide range of ways that might exist to order the world so as to better combat global poverty and economic inequality?

The following sections address this question by considering the two main features of the substantive policy framework enshrined in the law, using the Principles and the Commentary as a resource on how the law is understood. Before turning to the substantive features, the present section paves the way for a consideration of them by setting out briefly the general conceptions of areas of obligation in this field, and sketching out some of the main policy issues at stake in an enquiry as to the value of this legal framework.

### B. The Legal Framework—Power and Cooperation

Principle 8 defines extraterritorial obligations thus:

- a) obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State’s territory; and
- b) obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately, and jointly through international cooperation, to realize human rights universally.<sup>74</sup>

<sup>74</sup> Principles, *supra* note 1, Principle 8.

The obligations in paragraph (a) can be understood as conceptualizing a trigger for the operation of legal regulation if and when a particular type of power relationship operates between a state and people outside its territory. Only if this power relationship is present are the obligations triggered. According to this approach, the very existence of obligations operates on the basis of a default position of exclusively territorial significance (in terms of the location of the rights-holders) which is departed from if a particular power relationship is considered to exist extraterritorially. In what follows the notion of a 'power' conception of extraterritorial obligations will be used as shorthand for this feature of the normative framework.

The obligations in paragraph (b) arise not only and as a consequence of the existence of a power relationship extraterritorially but, rather, in any event. They are concerned not with regulating exceptional power relationships if and when they arise, but, rather, addressing the 'normal' situation of economic interdependence between states understood as a permanent state of affairs, seeking to graft onto this certain requirements on the part of states in position to do so to improve economic rights outside their territories, described as being about 'cooperation'. Thus there is no trigger that needs to be present in order for the obligations to be in operation; they operate all the time. In what follows, the notion of obligations concerned with 'cooperation' will be used as shorthand for this feature of the normative framework.

### C. What Is at Stake

Clearly there are many and varied ways in which the structures of the global economy and international economic relations could be changed in order to combat poverty and economic inequality, and a range of different rationales for these changes. The choice between these options is contested, implicating different conceptions of economic and political theory, and historical record, involving varying degrees of difference, from modest reform to radical transformation of the *status quo*, and a matter on which a wide range of stakeholders, from grassroots civil society activists to the elites of the international economic system, are and will be engaged. Bearing all of this in mind, how might what international human rights law is said to offer implicate these broader debates? Whose agenda does it further, and whose does it undermine?

The point of this enquiry is not to adopt a particular substantive approach to, and/or the interests of a particular stakeholder about, how the global economy might be ordered better. Rather, it is to ask how the law might mediate the choices made about, and the fortunes of particular stakeholders in relation to, these contests, bearing in mind the particular policy preferences embedded in legal norms. Whereas it is for broader debates and processes to contest and determine the merit of these preferences, it is important to know what they are, so as to know what particular agenda is being furthered by advocacy of the law in this field.

In the foregoing analysis, the following considerations will be borne in mind. In the first place, in a situation of complex economic independence, a multitude of different causal and power relationships and linkages operate in all sorts of ways and

at all sorts of levels to determine the economic position of most people in the world. Economies are intertwined, and operate on the basis of many varied and dynamic power and control hierarchies. How does international human rights law understand and seek to mediate these relationships? In the second place, how does the way the law is conceived relate to rationales that underpin options for realizing international economic equality and the range of possible options themselves? The following two sections analyse the potential and limitations of the two key features of the substantive legal regime.

## 6. Law: Power

It will be recalled that the ‘power’ basis for extraterritorial human rights obligations is concerned with defining a set of circumstances extraterritorially (sometimes with a territorial origin) that have to be met before, and in order that, obligations are triggered. These circumstances are conceived in Principle 8 thus: ‘the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State’s territory’.<sup>75</sup>

A plain reading of this provision, in isolation from the rest of the Principles, suggests an idea that is potentially very broad in what it takes in by way of economic interdependence, because of the inclusion of omissions as well as acts, the idea of all ‘effects’, defined simply as such, as a basis for obligation, and how it covers acts and omissions existing not only extraterritorially but also territorially. However, this expansive potential is lessened considerably by Principle 9, which states that:

A State has obligations to respect, protect and fulfil economic, social and cultural rights in any of the following:

- a) situations over which it exercises authority or effective control . . . ;
- b) situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory;
- c) situations in which the State . . . is in a position to exercise decisive influence . . . to realize economic, social and cultural rights extraterritorially.<sup>76</sup>

Also relevant is Principle 13, which states:

States must desist from acts and omissions that create a real risk of nullifying or impairing the enjoyment of economic, social and cultural rights extraterritorially. The responsibility of States is engaged where such nullification or impairment is a foreseeable result of their conduct.<sup>77</sup>

The import of these provisions is to set up a more qualified and varied approach to conceiving power so as to trigger obligations relating to the enjoyment of human rights extraterritorially. On the one hand, if the state is present on the ground extraterritorially, exercising ‘authority or effective control’, then it has a broad obligation to ‘respect, protect and fulfil’ economic, social and cultural rights there (Principle 9a). This retains the breadth of the original articulation in Principle 8,

<sup>75</sup> Ibid., *supra* note 1, Principle 8.

<sup>76</sup> Ibid., Principle 9.

<sup>77</sup> Ibid., Principle 11.

but is limited to unusual situations where states are present in this kind of direct way outside their territories. It is reminiscent of how the ECHR and the ICCPR have been understood to apply extraterritorially, via a definition of the term 'jurisdiction' in these treaties to include the exercise of effective control extraterritorially.<sup>78</sup> The term 'jurisdiction' is used in the heading for Principle 9, and was invoked by the ICJ, without authority, to have this meaning in the context of the extraterritorial application of the ICESCR in the *Wall* Advisory Opinion, although actually the term is not used in that treaty.<sup>79</sup>

On the other hand, the more commonplace projection of power extraterritorially that falls short of direct extraterritorial presence is covered only if, on the one hand, states are in a position to exercise 'decisive influence' to 'realize' economic, social and cultural rights (Principle 9c), or, on the other hand, in the context of 'acts and omissions' that have 'foreseeable effects on the enjoyment of economic, social and cultural rights' (Principle 9b) or if it is 'foreseeable' that they create a 'real risk of nullifying or impairing' such enjoyment (Principle 13).

Setting aside the narrow circumstances of direct extraterritorial presence on the ground, the language used to address all other forms of economic interaction is either limited to a high threshold of 'direct influence', or, otherwise, seems to be concerned with power relationships that are in some way deemed to be harmful (cf. 'nullifying or impairing'). The suggestion that this is about harm is supported in the Commentary, which explains the general distinction between the 'power' and 'cooperation' bases for obligations in Principle 8 paragraphs a) and b), the former being the present focus of attention, thus:

... the obligation to provide assistance to other states in order to strengthen respect for human rights in those states, in the absence of any particular link between a state and the denial of human rights in those states, arises only by virtue of the obligation of a global character as described in Principle 8 (b).<sup>80</sup>

Here, then, is the idea that the 'power' conception for obligations can be understood holistically as being about a 'particular link between a state and the denial of human rights'. Furthermore, the language suggests that of the two types of extraterritorial obligations, only 'power' is concerned with responsibility arising out of harm; 'cooperation' (in Principle 8b) is described in language suggesting a different rationale and objective (the word 'cooperation' itself, and the way the substantive action required of a state here is to 'provide assistance'—hardly the language of reparation for harm). This notion of 'harm-' or 'fault-' based responsibility reflects the ideas discussed earlier that invoke the introduction of 'accountability' into the arena of economic globalization as a rationale for the present project.

The language used also suggests that the nature of harm is to be limited from the full extent of possible options available—only a 'particular link' which has to be

<sup>78</sup> On this, see e.g. Wilde, *supra* note 4, Section 3.3.

<sup>79</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, 9 July 2004, ICJ Reports (2004) 136, at para. 112.

<sup>80</sup> Commentary, *supra* note 1, at 1101–1102.



foreseeable and involving a 'real risk'. The relatively limited definition of causation is underscored by the Commentary, which states:

Principle 9 (b) acknowledges that the obligations of a state under international human rights law may effectively be triggered when its responsible authorities know or should have known the conduct of the state will bring about substantial human rights effects in another territory. Because this element of foreseeability must be present, a state will not necessarily be held liable for all the consequences that result from its conduct where the proximity between that conduct and the consequences is remote.<sup>81</sup>

In the same way, the Commentary to Principle 13 states that '[f]oreseeability serves an important limiting function by ensuring that a state shall not be surprised with claims of responsibility for unforeseeable risks that are only remotely connected to its conduct'.<sup>82</sup>

Clearly discussion and disagreement can be had regarding work in related areas of law such as the law of state responsibility drawn upon in considering, how these key terms can and should be defined legally, from the notion of 'particular' types of harm that are 'proximate' and 'foreseeable' not 'remote' to the idea of a 'real risk' with effects that are 'substantial'. But whichever approach is taken in the range of options for the scope of liability here, from narrow to broad, more fundamentally the range itself only covers a sub-set of the wide linkages that exist globally between national economies, given how they are intertwined in an acute, complex and constant fashion. This is a limited notion of international economic relations in not taking in the full potential for causal relationships that can mediate the state of economic rights.

Moreover, recalling the earlier discussion of statism and cosmopolitanism, it is clear also that in the 'power' area of extraterritorial obligations, the rationale is not some cosmopolitan idea of the worth of human beings globally shorn of nationality, but a narrower fault-based idea that seems to reserve broader conceptions of duties in the economic sphere exclusively to the territorial domain. Under this paradigm, obligations are owed extraterritorially not because of a cosmopolitan commitment to human welfare generally, but because of a narrower notion of a particular conception of fault connecting the state to an extraterritorial human rights situation.

## 7. Law: Cooperation

... governments may feel bound to act, but that feeling of obligation may simply come from their own sense of altruism rather than a belief that human rights bind all governments to help if the government most directly responsible fails to fulfil its duties ...

Andrew Heard, quoted by M. Langford, *et al*<sup>83</sup>

<sup>81</sup> *Ibid.*, at 1109.

<sup>82</sup> *Ibid.*, at 1113.

<sup>83</sup> Heard, 'Human Rights: Chimeras in Sheep's Clothing?', *Simon Fraser University Online* (1997), available online at <http://www.sfu.ca/~aheard/intro.html> (last accessed 23 July 2015), cited in Langford *et al.*, *supra* note 1, 8.

## A. Introduction

The second area of obligations, those relating to ‘cooperation’ in the realization of economic, social and cultural rights extraterritorially, would suggest that the idea of ‘help’ is, indeed, derived not simply from altruism but also legal obligation. But what is the scope of this ‘help’ and, indeed, what does conceiving it as ‘help’, and associating it with the idea of ‘altruism’, indicate about its nature and potential?

As previously indicated, the ‘cooperation’ obligations are not conceived to be triggered by the existence of a particular power relationship between a state and an extraterritorial human rights situation. Rather, they operate generally. As such, they have the potential to be of much wider relevance to international economic relations, and so to be much more important to efforts to combat global poverty and economic inequality, than the first set of obligations. They are also, given what has been said earlier about the fault-based nature of the ‘power’ obligations, the main option within this regime for conceptualizing a ‘cosmopolitan’ idea of rights rooted simply in humanity, regardless of global location.

It will be recalled that Principle 8 defines the ‘cooperation’ category of extraterritorial obligations as being ‘of a global character . . . to take action, separately, and jointly through international cooperation, to realize human rights universally’.<sup>84</sup> The main human rights instrument enshrining the obligation to cooperate in this way is the ICESCR, in Article 2.<sup>85</sup> Principle 9 states:

A State has obligations to respect, protect and fulfil economic, social and cultural rights in . . . c) situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position . . . to take measures to realize economic, social and cultural rights extraterritorially.<sup>86</sup>

This law on ‘cooperation’ includes, arguably as its most important norm, and falling within the particular obligation to ‘fulfil’ in this area, an obligation ‘to provide assistance,’ in Principle 33.<sup>87</sup> The obligation to provide assistance to enable the realization of socio-economic rights extraterritorially is the only area of this legal regime that speaks to the fundamental issue of financial, technological and resource transfer across borders from the economically privileged to the economically disadvantaged in order to combat poverty and reduce economic inequality, not simply, as in the ‘power’ area of law, to make amends for certain forms of foreseeable and non-historical harm. It is the area within which the ‘right to development’, economic redistribution, and development assistance and aid, including the setting of targets for such aid must fit, if they fit at all, as far as the contours of international human rights law are concerned.

<sup>84</sup> Principles, *supra* note 1, Principle 8.

<sup>85</sup> International Covenant on Economic, Social and Cultural Rights 1966, 993 UNTS 3 (ICESCR).

<sup>86</sup> Principles, *supra* note 1, Principle 9.

<sup>87</sup> *Ibid.*, Principle 33.

## B. Assistance

The Commentary asserts that '[d]espite its provision in binding international instruments, disagreement persists as to the legally binding nature of the obligation of international cooperation as expressed in' the ICESCR.<sup>88</sup> This is a significant observation when situated within the law of human rights extraterritorially in general, and, more broadly, international human rights law in particular and international law as a whole. Actually, 'disagreement' exists across the board in many areas of international law, and, notably, about many aspects of the law of the extraterritorial application of human rights. However, this is the only rule on extraterritoriality where the 86-page Commentary invokes the existence of 'disagreement'.<sup>89</sup> Given the wider context of disagreement in international law, one has to ask why a particular rule is being singled out as the only one in relation which disagreement exists, especially when, as the statement acknowledges, the rule is expressly articulated in a treaty. Moreover, this approach is in marked contrast to the way, as mentioned, the Principles seem to adopt the 'jurisdiction' basis for triggering obligations in this sphere, and the effective control basis on which that term has been defined in case-law, as operative in relation to economic, social and cultural rights, even though the term is not contained in the ICESCR and the case-law defining it in this way is derived, as mentioned with one exception in a dictum from the ICJ, from the other human rights treaties that do use it and are limited to civil and political rights.

The transposition of the standard from the law on civil and political rights is also significant in two further respects. In the first place, actually, even in that area of law extraterritorial applicability is disputed; there is 'disagreement'.<sup>90</sup> In the second place, the area of applicability that the standard is being transposed to—economic rights in situations where control and authority is exercised 'on the ground' extraterritorially—addresses activities by states which are, as mentioned, although significant when they happen, unusual when situated within the broader projection of power by states extraterritorially and the effects of this on the economic position of people worldwide. Given the limited conception of the 'power' test for applicability as reviewed above, much of the broader picture is only going to be addressed by the law through the alternative 'cooperation' conception of responsibilities. Yet here, it seems, the very existence of a binding obligation is in question. The consequence of all this is that there is a bold affirmation of normativity, where such normativity is actually disputed, to unusual situations, and a questioning of normativity, despite the existence of binding treaty provisions on the issue, to a much broader area of international economic relations.

In this context, is hard not to view the questioning of the binding nature of the obligation to cooperate internationally as over-compensation. It seems that in this

<sup>88</sup> Commentary, *supra* note 1, at 1094.

<sup>89</sup> In a footnote it is also acknowledged that there are disagreements about the 'Lotus presumption'. *Ibid.*, at 1138 no.136.

<sup>90</sup> See e.g. the discussion and sources cited in Wilde, *supra* note 3.

area it is deemed prudent to play it safe in terms of the extent to which economically privileged states will have to act and international economic relations altered. So safe, actually, that challenges to the binding nature of express provisions of a treaty will be acknowledged.

It can hardly be a surprise, then, that what follows from this is very limited. The Commentary concludes that on the question of the provision of assistance, it is probably only possible to say that states should coordinate with each other, including on the allocation of responsibilities, and have foreign assistance programmes.<sup>91</sup> Within this, on the crucial question of how much resources are to be allocated to such programmes, the Commentary adopts the standard ‘progressive’ approach adopted in relation to positive obligations to fulfil economic, social and cultural rights generally, that states have to assist to the maximum of their available resources.<sup>92</sup>

The progressive test requiring best efforts (“in a position to do so”) to be made in the area of fulfilling economic, social and cultural rights is, of course, a challenging idea even if just applied to the domestic context (given that, for example, the level of available resources is not fixed, being determined, rather, by prior matters involving contested choices between fundamentally different economic and political systems). But when it is being applied to extraterritorial assistance, it has to reckon with a new complicating factor: how are resources to be divided up as between welfare ‘at home’ and welfare ‘abroad’, assuming a zero sum equation? This is, of course, a crucial matter that goes to the heart of a regime that purports to conceive extraterritorial norms in the area of economic rights. It operates at one axis of the statist/cosmopolitanist dialectic. Here, again, we see that the law is not somehow replacing the former with the latter, but engaged in a process that involves both and, in this case, implicates an idea that requires a balance to be struck between them. The ‘best efforts’ test by itself is insufficient, because it is also necessary to know, within its operation, whether and to what extent states can privilege the economic welfare of their own nationals or, put differently, the extent to which states should be required to put the welfare of foreigners ahead of that of their own nationals.

There is, actually, an international standard of some pedigree that speaks to the crucial quantum question. As the Commentary acknowledges, the aforementioned target of 0.7 per cent of GNP to be allocated to overseas development assistance by wealthier countries has been affirmed in a range of instruments.<sup>93</sup> This is the closest international law has come to a benchmark for economic redistribution through

<sup>91</sup> Principles 30 and 33. See also Principles 28–29, 31–32, 34–35 and the relevant sections of the Commentary, *supra* note 1.

<sup>92</sup> Principles, *supra* note 1, Principle 33. See also, on coordination, Principle 30, and capacity and resources, Principle 32, and the relevant sections of the Commentary, *supra* note 1. On the ‘progressive’ standard, see ICESCR, *supra* note 85, Art. 2.

<sup>93</sup> Resolution adopted by the General Assembly 2626 (XXV)—International Development Strategy for the Second United Nations Development Decade, UN Doc. A/RES/25/2626, 24 October 1970, para. 43; Preparatory Committee for the International Conference on Financing for Development Fourth Session, UN Doc. A/AC.257/32, 7 December 2001, para. 42; Resolution adopted by the General Assembly on 24 December 2008—Doha Declaration on Financing for Development: Outcome Document of the Follow-up International Conference on Financing for Development to

aid, thereby speaking to the crucial issue of where the balance is to be struck between welfare at home and welfare extraterritorially. It feeds into Goal 8 of the aforementioned MDGs, on a 'Global Partnership for Development', Target 13 of which, concerned with 'Least Developed Countries', involves a pledge for 'more generous official development assistance for countries committed to poverty reduction' and includes as indicators levels of development assistance provision.<sup>94</sup>

The Principles were adopted 11 years after the MDGs, when the period set for the targets they enshrined, which implicate realization of the 0.7 per cent standard, had four more years to run, and when the 'post-MDG' normative regime, which might be expected to have some relevance to this matter, was being discussed and formulated. The Principles were, thus, introduced at an important moment in the broader normative development of an issue of fundamental relevance to the issues they seek to address.

However, the Commentary only invokes the MDGs as a generalized indication lending 'strength to the legal commitment to internationalized responsibility . . . in this area'—i.e., a responsibility to cooperate.<sup>95</sup> Significantly, the Commentary discusses the 0.7 per cent target in its main text only because of its relevance to the discrete, ultimately less important question of the relevance of joint, in addition to individual, state action in the context of cooperation.<sup>96</sup> The more fundamental matter of whether or not this target is, or might become, legally obligatory is not itself addressed.<sup>97</sup> Obviously, a discussion can be had as to whether the target has attained normativity, whether generally or at least for certain states. But what is striking about the coverage in the Commentary is that the possibility of this discussion, and the potential of the standard concerning aid allocation to be or become binding, is not even directly addressed.

The closest things get to addressing normativity is in the discussion of Principle 30, which obliges states to coordinate, including in the allocation of responsibilities in this regard. The Commentary states that '[i]nternational law recognizes a principle of common but differentiated responsibilities among states and there are several examples of negotiated systems of burden-sharing established to address challenges or duties of a global character'.<sup>98</sup> This sentence ends with a footnote that includes a citation to the arrangements dealing with the 0.7 per cent target, as one of the 'examples', alongside others that are similarly concerned with burden-sharing in different fields, e.g. the Kyoto Protocol. Oddly, then, something which actually directly relates to the subject at hand, being concerned with levels of development assistance, is relegated to the margins of a footnote, and within this only invoked as an example, amongst others, of the idea of burden-sharing in the general field of international law. Moreover, the main text continues from the earlier quotation to

Review the Implementation of the Monterrey Consensus, UN Doc. A/RES/63/239, 19 March 2009, para. 43.

<sup>94</sup> See <http://www.unmillenniumproject.org/goals/gri.htm#goal1> (last accessed 23 July 2015), Goal 8, Target at 13, and indicators at 33–37.

<sup>95</sup> Commentary, *supra* note 1, at 1095. <sup>96</sup> *Ibid.*, at 1151–1152.

<sup>97</sup> *Ibid.*, at 1152. <sup>98</sup> *Ibid.*, at 1149–1150 (mid-sentence footnote omitted).

qualify the significance of all this as being relevant not to substantive obligations directly (the question of how much aid must be given), but only to the idea of a second-order procedural obligation to devise the substantive obligations (the question of agreeing how much aid should be given).<sup>99</sup>

Just as, earlier, the 0.7 per cent target was invoked for its side-relevance to the matter of states acting not only individually but also jointly, here, it is picked up (in a footnote) only because of what it indicates about a second-order norm requiring states to agree on burden-sharing. Whereas it might indeed have significance in indicating such a procedural norm, it also, first and foremost, might have something to say on the substance of what it covers. Yet the passage above suggests that on the substance, things are only 'being developed'. At a stroke, a standard that has been invoked and affirmed since 1970 is still, it would seem, in a stage of crystallization when it comes to being binding. As mentioned, perhaps this is actually the case; the point is that the Commentary assumes it without offering any analysis or authority whatsoever.

Earlier it was observed that narratives of the identity of the personnel who signed the principles that foreground 'expertise' and marginalize NGO 'activism' might have been deemed helpful in reassuring and obtaining the support of those who would be obligation-bearers in this system: states. This hypothetical explanation for the stylistic move may also lie behind the substantive move of affirming a very modest position accepting of the notion that the obligation of cooperation is of questionable normativity. Although not mentioned in the Commentary, some of those involved in the initiative raise in their separate writings on the Principles the resistance of wealthier states to the notion that there is a legal obligation to cooperate in general and an obligation to provide particular levels of assistance in particular.<sup>100</sup> This may be, then, a pragmatic decision made to accept, not challenge, the resistance of such states to accepting obligation in this area, in order, presumably, to ensure that they come on board on the regime more generally, which, in order for this logic to work, has to be worth the price paid in jettisoning some of the core aspects of the obligation to cooperate. But the merits of this position are not self-evident, requiring a considered cost-benefit analysis that is reasoned and persuasive. We are not given this (although, as will be addressed in due course, there is one statement by some of the signatories writing separately that seems to speak to the issue).

### **C. Welfare, Assistance, Statism, Cosmopolitanism and Nationality Discrimination**

Earlier it was explained how 'extraterritoriality' is not the displacement of statism with cosmopolitanism, but, rather, an effort to combine the two in overlapping contexts where the reach of one is bound up in the extent of the other. Thus

<sup>99</sup> Commentary, *supra* note 1, at 1150. See also Salomon and Seiderman *supra* note 1, at 460.

<sup>100</sup> See Salomon 2012, *supra* note 1; Coomans 2013, *supra* note 1, at 6; Langford *et al.*, *supra* note 1, at 26.

distinctions between home and abroad and so, necessarily, between a state's own nationals and everyone else in the world, are accepted and affirmed. This is not, then, an absolutist cosmopolitan project seeking to transcend nationality completely and, as the Commentary indicates, obliging 'each state' to be 'responsible for ensuring the human rights of every person in the world' on an equal basis.<sup>101</sup> Rather, it involves a complex series of dialectical moves and, ultimately, a balance struck between, statism and cosmopolitanism. This is illustrated in how the law addresses the question of whether and to what extent states must provide development assistance/aid to other countries. Initially, there is cosmopolitan shift of focus from the home (the territorial state) to the world (other states) as far as the potential aid provider is concerned. But then in determining on how duties to those at home versus those at abroad are to be calibrated, there is a flip back to a statist consideration as far as the other (assisting) states are concerned (their relationship to their own people). Moreover, in requiring a consideration of how the contribution by other states is to be balanced against the welfare role of the state whose people the aid would be targeted to, there is a further flip back to statism, in this case addressing the relationship between the recipient state and its people. The vagueness as to the normativity and substantive content of the obligation to provide assistance internationally suggests that the outcome of this dialectic is ultimately to leave things in an overwhelmingly statist orientation. How this is brought about can be illuminated further in how the Principles and the Commentary invoke nationality discrimination.

The Principles and the Commentary articulate a seemingly 'utopian', cosmopolitan absolutist prohibition of nationality discrimination at odds with the very modest statist 'reality' of the position adopted on cooperation. The Commentary provides the following definition of 'discrimination' in general:

In human rights law, discrimination constitutes any distinction, exclusion, restriction or preference, or other differential treatment based on any ground, such as race, color, . . . national or social origin . . . birth, or other status . . . which has the purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise by all persons, on an equal footing, of all rights and freedoms.<sup>102</sup>

Clearly, approaches taken by a state which privilege people in its own territory, most of whom are its own nationals, over people elsewhere, most of whom are non-nationals, as far as the enjoyment of rights are concerned, can be understood as discrimination as defined here. For example, a decision by a state to allocate more of its resources to combat poverty at home, especially in relation to its own citizens, than to combat poverty in the rest of the world, in circumstances where in material terms those abroad are in equal or greater need, necessarily involves a departure, via distinction based on 'national or social origin', from the notion that all individuals enjoy a right to be free from poverty 'on an equal footing'. Direct discrimination on grounds of nationality is inherent in such an approach; indirect discrimination on grounds of race, colour and birth might also be understood to be implicated in it.

<sup>101</sup> Commentary, *supra* note 1, at 1090.

<sup>102</sup> *Ibid.*, at 1088.

Indeed, one might even say a distinction grounded in nationality is, ultimately, the fundamental rationale for the distinction between territorial and extraterritorial obligations that is adopted as a central feature of this normative regime, in ultimately providing greater protections in the former context than the latter context, even when all other things are equal. It is a notion of a profoundly more important connection between a state and its own nationals compared to the relationship between that state and people in the rest of the world that leads to a different conception of territorial and extraterritorial human rights obligations.

An appreciation of the project in terms of its statist/cosmopolitan dialectic, and in the light of the scope of the norm of 'cooperation' it is willing to accept, suggests that the significance of nationality discrimination to it is more subtle and complicated than an absolute articulation of the principle might suggest. Extraterritorial obligations seek to mediate distinctions a state might wish to make between the welfare of its own nationals (and non-nationals) at home, and the welfare of foreigners (and some nationals) in the rest of the world. Such obligations as articulated in this project accept and enable such distinctions, but insofar as they push things further towards the welfare of foreigners abroad than a state might otherwise accept, they necessarily reduce the state's ability to place its own nationals first (assuming a zero sum scenario in terms of available resources), an outcome that can be understood in terms of reducing that state's ability to discriminate in favour of its own nationals.

Even so, Principle 2 articulates the obligation of non-discrimination on grounds of nationality in general terms, 'at all times'.<sup>103</sup> If non-nationality-discrimination were articulated only in and relating to a particular extraterritorial context where the state's involvement in that context is a pre-existing given, such as the unusual scenario of plenary direct effective territorial control addressed earlier as one of the categories of 'power'-based extraterritorial applicability, then it would leave outside its scope distinctions between the territorial and extraterritorial context that might indeed be rooted in nationality. The absolute articulation, by contrast, suggests the operation of a principle in all circumstances, territorially and extraterritorially. If this were taken literally, and one were to apply it, for example, to the needs-based 'best efforts' standard of social provision, the conclusion would be that all but the very core welfare provisions that wealthier states currently focus on people in their own territories would need to be transferred to assisting the much poorer people in other parts of the world.

Of course, actually this is far from what the law requires, as far as the description of it in the Principles and the Commentary is concerned. Moreover, the foregoing analysis on the questionable nature of the binding status of the obligation to 'assist' and the specific matter of allocating certain levels of GNP to overseas aid suggests that international human rights law does not rule out a more transformatory conception of extraterritorial obligations in the sphere of economic rights through an express acknowledgement and acceptance of nationality discrimination, something which would bring this key statist operating principle to the surface. Rather,

<sup>103</sup> Principles, *supra* note 1, Principle 2. See also *ibid.*, Principle 32, and Commentary, *supra* note 1, at 1156.



it rules it out by omission in the way the obligation to assist is conceived: by simply requiring an active programme of extraterritorial assistance, and not also addressing how much assistance this should involve, it leaves the quantum to the discretion of states, thereby enabling them to devote most resources to welfare at home, while still being compliant with the legal regime.

How, then, can the inclusion of an absolutist affirmation of anti-discrimination in these instruments be understood? Recalling the earlier discussion of hope versus reality, we see the 'utopian' element of anti-nationality-discrimination, with its cosmopolitanist significance, being invoked without an acknowledgement of how it is mediated by the 'apologetic' elements in the rest of the project, with their statist acceptance and reinforcement of the ability of states to put their own people first. As with the earlier problems caused by the misleading presentation of exclusive 'expertise' without also acknowledging 'activist' tendencies, here there is a reverse problem: the way the project is concerned with a compromise between a state's duties to the welfare of its own people, and its duties to the welfare of people around the world ('reality'), is concealed by an absolute articulation of anti-nationality-discrimination ('hope'). Just as being less than candid about one's activism gets one off the hook in terms of defending the particular agenda being furthered in preference to the alternatives, here concealing the existence of a compromise enables the compromise itself to be shielded from critical scrutiny.

#### **D. Charity, Which Begins (Largely) at Home**

What, then, of the substantive nature of the compromise, in terms of where it has been struck? The very existence of an obligation to assist is called into question, and no proper consideration is given to the crucial question of how resources are to be allocated by more economically advantaged states as between welfare at home and welfare internationally, let alone the matter of whether the 0.7 per cent target of GNP, which would in any event be remarkably modest, is/might be binding. More fundamentally, the language of 'assistance' and 'cooperation' indicates very limited notions of action. It suggests a pre-existing reality taken as a given and, moreover, in relation to which locates responsibility for realizing socio-economic rights exclusively in the territorial state, as in the quotation from Andrew Heard at the start of this section, cited by Langford, Vandenhole, Scheinin and van Genugten, with its reference to the provision of 'help if the government most directly responsible fails to fulfil its duties'. Other states then 'assist' that government in this, although not by any clear level in terms of resources. Broader, more fundamental approaches, including of redistribution, that would involve a more radical transformation of the world economy, are not considered.

This is a model that takes the existing structures of the global economy as a given, grafting onto them relatively minor modifications which do not in any significant way challenge things to bring about a significant change in levels of poverty and economic inequality across borders. There is no place here for the kind of radical restructuring of the world economy that would be of much more significance to the global poor, the call for which of course being associated with

social movements in the global south and in certain ideas from post-colonial and approaches to international law and politics. One cannot help wondering whether such a limited horizon of options would have been articulated, and then set up, as discussed above, as an urgent priority for global activism, had more activists from the global south been formally involved as determinative actors, via inclusion as drafters and/or signatories, in this initiative.

Equally, one cannot help wondering whether a greater involvement of this kind by women might have led to a different substantive outcome. It will be recalled that feminist ideas have foregrounded how in various ways women are disproportionately negatively affected by global poverty. It might have been thought that an initiative such as this one would seek to integrate a consideration of that fundamental insight into the way it conceives the substantive regime. Unfortunately, there are only very few, and all tokenistic, references to sex, gender and women in the Principles and Commentary. Gender equality is included in the general affirmation of 'non-discrimination' in Principle 2.<sup>104</sup> However, the relevant section of the Commentary makes no reference to the special position of women, as discussed above, as being disproportionately negatively affected by global poverty.<sup>105</sup> This suggests a thin, formal notion of equality that does not address structural differences in the position of women and men.

A related approach is to invoke a more radical idea of equality, but only in the context of a relatively marginal aspect of the substance being covered. Principle 7 concerns the right of people to 'informed participation in decisions which affect their human rights'.<sup>106</sup> The Commentary observes that 'human rights standards require a high degree of participation from communities, civil society, minorities, women, young people, indigenous peoples, and other identified groups that in general are weakly represented in normal decision-making processes'.<sup>107</sup> This does seek to address structural inequalities ('weakly represented') and suggests approaches to address them that go beyond formal equality to prioritize the involvement of hitherto underrepresented groups ('high degree of participation'). It is an irony that, as discussed above, this approach was not adopted in the process that led to the drafting and signature of the Principles, as concerns the personnel formally involved in this process. Moreover, the approach is only articulated in relation to substantive norms in the context of what is ultimately, on this topic, a second-order issue of 'participation'. Actually it is relevant across the board, significant also to more fundamental matters such as the nature and scope of the core 'power' and 'cooperation' obligations reviewed above. One wonders whether, had it in its 'participation' manifestation been much more seriously followed in the process of formulating the Principles, at the formal level of drafters and/or signatories, the role of the voices included might have led to this broader significance being appreciated.

Other references to sex and women are similarly limited. There is a sideways reference to Article 55 of the UN Charter, which concerns the promotion of respect for human rights without distinction, including as to sex, in the context of the

<sup>104</sup> Principles, *supra* note 1, Principle 2.

<sup>106</sup> Principles, *supra* note 1, Principle 7.

<sup>105</sup> Commentary, *supra* note 1, at 1087–1090.

<sup>107</sup> Commentary, *supra* note 1, at 1100.

obligation to respect human rights articulated in Principle 19. This seems to have been included not on the discrimination issue as such but because of its link to Article 56 of the UN Charter, with its reference to the taking of 'joint and separate action', which the Commentary argues is the conceptual basis for an extraterritorial understanding of the obligation to promote human rights as articulated in Principle 19.<sup>108</sup> Similarly, the Commentary cites Guideline 20 from the precursor to the Maastricht Principles, the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, in the context of stating that references in the Principles to 'persons' are to 'include individuals and groups'.<sup>109</sup> The Guideline, which is extracted in the Commentary, states that 'both individuals and groups can be victims of violations of economic, social, and cultural rights. Certain groups suffer disproportionate harm in this respect such as . . . women'.<sup>110</sup> However, the Commentary does nothing with this idea of disproportionate harm in the way it goes on to conceive the substantive obligations.

When in 2000 Hilary Charlesworth and Christine Chinkin reviewed the Declaration on the Right to Development and associated ideas and instruments, their criticism included the fact that the declaration 'does not specify discrimination against women as a major obstacle to development, nor to the fair distribution of its benefits' and that UN deliberations that have referred to the gender implications of development have tended to present concerns as 'discrete, soluble by the application of special protective measures, rather than as central to development'.<sup>111</sup> A further criticism was that the right to development 'does not regard systemic discrimination on the basis of sex as a barrier to development, despite the global evidence of the disparity between the economic position of women and men'.<sup>112</sup> These criticisms could equally be made of the Principles and the Commentary, which, then, would seem to mark a continuation of, not a break from, earlier, problematic approaches.

### E. Historical Responsibilities/Responsibilities Because of Historical Legacies

Post-colonial, NIEO and TWAIL approaches to the international economic system form the basis for an agenda that seeks to address global economic inequality as a present injustice that should be resisted, but that is not their only impact. These approaches have also been the site of arguments to the effect that international economic relations should be reconceived because of historical injustices, notably those associated with colonialism and imperialism. The two strands of argumentation are related insofar as current economic inequalities can in part be linked back to colonial and imperial structures of the past. One link would be in how industrialization in the West, with its ongoing legacy in terms of economic inequality and environmental destruction, was bound up in and enabled by slavery, the imposition

<sup>108</sup> Commentary, *supra* note 1, at 1127.

<sup>109</sup> Commentary, *supra* note 1, at 1128.

<sup>110</sup> *Ibid.*

<sup>111</sup> Charlesworth and Chinkin, *supra* note 61, at 241.

<sup>112</sup> *Ibid.*, at 243.

of unequal trade relations, and the exploitation of people and the plunder of natural resources in colonial territories. Another link would be the colonial legacy of externally imposed arbitrary boundaries which formed the contours of the borders of post-colonial states. This meant that many newly independent states began as entities facing considerable challenges in forming cohesive and functioning political communities, placing them at a disadvantage in this regard compared to many western states.<sup>113</sup> At the same time, historical questions of responsibilities for the abuses and exploitation of the colonial era, and associated calls for redress and reparation, are not limited to matters which, directly or indirectly, feed into contemporary global inequalities: they are also significant in their own right.

Taken together, these strands of related argumentation suggest that the present topic cannot be appreciated simply by taking the unequal world as it is now, without an appreciation of the historical context which both contributed to this inequality and also suggests a series of unresolved injustices.

As highlighted earlier, the way the Commentary describes the relationship between the 'power' and 'cooperation' conceptions of extraterritorial responsibilities indicates that as far as duties arising in some way as a result of fault, harm, etc., are to be addressed only by obligations in the former category (given the use of the language referring to the 'denial of human rights') and not also the latter category (given the non-compensatory/restitutionary language of 'assistance'—in the words of Andrew Heard, to 'help' the government 'most directly responsible'). It is also clear from the language used in relation to obligations in the former category that they have a temporal orientation limited to situations that arise only after they come into operation, not also those of a historical character.

This legal regime does not, then, address ideas of extraterritorial responsibilities arising out historical considerations, whether the historical origins of contemporary global economic inequalities or the question of redress for historic economic exploitation and abuse across borders. These broader matters are only addressed once in the Commentary, when addressing the description in Principle 31 of 'capacity and resources' as, 'inter alia', the benchmark against which a state must take action to fulfil economic, social and cultural rights extraterritorially. The Commentary explains:

Principle 31 indicates by the use of the term 'inter alia' that capacity and resources do not exhaust the basis for assigning obligations of international assistance and cooperation. It leaves open the possibility of assigning obligations on the grounds of other bases, for example, historical responsibility or causation, which take a compensatory approach based on some determination of liability for contributing to a problem that undermines the fulfilment of economic, social, and cultural rights extraterritorially.<sup>114</sup>

A footnote after the text above states:

Capacity offers both a specific and a general requirement: specific in that it is one of the bases that points to the requisite duty-bearers, e.g. 'those in a position to assist,' and general

<sup>113</sup> See Mutua, 'Why Redraw the Map of Africa: A Legal and Moral Inquiry', 16 *Michigan Journal of International Law* (1995) 1113.

<sup>114</sup> Commentary, *supra* note 1, at 1153.

in that it is a prerequisite to discharging any obligation. Thus, even if it were argued for example that historical responsibility should form a basis for assigning international obligations, but capacity would still be a necessary element in order to see that obligation fulfilled even when the basis is determined on some other ground.<sup>115</sup>

It would seem, then, that historical bases for responsibilities are only a possibility that is open in that they are not ruled out by the law as it stands. Implicit in this is that they do not yet form part of the law. Moreover, how this might come about, and what the contours of the substantive norms might be, are not given any consideration other than that the 'capacity' test would operate as a general prerequisite for discharging any obligation that might come to be adopted in this area. As with the accepted area of cooperation/assistance, of course, the operation of the 'capacity' test would require the fundamental matter, not addressed here, of the division of resources as between welfare at home and providing redress for historical matters.

## 8. Conclusions

The Principles and the Commentary are, as Margot Salomon (co-drafter of the former and co-author of the latter) indicates, a 'giant step' when it comes to the codification effort of mapping out the substantive contours of the extraterritorial application of human rights law in the field of socio-economic rights.<sup>116</sup> But what is the substantive merit of that which has been put forward? How 'responsive', in substance, is international human rights law to global deprivation? Will the giant step in doctrine bring about a giant reduction in global poverty levels? And even if its potential is much more limited, should the current legal settlement serve as the departure point, from which to go further, making refinements? Is it the right place to start?

The foregoing analysis suggests, as mentioned, that the current legal regime takes the fundamental structures of global economic relations largely as is, grafting onto them relatively discrete areas of liability, concerned either with certain forms of power relations and harm understood in terms of direct or foreseeable causation, or vague notions of 'cooperation' that do not extend to particular levels of financial and resource transfer.

At the start of this chapter, it was observed that some of the proponents of the Principles invoke them in the context of economic globalization, as being a much-needed introduction of accountability into this area. A further feature of this invocation of economic globalization, which indicates the nature and the limitations of that which is being advocated, is a description of it as in some sense a 'new' phenomenon. The Preamble to the Principles contextualizes the contemporary need for that which it contains as the 'advent' of economic globalization.<sup>117</sup>

<sup>115</sup> *Ibid.*, at 1153 no. 179.

<sup>116</sup> Salomon 2012, *supra* note 1, at 3.

<sup>117</sup> Principles, *supra* note 1, Preamble.

An account of economic globalization, its problems, and the consequent need of human rights law to regulate it, as ‘new’ or ‘recent’ runs through much of the writing in this area.<sup>118</sup>

Such an approach to economic globalization ignores the way in which international economic relations have been globalized for centuries. Why does this matter for the project at hand? Conceptualizing economic globalization as novel or at least of relatively recent pedigree perhaps explains why the approach for addressing its problems advocated by this initiative fails to address the way such problems are partly structural and historically rooted. Rich countries and their populations are operating on a blank slate in terms of the historical past and their inheritance from previous generations. No investigation is to be made into how the economic inequalities of today are in part rooted in such inequalities in the past. Thus any matters of global economic reconstruction and redistribution can be understood exclusively in terms of debates around communitarianism and charity—resulting in very modest economic consequences—not unfair, inherited privilege based on past inequality and exploitation—which might require more profound, transformatory change.

It would seem, then, that some of the grand claims made for the potential of international human rights law in the context of global poverty and economic inequality reviewed at the start of this chapter do not stand up to scrutiny. It has to be asked, then, whether a campaign to put human rights obligations at the centre of activism in this field is a valuable use of the limited time and resources of those involved. And, in consequence, the concern must also be that the modest nature of the substantive law creates a danger that it will merely serve to bolster the continuation of the *status quo* which can now be further legitimated by states through claims to be ‘human rights compliant’.

But could not a more modest position be adopted, that certain limited improvements might be effected at the margins, and that more radical efforts seeking transformatory changes can be, and indeed perhaps should be, left to broader struggles taking place outside the structures of international human rights law? Such broader struggles could, as human rights by definition cannot, involve ideas that offer more fundamental challenges to the structural aspects of global economic life, from the division of the world into sovereign states itself to the substantive models of economics that form the basis for the world economy. Modesty in the expectations made of the law can also be used to limit the legitimating power the law holds when it comes to undergirding the status quo: if activists were not making grand claims about the value of the law, states would be undermined in their efforts to use the law to legitimate business as usual.

Part of the problem with this approach is that it substitutes an overblown account of the law’s emancipatory potential with an alternative narrative that obscures how the law enables particular substantive policies to be furthered.

<sup>118</sup> See Vandenhoele 2011, *supra* note 1, at 430; Coomans and Künnemann, ‘General Introduction’, *supra* note 1, at 1; Langford *et al.*, *supra* note 1, at 29; Vandenhoele 2012, *supra* note 1, abstract and 2.

A model of extraterritorial obligations in the economic sphere that is limited to narrow conceptions of direct or foreseeable harm, direct territorial control, or vague notions of cooperation, maps onto a liberal economic model of *laissez faire*, with a modicum of light-touch regulation and modest social provision in exceptional areas, outside unusual situations where direct territorial control is exercised by a foreign state. International economic inequality is accepted as a given, bar narrow areas where there is more direct transboundary harm (only in the present), and the possibility of ‘assistance’ which is unquantified and thereby left largely in the realm of charity and discretion. This model not only lacks more substantial socialist or solidarist elements; for its proponents, of course, it would be conceived to be an alternative to a model with these elements. For an economist, international human rights law would appear to have come down on one side in the hugely contested debate about the operation of the global economy.

One way this approach is enabled is by touching upon issues that clearly imply substantive economic ideas, doing so just enough to dismiss more solidarist approaches in sweeping terms, but not long enough to acknowledge the substantive significance of, let alone engage in a discussion of, the economic ideas in play. Langford, Vandenhole, Scheinin and van Genugten argue that an ‘inordinate amount of time’ has been taken up with debates over the provision of development assistance and fiscal resource transfers.<sup>119</sup> This is ‘unfortunate’ because of the emergence of middle-income countries where the poor are located, where ‘international development assistance is rapidly becoming less relevant’.<sup>120</sup> Moreover, ‘[e]ven many low-income countries have set themselves a goal of graduation from development assistance. Thus the approach of reducing global poverty through fiscal transfer to poorer States has an increasingly limited scope.’<sup>121</sup> Also, it is ‘unfortunate’ because ‘extraterritorial obligations may be even more relevant and effective in other areas. This might include the structure of the world economy.’<sup>122</sup> What is cast as a purely empirical treatment of key facts of course implies a series of economic preferences, such as the idea that fiscal transfers are only relevant if somehow local capacities are deficient, ignoring more structural links across borders determinative of ‘local’ capacities and denying the validity of alternative rationales for transfers such as redress for historical injustices. And when we bear in mind the substantively limited nature of extraterritorial obligations in ‘other areas’ as reviewed above, which hardly seem capable of transforming the global economy, the notion of jettisoning efforts for the adoption of solidaristic norms involving resource transfer as a waste of time only makes sense if the neo-liberal model of economic relations that is left is to be preferred.

A more typical approach, which is illustrated in some of the statements from proponents of the Principles reviewed, is to insist that human rights law is in some sense anti-capitalist. Olivier De Schutter, for example, posits the ‘neoliberal agenda’ as somehow ‘other’ than human rights law, and its ‘imposition’ something which has led to the pledges in that area of law being forgotten.<sup>123</sup> But, as has been

<sup>119</sup> Langford *et al.*, *supra* note 1, at 30.

<sup>120</sup> *Ibid.*, at 30.

<sup>121</sup> *Ibid.*, at 31.

<sup>122</sup> *Ibid.*, at 31.

<sup>123</sup> De Schutter, ‘Foreword’, *supra* note 1, at vi.

suggested, the nature of the substantive legal framework in the field of extraterritoriality would seem to approximate most to a liberal view of the global economy. It could also be said that this forms part of the broader way in which international law is compatible with, and indeed often the enabler of, liberal economic governance, most obviously in investment and trade law, and that, as a result, international lawyers have to understand their relationship to neo-liberal economics, not as something 'other' than international law which has been 'imposed,' but, rather, as an agenda that the law has played a role in fostering. If De Schutter wishes to resist the neo-liberal agenda, then, it may not even be 'merely' about ensuring compliance with human rights law. Such compliance might be part of the problem.

If this is correct, then it is not possible simply to assume that the law offers a modest, neutral foundation on which all manner of developments, including progressive, transformatory and solidarist ones, might be possible. The foundation might determine that which is possible. It sets the trajectory that would, therefore, have to be altered, not followed, if different conceptions of international economic relations were to be attempted. This is equally true on the earlier, ahistorical conception of economic globalization and its seeming connection to an absence of responsibilities for historical injustices. Although there has been for some time a vibrant field of 'transitional justice' seeking to address, *inter alia*, questions of responsibility for historical human rights abuses, an internal statist focus has predominated, with transnational issues dealt with relatively occasionally and mostly those of more recent provenance (transitional justice has also tended to focus more on civil and political rights than socio-economic rights). There remains a huge absence of, and resistance to, a reckoning for historical transnational human rights abuses, especially in the context of the colonial era and the actions of victorious belligerents. In recent years, certain efforts have had some success in challenging this, for example the litigation brought against the British concerning the displacement of the Chagos Islanders and the atrocities perpetrated during the *Mau Mau* rebellion in Kenya. In this context, the present initiative, in failing to address the idea of historic inequalities and abuses as a factor in understanding how the normative regime should operate, in its omission intervenes in a debate on the side of those who would deny the significance of this factor.

Finally, as a project of international human rights law, this initiative, although coming out of the work of non-state experts/activists, and in its subject matter seeking to disrupt state boundaries, ends up legitimating the state-based international system that might be one of the structural causes of international economic inequality (cf. TWAIL critiques). Moreover, on its own terms, this system privileges states in the area of norm-generation and transformation. The modest nature of the current regime for extraterritoriality could be built upon not only, as its proponents intend, by those who aspire to progressive development; it could also be captured by powerful states, and for different ends. Indeed, in language that could have been lifted from Koskenniemi's *Apology to Utopia*, Olivier De Schutter suggests the potential for the development of the normative system to be determined by states:



... they [the Principles] are *relatively incomplete*. They are sufficiently precise to provide a focal point for deliberations as to how to build international regimes ... yet ... vague enough not to pre-empt the result of these deliberations. They thus allow true ownership by the actors, primarily States, who contribute to the establishment of international regimes.<sup>124</sup>

<sup>124</sup> Ibid., at viii (emphasis in original).