

1. Introduction: An Emerging Field

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1. Beyond Westphalia

Human rights are often framed within a territorial perspective. The phrase can easily conjure up images of citizens struggling for their rights with their own governments rather than with distant foreign governments. The idea of human rights gained prominence in the wake of the establishment of a Westphalian world order of 1648, with territorially distinct States exercising sovereignty within their geographical borders. This territorial ordering has shaped the trajectory and vocation of domestic and international human rights law: it is a corrective to the domestic failures of the State. Whatever the content of the claim (rights to life, vote, education, etc.) or the nature of the government (democratic, authoritarian or colonial), the responsibilities of States are constrained by national borders. Even though the wording of international human rights standards suggest a much broader scope of application, obligations that extend beyond this domestic sphere have been largely understood or interpreted in residual, minimalistic or moral terms, if at all. This is particularly evident in mainstream political philosophy, international legal jurisprudence and most constitutional bills of rights.

Despite its ascendance, this Westphalian territorial framing of rights is a paradigm under strain. As Amartya Sen commented, there are “few non-non-neighbours left in the world today” because we are “increasingly linked not only by our mutual economic, social and political relations, but also by vaguely shared but far-reaching concerns about injustice and inhumanity”.¹ The capacity of States and other actors to impact human rights far from home, whether positively or negatively, is impressive. Most notable has been the rise of trade

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¹ A. Sen, *The Idea of Justice* (Cambridge: Belknap Press, 2009). p. 173.

and investment regimes, international aid policies, global military operations and global finance, together with ever-speedier and comprehensive transport and telecommunications.² The result is that the world is a smaller place - the State has lost its omnipresence.

Economic globalisation in particular has fragmented and transformed State sovereignty, facilitating the growth of other powerful actors. This diffusion of authority has heralded what some call a new age of neo-medievalism, a phenomenon where “overlapping and criss-crossing loyalties” co-exist³ and which is “held together by a duality of competing universalistic claims”, particularly those of the “nation-State system and the transnational market economy”.⁴ In addition, economic globalisation has arguably contributed to increasing socio-economic disparities even if absolute poverty levels have dipped slightly. Over the last two centuries, Branko Milanovic has estimated that global inequality amongst individuals has increased, from a global Gini coefficient of 43–45 to 65–70.⁵

The response of international law and relations to this phenomenon has been slow and creaking. Its architecture remains State-centric in two respects. First, States remain the principal decision makers and duty-bearers. International law has recognised that non-State actors can be *beneficiaries* of substantive or procedural rights, whether foreign investors, individuals, indigenous peoples, ethnic minorities, trade unions and so forth. There has been caution, however, in extending *responsibilities* to non-State or multilateral actors, particularly outside the framework of international humanitarian and criminal law. As the title of this book suggests, there is a tension between the ideals of global justice and the realities of the current State-based architecture.

Second, in international relations in the twentieth century, global misdistributions of power and poverty have been primarily understood as a lack of justice *between* States. This is

² This is not to overstate the transformation. For example, European trade policies in the nineteenth century wreaked havoc on some developing countries. Moreover, one of the most successful human rights campaigns in history - the movement for abolition of slavery - was fundamentally extraterritorial. The scale and reach of global activity are unparalleled, however.

³ H. Bull, *The Anarchical Society* (New York: Columbia University Press, 2002), pp. 246. See discussion in C. Bailliet, ‘What is to Become of Human Rights Rule-Based International Order within an Age of Neo-Medievalism?’ in C. Bailliet (ed.), *Non-State Actors, Soft Law and Protective Regimes: From the Margins* (Cambridge: Cambridge University Press, 2012).

⁴ J. Friedrichs, ‘The Meaning of New Medievalism’, *European Journal of International Relations*, Vol. 7, No. 4 (2001), pp. 475–501, at 475.

⁵ See *Global Inequality and the Global Inequality Extraction Ratio: the Story of the Past Two Centuries*, Policy Research Working Paper 5044, World Bank, 2009.

evident in the recurring calls for economic redistribution between Southern developing and Northern developed States. In the 1950s and 1960s, Southern countries called for the right to self-determination and control over national resources; in the 1970s, they championed a New International Economic Order; in the 1980s, they pushed the General Assembly to recognise a right to development that covers both individuals *and* peoples; and in the 1990s and 2000s, fair trade and debt relief took centre stage.⁶ Southern governments have not been alone in adopting this statist framework: The phenomenon of international development cooperation has been largely driven by Northern governments through State-to-State or multilateral relations.

However, calls for economic and social justice have taken on a new dimension. Individuals or groups increasingly express their grievances against foreign States in direct terms and outside the language of inter-State relations or colonial struggles. The territorial State is not viewed as their immediate proxy or representative in such situations. Rather such claims are conceived in diagonal terms, and often in the modus of rights. The non-territorial State is viewed as holding direct obligations to these individuals and groups.

Of course, these claims by individuals and groups may overlap with those articulated by their own governments. It is not uncommon to find alliances of civil society formations with their governments to oppose export dumping, investment arbitration, debt relief conditions or foreign military intervention. However, individuals and groups may have quite divergent interests from their governments. The domestic State may be actively cooperating with foreign States or international regimes, or it may simply lack the interest or capacity to defend these diverse interests. Thus, powerful extraterritorial actors may be able to operate with a high degree of immunity. Moreover, global frictions no longer follow a simple North-South divide. Globalisation has destabilised and disturbed the traditional lines of political economy and development, as Southern States grow in influence and Northern States become more enmeshed. The result is that the State under scrutiny for its extraterritorial behavior may be Southern or the negatively affected group may be Northern.

⁶ These persistent demands are well captured in the singular aim of the G77, the largest intergovernmental organization of 131 Southern countries. Established in 1964, the group's mandate is to "articulate and promote their collective economic interests and enhance their joint negotiating capacity on all major international economic issues within the United Nations system, and promote South-South cooperation for development". Available at <http://www.g77.org/doc/>, accessed 22 June.

This diagonal relationship has gained some recognition within international law. The first change has been the rediscovery that some international human rights standards are not as territorially limited as presumed. Extraterritorial obligations have simply gone unarticulated.⁷ In some instances, there is no spatial limitation, such as in the Universal Declaration on Human Rights⁸ or the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁹ The obligations are framed in universal terms. Other treaties are limited by jurisdiction, such as the European Convention on Human Rights,¹⁰ or the complaint mechanism is limited by jurisdiction, as in the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women.¹¹ This begs the following questions. What is this concept of jurisdiction? When is it broader than territory?

The second development is the use of international courts and treaty bodies to test extraterritorial claims. There is a long history of international diagonal litigation – for instance, in the form of arbitration panels established between States. However, such procedures are often *ad hoc*. Contemporary human rights mechanisms do not require ongoing State consent, which means they are open in principle to extraterritorial litigation. The result has been a rise in claims submitted to permanent regional courts for extraterritorial violations and the growing attention of United Nations (UN) treaty bodies to the issue in their periodic reviews and general comments.

The third shift is the growth of ‘global administrative law’ or simply global law in which responsibility is placed directly on non-State and multilateral actors.¹² Prominent examples within the socio-economic arena include the creation of an Ombudsperson for International Finance Corporation and the establishment of complaint mechanisms, such as

⁷ S. Skogly, *Beyond National Borders: States’ Human Rights Obligations in their International Cooperation* (Antwerp: Intersentia, 2006).

⁸ Universal Declaration of Human Rights (adopted 10 December 1948), 217A (III), UN Doc. A/810 at 71.

⁹ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976), 993 UNTS 3, UN Doc. A/6316 (1966).

¹⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953), ETS No. 5 213 UNTS 222, as amended by Protocols 3, 5, 8, 11 and 14, which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, 1 November 1998 and 1 June 2010, respectively.

¹¹ Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 22 December 2000), 1249 UNTS 13, UN Doc. A/54/49 (Vol. I) (2000).

¹² B. Kingsbury, N. Krisch and R. Stewart, ‘The Emergence of Global Administrative Law’, *Law and Contemporary Problems*, Vol. 68 (2005), pp. 15–61.

the World Bank's Inspection Panel or the contact point procedure under the Organisation for Economic Cooperation and Development's Guidelines on Multinational Enterprises.

2. Extraterritorial Economic, Social and Cultural Rights

The extraterritorial reach of human rights within international law has been most examined and tested in the field of civil and political rights. Gibney and Skogly claim that this is “because the direct causation between government action or inaction and human rights violations are very clear and easy to document” and “most people have a better grasp of civil and political rights than economic, social, and cultural rights”.¹³ A lively body of research now focuses on legal strategies that have attempted to make extraterritorial States liable, through regional and international adjudication. This has included arrest by foreign security agents, military operations and tolerance of religiously sensitive cartoons.¹⁴ Torture has been particularly implicated in extraterritorial actions, whether in international armed conflict, counterterrorism efforts, security operations and practices such as renditions.

However, Gibney's and Skogly's assertion is less defensible on closer inspection. It is not clear that causation provides a bright line or clear distinction between the two sets of rights in an extraterritorial context. Proving causation for extraterritorial violations of civil and political rights may be extremely challenging. For example, do transnational shipments of small arms to parties in armed conflict amount to a denial of the right to life or to an attempt to ensure the right to life? The answer might depend on who receives the arms and what their methods of warfare are. Is a State complicit in torture if its official happens to observe torture during interrogation in a police cell in a foreign country? In contrast, the causation element may be easy to prove for some violations of economic, social and cultural (ESC) rights. Examples include forcible evictions in multilateral infrastructure projects or donor conditionalities for the charging of fees in primary education. In practice, many cases may implicate both sets of rights, as was clear in the International Court of Justice's (ICJ's) *Advisory Opinion on Legal Construction of a Wall in the Occupied Palestinian Territory*.¹⁵ In

¹³ M. Gibney and S. Skogly, *Universal Human Rights and Extraterritorial Obligations* (Philadelphia: University of Pennsylvania Press, 2010), p. 6.

¹⁴ These cases are discussed in Chapter 4 by Gibney and Chapter 5 by den Heijer and Lawson in this volume.

¹⁵ *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice, 9 July 2004.

the literature actors such as transnational corporations (TNCs), armed groups, international financial institutions (IFIs) and UN agencies, equal weight is often given to both sets of rights, particularly labour, housing and environmental rights.

Moreover, ESC rights have gained increased acceptance in international law and comparative jurisprudence. This is evident in an array of new treaties and resolutions and the adoption of international complaint mechanisms that cover ESC rights, such as the Optional Protocols to ICESCR, Convention on the Rights of the Child and Convention on the Rights of Persons with Disabilities (see Chapter 3). This has been accompanied by a rise in regional and national adjudication of ESC rights, and many general comments and concluding observations from UN treaty body committees and the International Labor Organisation (ILO) bodies have shed greater light on the respective obligations.¹⁶ In addition, the arguments for viewing ESC rights, or at least the minimum core of all human rights, within international customary law have strengthened considerably.¹⁷

Nonetheless, there is a certain ring of truth to the assertion. Thus far, there has been less extraterritorial litigation of ESC rights, and less attention has been paid to the different types of scenarios that may attract extraterritorial responsibility. We are yet to witness a fully visible global jurisprudential practice on extraterritorial obligations concerning ESC rights. The question is whether it is a matter of time before the law catches up. We have seen this occur at the domestic level where concepts and doctrines have been borrowed from civil and political rights or autonomously developed to address the particularities of ESC rights. But does the supposed complexity of ESC rights together with extraterritorial application mean that such jurisprudence is likely to be insignificant or peripheral?

¹⁶ See also M. Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, 2008); C. Mahon, 'Progress at the Front: The Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights', *Human Rights Law Review*, Vol. 8, No. 4 (2008), pp. 617–46; M. Stein and J. Lord, 'Future Prospects for the United Nations Convention on the Rights of Persons with Disabilities', in O. Arnardóttir and G. Quinn, *The UN Convention on the Rights of the Person with Disabilities: European and Scandinavian Perspective* (Leiden: Martinus Nijhoff, 2009); M. Langford and S. Clark, 'The New Kid on the Block: A Complaints Procedure for the Convention on the Rights of the Child', *Nordic Journal of Human Rights*, Vol. 28, No. 3 (2010), pp. 371–400; F. Coomans (ed.), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Antwerp: Intersentia and Maastricht Centre for Human Rights, 2006); and R. Gargarella, P. Domingo and T. Roux (eds.), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Aldershot/Burlington: Ashgate, 2006).

¹⁷ See discussion in Section 2.3 of Chapter 4 of this volume.

Given that international treaty *law* pertaining to ESC rights is generally less territorially constrained, it may be just a matter of time. Alternatively, the law may be developed through other means through treaties, declarations, interpretive opinions and various practices. Nonetheless, many issues deserve consideration on a systemic basis. How far do these obligations actually stretch? Do wealthier States have *legal* and not just moral obligations to address poverty beyond their borders? How far should these States go in cooperating internationally to fulfil ESC rights, from provision of access to intellectual property for medicines through to development assistance? Andrew Heard put this classical challenge in the following way:

[A] complication arises when a government either is incapable of providing a benefit protected by human rights – such as the Ethiopian government’s inability to provide food during the worst of the famines – or when a government simply fails to respect human rights. If an individual’s government is the central duty-holder, then the rest of the world can shake their heads saying “tut-tut” without feeling any sense of duty to intervene. Other 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 fulfill its duties.¹⁸

However, this is not the only relevant question for the extraterritorial application of ESC rights. We are also interested in the degree to which States must regulate the extraterritorial activities of multinational corporations registered in their jurisdiction or influence the activities of international organisations such as the World Bank, International Monetary Fund (IMF) or World Health Organisation (WHO). When must they intervene to control the extraterritorial impacts generated by these actors?

In addition, there are a range of typical legal questions. As regards *jurisdiction*, is there a different departure point for ESC rights? The limits of a State’s jurisdiction regarding civil rights violations have often, but not always, been constructed on the concept of some sort of ‘physicalised’ relationship – for example, armed occupation or an arrest by agents. In the

¹⁸ A. Heard, ‘Human Rights: Chimeras in Sheep’s Clothing?’, (1997) available at <http://www.sfu.ca/~aheard/intro.html> accessed 22 June 2012.

case of ESC rights, however, the element of direct physical control or effect is often not required for a State to produce a negative impact.¹⁹ For instance, subsidies for domestic production or incentives for production of certain crops such as biofuels may have global effects on livelihood and environmental rights. Does this make the establishment of jurisdiction (and also causation and calculation of remedies) more difficult or easier?

As to *causation*, how does one determine complicity or deal with many links in the chain of causality? If States require that unaffordable user fees be imposed for primary health care as a condition of their international aid programme, is the right to health violated? If a State's export credit agency provides support to companies involved in major infrastructure projects or production of goods that leads to violations of ESC rights, is that State responsible? Moreover, how is responsibility to be *apportioned* amongst multiple State actors? If a dam built with international support leads to various rights violations, which State is responsible? Is it the State in which the dam is constructed, the Executive Directors (i.e., States) of the World Bank and/or the State whose export credit agency backed corporations involved in the project? Can international human rights law, at least in theory, act as a corrective to failures of both States and the market and provide a system of accountability?²⁰

3. Research Questions and Perspectives

This book sets out to answer such questions. In other words, what is the applicable content of extraterritorial State obligations in the field of ESC rights in international law? In the corpus of international law, can we discern obligations that are both clear and relevant to current realities? Are the common demands of law – duty, jurisdiction, causation, division of responsibility and remedies – satisfied? The focus of this book is principally on the scope of the ICESCR, but consideration is also given to other treaties and standards relevant to ESC rights, particularly those concerned with the rights of women, children and persons with disabilities; racial discrimination; and rights of indigenous peoples. Given the importance that regional instruments have so far played in the field of extraterritorial obligations, these regimes are also considered.

¹⁹ Although this is sometimes the case for civil and political rights, the potential for some acts to have widespread socio-economic consequences means that the concept of jurisdiction requires close interrogation.

²⁰ See K. De Feyter, *Human Rights: Social Justice in the Age of the Market* (London, Zed Books, 2005), p. 15. Compare to Narula in this volume.

The primary aim of this book is not to articulate a moral or normative basis for extraterritorial obligations: A rich and developing literature already exists on that point.²¹ Nor is there an express reformist agenda that seeks to articulate how existing treaties or mechanisms could be improved or supplemented. Rather, this book seeks principally to interpret existing international law, in light of existing legal doctrine and the questions raised by practical application. It is for this reason that a range of international law scholars and practitioners, who have investigated these questions in the domain of human rights, were invited to contribute. In doing so, each author probes and interrogates a range of sources in international law relevant to his or her question, although the interpretive orientation is sometimes different.²²

However, moral or reformist perspectives are partly addressed in different ways. At times, the chapter authors draw on them as a departure point for some of the analysis or as a basis for recommending improvements to the current international architecture. In an afterword, *Malcolm Langford* and *Mac Darrow* go further and examine the current state of international law in light of a range of moral theories (from communitarianism to cosmopolitanism) that address the question of global justice. This is done to not only provide an external perspective on the legal findings but also because moral norms influence perceptions of the legitimacy of international human rights law.

This book is unique in three respects. First, it is the only academic publication to exclusively focus on the extraterritorial application of ESC rights. Whereas the analysis of the extraterritorial application of human rights treaties on civil and political rights has reached a certain level of sophistication, discussions in relation to ESC rights are still at an embryonic stage. A volume that specifically addresses extraterritorial ESC rights is therefore needed.²³

²¹ See review of the literature in Chapter 2.

²² For example, the wording of a relevant legal provision, the object or purpose of a legal standard, the *travaux préparatoire*, jurisprudence from international courts and tribunals or doctrines from other fields of law that would resolve a particular legal problem. It should also be said that even though legal method does provide a constraint on reasoning, it is somewhat fruitless to assert that it is hermetically sealed off from broader normative or subjective perspectives. See the critical but nuanced discussion in K. Klare, 'Legal Culture and Transformative Constitutionalism', *South African Journal on Human Rights*, Vol. 14 (1998), pp. 146–72.

²³ There has been considerable debate in discrete journal articles, but no coherent collection has been published so far. In 2004, a book on extraterritorial human rights obligations was edited by Fons Coomans and Menno Kamminga, *Extraterritorial Application of Human Rights Treaties* (Antwerp: Intersentia), which focused almost exclusively on civil and political rights. A more recent volume is that edited by Mark Gibney and Sigrun Skogly,

Second, the topic is approached from the perspective of cross-cutting issues that shape any standard legal conversation or analysis rather than by proceeding on a right-by-right basis. We focus on five particular legal issues that structure the publication:

1. Legal status (nature of obligations)
2. Jurisdiction
3. Causation
4. Division of responsibility
5. Remedies and accountability

In each part, the first chapter provides a comprehensive overview of the issue, and the subsequent chapter offers a different perspective or focuses on a particular issue or case study.

Third, the book is focused on one type of actor: States. Non-State actors are mentioned only when they can be viewed through the lens of State obligations. For instance, they may be home States for a TNC or member States of an intergovernmental organisation. It could be argued that the direct obligations of non-State actors (whether TNCs, intergovernmental organisations or military actors) should also be included, given their significance.²⁴ Although such discussion is important,²⁵ this book limits the analysis to States. This enables a more focused and precise analysis; and acknowledges that, even though the contemporary State may be weaker, it has not withered away. Indeed, the current rise of the Southern powers has been strongly premised on notions of State sovereignty. Moreover, understanding the relative legal and institutional strength of human rights obligations incumbent on States may better

Universal Human Rights and Extraterritorial Obligations (Philadelphia: University of Pennsylvania Press, 2010), but it takes a right-by-right approach, and neither addresses underlying cross-cutting issues nor focuses exclusively on economic, social and cultural rights. The closest is *Casting the Net Wider: Human Rights, Development and New Duty-Bearers*, edited by W. Vandenhoe, M. Salomon and A. Tostensen (Antwerp: Intersentia, 2007), but this book seeks to raise the issues rather than address the legal questions systematically.

²⁴ For an argument on the need for a systematic shift towards private duties in international human rights law, see C. Bailliet, 'What Is to Become of Human Rights Rule-Based International Order within an Age of Neo-Medievalism?', in C. Bailliet (ed.), *Non-State Actors, Soft Law and Protective Regimes: From the Margins* (Cambridge: Cambridge University Press, 2012).

²⁵ For other works that tackle the direct human rights obligations of these actors in the context of human (including ESC) rights, see M. Darrow, *Between Light and Shadow, The World Bank, The International Monetary Fund and International Human Rights Law* (Oxford: Hart Publishing, 2003); O. De Schutter (ed.), *Transnational Corporations and Human Rights* (Oxford: Hart Publishing, 2006); S. Skogly, *The Human Rights Obligations of the World Bank and the IMF* (London: Cavendish Publishing, 2001).

help us consider how the nascent regime of human rights obligations for other actors should be further developed.

The book also touches upon current themes in international legal scholarship. The analysis of extraterritorial human rights obligations often rubs up against other areas of international law: trade, environment, humanitarian, development, investment and so forth. This highlights the ever-continuing challenge around the fragmentation of international law.²⁶ Thus, the book's authors struggle at times with questions of whether there are any rules of primacy between these different regimes and general international law, the dissonance (but also potential synergy) between understandings of different concepts such as jurisdiction in general international law and human rights law and the applicability of the ILC Articles of State Responsibility²⁷ to human rights law.

4. Overview of this Book

Before introducing the chapters in the book and drawing together some tentative conclusions, it is worth traversing the verbiage of terminology that seeks to capture the borderless or global dimension of human rights. In the literature, we find terms ranging from international obligations, universal obligations, transnational obligations, transboundary obligations, third (party) State obligations through to extraterritorial obligations. This has led to some confusion because it is unclear whether all these terms have a specific meaning, scope and implication. Indeed, the legitimacy of the discussion may be questioned on the grounds that its proponents cannot even agree on basic terminology.

The second chapter in the book addresses these semantics and Mark Gibney explores the pros and cons of different terms. He rejects outright the use of notions with the prefix 'trans-' or 'cross-', such as transnational or transboundary obligations. These concepts have been borrowed from international environmental law, and seem to suggest a geographic proximity that often does not accord with human rights realities. The terminology most commonly used by the UN Committee on Economic, Social and Cultural Rights (CESCR),

²⁶ See, for example, the Special Issue on 'The Proliferation of International Judicial Bodies: Piecing Together the Puzzle', in the *Journal of International Law and Politics*, Vol. 31, No. 4 (1999), pp. 679–918.

²⁷ ILC, 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries', *Report of the International Law Commission on the Work of its Fifty-third Session (Fifty-third Session, 2001)*, UN GAOR, Supp. No. 10 at 43, UN Doc. A/56/10 (2001).

international obligations, is equally discarded: it is too infused with the traditional interstatism of international law. Gibney likewise questions the term *global obligations*, which tends to make all actors responsible for human rights. Such an approach may well result in no one being responsible for anything. Eventually, Gibney arrives at a preference for *extraterritorial obligations*. It is a negative choice though, one informed by the lack of better alternatives. He identifies several potential problems with the term. It may create the notion that human rights obligations are in principle territorial, and only exceptionally apply outside a State's borders. The distinction between territorial and extraterritorial can also be so blurred that it has no analytical value. Despite these dangers, Gibney opts for the expression but warns about the consequences of its use in ongoing debates on important legal concepts such as jurisdiction and responsibility.

The editors of this volume have equally opted for the term, and we refer to *domestic obligations* as those obligations pertaining to the State within its territory and/or toward its citizens. However, there is much to be said in principle for the option of *third State obligations*. It views obligations of States from the perspective of individual rights-holders rather than the territorial demarcations amongst States.²⁸ Indeed, Gibney also notes it is a compelling term that nicely captures the diagonal relationship. The term is dismissed though by Gibney on the grounds that it has not attracted a following, which is somewhat curious given it is a standard term in domestic law. Dissenters on the choice of terminology also appear in this book. Salomon expresses an explicit preference for *transnational obligations*, arguing that there is no territorial limitation in the ICESCR, and therefore no reason to talk about *extraterritorial obligations*.

The discussion obviously sets a linguistic challenge for the future. Can one coin a more appropriate term, or set of terms, that better grasps the background idea that States have human rights obligations both within and outside their national borders? One interesting development in this regard is the recent *Maastricht Principles on Extraterritorial Obligations (ETOs) of States in the area of Economic, Social and Cultural Rights* (Maastricht ETO

²⁸ W. Vandenhoe, 'Economic, Social and Cultural Rights in the CRC: Is There a Legal Obligation to Cooperate Internationally for Development?', *International Journal of Children's Rights*, Vol. 17, No. 1 (2009), pp. 23–63, at 25.

Principles).²⁹ It adopts the term *extraterritorial* but divides it into *obligations relating to a State's extraterritorial acts and omissions on its territory* and *obligations of a global character*.

4.1 Legal Status

The first cross-cutting issue examined in the book is the legal status of extraterritorial obligations. The chapter by Malcolm Langford, Fons Coomans and Felipe Gómez Isa traces the history of the principle of international cooperation in the early years of the UN through to developments in international treaty and customary law. They find considerable evidence for the existence of negative and positive extraterritorial obligations but conclude that it is difficult to assert that the latter include direct bilateral obligations to provide assistance.

The chapter also examines the relevant treaties in some detail, focusing on the increasing specificity in recently adopted treaties and protocols. The authors note that treaties concerning ESC rights on their face are more open to extraterritorial application than are those concerning civil and political rights, although a certain degree of convergence and harmonisation is now apparent in legal interpretation. They also analyse the different ways of conceptualising and applying legal provisions in practice with a focus on the jurisprudence of the CESCR, the first treaty body to pay explicit attention to extraterritorial ESC rights obligations of States' parties. Areas of application include sanction regimes, military occupation, regulation of activities of non-State actors, membership in international organisations and provision of official development assistance.

Smita Narula focuses specifically on State duties to regulate the behaviour of TNCs and IFIs. She begins by exposing the State-centric and jurisdictional constraints of international human rights law, an approach that creates 'accountability gaps'. States are not responsible for affecting ESC rights outside their jurisdiction, nor are other global actors such as IFIs or TNCs. According to Narula, closing these accountability gaps should take place

²⁹ Adopted by International Experts on 28 September 2011, Maastricht. The entire operational paragraph reads, "For the purposes of these Principles, extraterritorial obligations encompass: 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."

within a conceptual framework that can be reconciled “with the more conservative articulations of State responsibility under international law”. She proposes a modified version of the obligation of international cooperation approach that focuses on negative-like obligations.

Narula contends that these non-State actors can be held indirectly accountable through the power States over entities. As far as IFIs are concerned, she concludes that powerful member States are capable of influencing the organisations to act in accordance with international human rights law: a State party’s obligation to respect and protect ESC rights extraterritorially could thus be applied to a State’s participation in IFI decision making.³⁰ As far as TNCs are concerned, Narula proposes home State accountability if the home State exercises decisive influence over the ability of TNCs to operate in an unregulated manner abroad. In such cases, it must exercise due diligence in protecting individuals abroad.

4.2 Jurisdiction

If the existence of extraterritorial obligations is recognised in law, the question arises as to when and how responsibility for compliance with these obligations can be attributed to non-territorial States. This naturally raises issues of jurisdiction and causation. To take the first, jurisdiction has been a prominent and heated topic in the discussion so far on extraterritorial obligations. This is particularly so in the field of civil and political rights,³¹ but how relevant is it with regard to ESC rights?

Maarten den Heijer and Rick Lawson argue that the ordinary function of jurisdiction within international law – namely to allocate competences between States – should not be equated with the specific delimiting function of the concept of ‘jurisdiction’ in human rights law. After comprehensively examining the international jurisprudence concerning ‘jurisdiction’ in human rights law, they note the slight shift by adjudicators away from a strict ‘effective control’ test towards an attribution-based assessment. The jurisprudence suggests that, either in fact or as a principle of law, “a State must always be guided by the human rights

³⁰ Note that some claim that the obligation to fulfil may also be arguably relevant in terms of shaping the aims and activities of the organisation.

³¹ See the chapters in Coomans and Kamminga, *Extraterritorial Application of Human Rights Treaties* (n. 23 above).

obligations it has entered into, thus regardless of territorial considerations". According to the authors, even the more cautious European Court of Human Rights has edged towards such a pragmatic approach, perhaps recognising the unworkability of the effective control test. In terms of the two sets of rights, Lawson and den Heijer advance an integrated approach for addressing jurisdiction; one based on identifying the legal nature of a State's duties towards persons in foreign territories in its context. They conclude that human rights law is sufficiently flexible to cope with various issues raised the extraterritorial activity of States.

Cedric Ryngaert is more sceptical towards a move in the direction of attribution or effects-based approaches to jurisdiction. Drawing on general international law, he argues that the effects doctrine as suggested by den Heijer and Lawson is in fact territorial (i.e., it allows a State to exercise jurisdiction over an act if the effects of that act could be felt in that State's own territory). Using the case of TNCs, he proposes a doctrine of conduct-based jurisdiction, which would oblige or allow a State to exercise jurisdiction over TNCs incorporated in that State, when acting abroad. Like Narula, he identifies the obligation of due diligence as the relevant standard.

However, taking a functionalist approach, Ryngaert imports a reasonableness test into the analysis in order to understand the overall jurisdictional reach of the obligation. For instance, a State would fail to observe the due diligence standard only if it has the capacity to influence the TNC but fails to do so. He incorporates within the reasonableness test the principle of non-intervention and the idea of jurisdiction in general international law, which would bar the home State of a TNC exercising jurisdiction if the host State strongly objects to extraterritorial jurisdiction. By introducing a continuum of jurisdiction, Ryngaert usefully connects the field of extraterritorial obligations to developments elsewhere in international and comparative law. However, the reasonableness test, like proportionality, retains a certain degree of ambiguity.³² It is also worth asking the following question: To what extent can a host State legitimately 'strongly object' to home State regulation in the field of ESC rights, when it is a party to human rights treaties such as the ICESCR and ILO Conventions or is bound by international customary law?

³² B. Porter, 'The Reasonableness of Article 8(4) – Adjudicating Claims from the Margins', *Nordic Journal of Human Rights*, Vol. 27, No. 1 (2009), pp. 39–53.

Martin Scheinin adopts the reverse approach and argues that the search for the meaning of jurisdiction is rather fruitless. Jurisdiction may not be a legal concept but rather a term that covers a range of legal concepts and arguments. Taking the ordinary meaning of the words in context, the notion, according to him, does not add anything to either the State responsibility regime or to the admissibility requirements under human rights treaties. It is merely a “shorthand expression” for certain elements of the question on attribution, which reflects the existence of a factual link. After carefully examining various international standards on State responsibility and human rights accountability, he concludes that the references to jurisdiction in some human rights treaties as well as protocols for complaint mechanisms, such as the new Optional Protocol to ICESCR, need to be demystified.

4.3 Causation

A perplexing issue is how to establish a causal link between the act or omission of extraterritorial States and a deprivation of human rights. Various arguments have been proffered including strict liability tests, the ‘but-for’ test, reversal of the burden of proof or the abandonment of any requirement of causation. In many cases, the extraterritorial State will be playing a ‘secondary’ role and the issue of whether its ‘influence’, ‘support’ or even ‘omission’ sufficiently contributes to the violation will be central. There are also questions as to whether the relevant doctrines should be sought from public international law in general or international human rights law in particular.

Sigrun Skogly argues that establishing causality may be quite straightforward in ‘bilateral situations’ in which acts or omissions by a foreign State resulted in violations of the human rights of individuals in the domestic State. Furthermore, by introducing a concept of complicity, it may be possible to divide up the relevant responsibilities of the two States. However, in multilateral cooperation, it is more difficult to establish causation and identify the contributions by different States, although other principles could be relied upon, such as proximity to the act/omission, influence over decisions, foreseeability of the effects of certain behaviour and the precautionary principle.

Skogly notes the conservatism of most international courts (in particular, the ICJ and the European Court of Human Rights) in tackling causation. This is partly a result of their approach to jurisdiction, where they have required ‘effective control’ or ‘overall control’ by the foreign State. These courts may acknowledge factual causality but it is not sufficient for triggering legal responsibility. Moreover, as the threshold for responsibility is set particularly

high for considering extraterritorial violations of civil and political rights, Skogly doubts whether international courts will be more obliging in the case of ESC rights. In these situations, it may be even harder to determine the causal link. However, she argues that, even in complex situations where precise identification of the responsibility of a contributing State is difficult, violations of human rights obligations may have nonetheless occurred. Therefore, it is necessary to use procedural principles of due diligence, in addition to or in lieu of factual causality, in determining responsibility. Skogly's conclusion is worth reflection: If 'jurisdiction' in general international law is about entitlements to act, why should acts undertaken outside one's 'jurisdiction' result in impunity for violations?

Margot Salomon is less encumbered by the current state of international jurisprudence. She focuses on the responsibility of developed States and structural impediments to development and poverty eradication, arguing that the core legal tools are there "to navigate meaningfully the challenges of attributing responsibility" and that the problem is rather the lack of appropriate judicial mechanisms to properly test and develop the law. For instance, Skogly had asked in her chapter whether a court could determine which States "have caused the higher food prices that result in cause violations of the right to food". Salomon answers Skogly in the affirmative. She notes that international bodies, such as the World Trade Organisation Appellate body, have already grappled with such questions of economic causation.

Salomon also tackles the more difficult question as to how to establish responsibility in situations where no *direct* causal link exists. She takes the hard case of ending world poverty and notes that responsibility could be attributed on the basis of a State's historical responsibility for the problem, their relevant spheres of influence or their capacity to assist as well as their respective abilities to reform international institutions so as to better advance the realisation of ESC rights. She argues that extraterritorial responsibility for failure to prevent the (ongoing) violation of the minimum essential levels of different ESC rights could be best attributed on the grounds of capacity. Given the structural or systemic causes of violations of ESC rights in developing countries, in Salomon's view it is up to the powerful and wealthy States to demonstrate that they have done all they can to redress the widespread breach of socio-economic rights globally and to prevent their perpetuation.

4.4 Division of Responsibility

It is generally agreed that the domestic State is the primary duty-bearer. The further division of responsibility between the domestic State and other actors, and *amongst* other actors, can be challenging, however.

Ashfaq Khalfan examines these questions through the lens of the categorical obligations of respect, protect and fulfil, which fall on both the domestic and the extraterritorial State(s). The interaction of these different obligations in hypothetical cases is examined, and the doctrine of the core obligation to ensure a minimum essential level is proposed as a way of helping allocate responsibilities. Khalfan argues that responsibility for ESC rights is divided amongst States according to the nature of their actions (for the obligation to respect) and on the basis of their ability to act (for the obligations to protect and fulfil). In cases of the former, responsibility may be joint where both the State acting territorially and the State(s) acting extraterritorially take part in the action, but the territorial State's obligation to fulfil may require additional steps to prevent and mitigate harm to ESC rights of its people that are caused by external States and by non-State actors under the jurisdiction of other States. As to protect, responsibility is said to be determined by the jurisdiction or influence of each State, although he notes that a State's extraterritorial obligation to respect and protect ESC rights can be mitigated by its territorial obligation to fulfil ESC rights.

Khalfan sees the extraterritorial obligation to fulfil as clearly distinct from the territorial obligation, as it is limited to States in a position to assist. It is an obligation that supplements the territorial obligation to fulfil. He argues that the extraterritorial obligation to fulfil is owed to individuals in countries whose governments are not able to ensure that their ESC rights are realised – due to lack of resources or control over global processes that affect ESC rights and even when they have chosen not to do so to the full extent of their ability. This extraterritorial obligation to fulfil is distributed amongst a wide range of actors and, with limited exceptions, is defined in relation to realisation of ESC rights at the global level, and responsibility for States acting extraterritorially often cannot be ascribed to a particular duty-bearer. The extent to which a State is in a position to assist could be objectively assessed, according to Khalfan, and he investigates different criteria that could be used for that purpose. He also concludes that a State can give priority to territorial obligations to fulfil important levels of ESC rights over extraterritorial obligations to fulfil where a trade-off is required.

Wouter Vandenhole and Wolfgang Benedek share some basic starting points with Khalfan in their analysis of division of responsibility. However, they rely less on the CESCR's views and focus more on the distribution of responsibility *amongst* external States in the context of misdistribution of resources between the North and South. Their first principle is that the *primary* responsibility for the realisation of ESC rights lies with the domestic State. A second principle is that the responsibility of other States is always and necessarily *complementary* to domestic State responsibility. The extraterritorial obligations to respect and to protect are qualified as complementary and simultaneous obligations; the extraterritorial obligation to fulfil is a subsidiary obligation. The latter is primarily incumbent on those States that are in a position to assist, which are mainly, but not exclusively, those States traditionally belonging to the donor community. The authors suggest a range of criteria for determining the scope of this obligation, consequent responsibility and identify the relevant beneficiaries. They then apply their theoretical perspectives to three illustrative cases that reflect the typology of obligations – donor support for primary health care, European Union (EU) sugar subsidies and the right to primary education – identifying the circumstances under which responsibility could be attributed.

4.5 Remedies and Accountability

Dinah Shelton examines different remedies that may be appropriate in extraterritorial disputes, including restitution, compensation, satisfaction and guarantees of nonrepetition, and concludes that reparation mainly boils down to cessation of violations and compliance with obligations. Shelton particularly focuses on the challenges of causation for remedial relief because it “is a critical element in determining the type and scope of reparation, because the responsible State’s obligation is to make full reparation” for the injury caused by the wrongful act³³ – although she notes surprise at the way, motivation and scope of reparations have been linked in the ILC Articles on State Responsibility. Drawing on international environmental jurisprudence, she points out some of the critical issues relating to causation, such as whether there is strict liability for extraterritorial harm or only liability for failure to exercise due

³³ ILC, ‘Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries’, *Report of the International Law Commission on the Work of its Fifty-third Session* (Fifty-third Session, 2001), UN GAOR, Supp. No. 10 at 43, UN Doc. A/56/10 (2001). Article 31(2).

diligence, difficulties in establishing a causal link and the need for damage to be not too remote or too speculative to be eligible for remedial action.

Ashfaq Khalfan subsequently examines which accountability mechanisms could be used to enforce extraterritorial obligations. A broad overview of different mechanisms is offered, ranging from the ICJ, the International Criminal Court and dispute settlement mechanisms to the UN human rights treaty bodies, the Human Rights Council and bi- and multilateral (development, environmental, trade) agreements as well as internal accountability through civil society initiatives. In Khalfan's view, for individual victims of violations, inter-State accountability and political accountability may be more important than legal accountability.

5. Some Tentative Conclusions

What do these contributions tell us about extraterritorial human rights obligations, particularly in the field of ESC rights? Our authors do not speak with one voice, but their contributions should assist in identifying the disagreements and the available options. In summing up, it is worth considering four issues raised or revealed by this book: (1) the degree of doctrinal clarity; (2) the nature of continuing puzzles; (3) the challenges raised as to the design and effectiveness of international law; and (4) the focus of contemporary scholarship and debate.

5.1 Doctrinal Clarity

Although this book covers a range of diverse issues, it is possible to point to a few areas where there seems to be some degree of clarity. The first is that negative or respect-style obligations can be most easily incorporated into the existing international human rights architecture, both procedurally and substantively. There is a rise in the number of ESC rights-oriented cases of this nature, and the ICJ's decision in its *Advisory Opinion on Legal Construction of a Wall in the Occupied Palestinian Territory* is perhaps most emblematic of this indivisibility in practice with its focus on both violations of civil rights and rights to work, housing and water under the ICSECR.³⁴ Indeed, many of the early General Comments of the CESCR from the 1990s specifically raised this issue for both States and intergovernmental

³⁴ ICJ Advisory Opinion (n. 15 above).

organisations, for instance, ensuring sanctions regimes took into account ESC rights³⁵ and that food or water embargoes were avoided at all times.³⁶

The second is that positive obligations are not as opaque or unarticulated as imagined. The treaty standards in this area tend to be more specific than their civil and political rights counterparts, a trend that is increasing over time. Some treaties articulate specific extraterritorial obligations to protect, such as the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.³⁷ The Protocol provides that States' parties must take steps to cooperate for the "prevention, detection, investigation, prosecution and punishment of those responsible" for the sale of children, child prostitution, child pornography and child sex tourism³⁸ as well as addressing the "root causes" of the problem.³⁹ As to the obligation to fulfil, recent treaties have gone beyond the general obligation of international cooperation and assistance.⁴⁰ The 2006 Convention on the Rights of Persons with Disabilities (CRPD) and Convention on the Rights of the Child (CRC) as well as the UN Declaration on the Rights of Indigenous Peoples are more explicit in the nature of international obligations in the context of development. They promote a human rights-based approach to international cooperation and recognise, to a certain degree, the direct relationship between donor States and individuals and communities and their organisations.

This trend is equally apparent, and more specific, in the interpretive and monitoring work of UN human rights treaty bodies. States are to (1) ensure that food aid does not adversely affect local producers and local markets but instead facilitate the return to food self-reliance, (2) provide disaster relief and humanitarian assistance in times of emergency, (3) take steps to ensure that relevant intergovernmental organisations of which they are members

³⁵ CESCR, *General Comment No. 8, The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights* (Seventeenth Session, 1997), UN Doc. E/C.12/1997/8 (1997), paras. 12–14.

³⁶ CESCR, *General Comment No. 12, Right to Adequate Food* (Twentieth Session, 1999), UN Doc. E/C.12/1999/5 (1999), para. 37; CESCR, *General Comment No. 15, The Right to Water* (Twenty-ninth Session, 2002), UN Doc. E/C.12/2002/11 (2003), para. 32.

³⁷ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (adopted 25 May 2000, entered into force 18 January 2002), UN Doc. A/RES/54/263.

³⁸ *Ibid.* Article 10(1).

³⁹ *Ibid.* Article 10(3).

⁴⁰ This is expressed in Article 2(1) of the ICESCR, for example. Some other articles of the treaty provide more specific detail (e.g. with the right to freedom from hunger and cultural rights).

ensure their policies are consistent with human rights treaties and (4) ensure an equitable distribution of world food supplies in relation to need. In the periodic review of State reports, States have been asked to justify their internal allocations of development assistance (from the perspective of rights in different treaties), give sufficient priority to certain issues (e.g. housing rights or the social sectors) and particular groups (e.g. refugees and internally displaced persons and children), or consider new policies (e.g. debt conversion and forgiveness measures).

The third is that the authors illustrate how the concept of jurisdiction can operate in relation to the regulation of TNCs as well as the control of intergovernmental organisations. The extent of the duty to actually regulate TNCs is contested. Take, for instance, the Commentary to the Guiding Principles on Business and Human Rights by former UN Special Representative John Ruggie. He argues that, “At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory.”⁴¹ Although he notes that there are good normative and policy reasons for regulation, that it is legally permissible to regulate and that hard legal obligations may emerge when States control such enterprises.⁴² However, Ruggie’s reasoning is difficult to sustain in light of the research in this book at least. He bases his narrow legal conclusion on the grounds that State obligations are limited by territory and/or jurisdiction clauses within certain international human rights treaties, but this ignores the absence of such phrases in treaties or provisions that address ESC rights.⁴³

Alternatively, jurisdiction may be the relevant concept, but Ruggie has misunderstood its application. Jurisdiction can be deduced simply from the fact that a corporation’s extraterritorial activities partly occur on a home State’s territory and that a home State has the ability to control the corporation. Also, jurisdiction may be the relevant concept in delimiting the extent of the obligation or simply the reflection of that obligation. Ryngaert argues in Chapter 6 that where there is a *strong* connection between an affected rights holder in a host

⁴¹ UN Human Rights Council, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie* (Seventeenth Session, 2011), UN Doc. A/HRC/17/31 (2011), p. 7.

⁴² *Ibid.* pp. 7–13.

⁴³ Indeed Ruggie views the obligation to protect as one of conduct, thus making it equivalent to the duty to take steps in many ESC rights-oriented treaties.

State and the activities of a corporation in the home State, jurisdiction of the home State over the corporation is automatically triggered, making regulation compulsory. Drawing on the jurisprudence of the ICJ, he argues that a State is required to act with due diligence in regulating such a corporation but that this varies according to its capacity to influence, its proximity to the corporation and its direct links (if any) with the corporation's activities (e.g. provision of insurance or credit supports). Similarly, Narula arrives at a due diligence standard for regulation of corporations but also extends this to the activities of IFIs that States have the capacity to influence. She argues that the concept of jurisdiction cannot be simply transcribed from the sphere of civil and political rights but nor can State's obligations be completely open-ended. Thus, the due diligence standard with its emphasis on capacity to influence becomes a useful means of simultaneously detailing and limiting the scope of legal obligations and jurisdiction.

Usefully, both authors also take up the countervailing problem of the potential interference that such regulation may cause for a host State's jurisdiction. Narula notes that not only may it raise formal jurisdictional issues, but it also acts as a disincentive for the foreign direct investment that is needed to support economic growth. She does note, however, that providing a uniform global regulatory framework may encourage foreign investment by levelling the business playing field for ethical corporations. In tackling this problem, Ryngaert develops a specific framework, a continuum. In addition to his case of compulsory regulation, he argues that, at the other end of the continuum, home States are prohibited from exercising extraterritorial jurisdiction if there are weak connections or because other States can assert overriding interests. Along the continuum, States are entitled to exercise their jurisdiction and regulate, without being required to do so under international law (permitted regulation).

The fourth area of emerging clarity is the issue of causation in the establishment of State responsibility. On one hand, it is seemingly easier to legally establish proximity by referring to acts of foreign States that have physical expression, whether arrests or torture, rather than the potentially more complex repercussions in the socio-economic arena. On the other hand, both Skogly and Salomon demonstrate that existing principles in international law can be usefully appropriated for the field of human rights and ESC rights, in particular that the 'but for' test together with 'reasonable foreseeability'. Salomon helpfully demonstrates in practice the use of the 'but for' and 'reasonable foreseeability' tests with examples of the effects of biofuel policy and export subsidies where the economic evidence of causation is relatively clear. Salomon argues that this factual causation can be translated into legal

causation in light of the provisions of the ILC Article on State Responsibility. She notes that the World Trade Organisation Appellate Body already found that the latter case fell afoul of international trade rules on account of the economic causative evidence.

Skogly notes that the notion of complicity may be important for situations where there are multiple actors and different types of contributions to the injury or the use of market shares where acts are committed through organisations like the World Bank. Shelton notes that precedents set in the context of international environmental law, such as shifting the burden of proof, may be useful starting points for further elaboration of an appropriate doctrine on causation.

The fifth is an enhanced focus on how one may divide responsibilities between domestic and extraterritorial States. What is relatively clear now is that the domestic State is to be viewed as a 'primary' duty-holder. This long-standing principle in international development law has been adopted in human rights law. Article 32(2) of the Convention on Rights of Persons with Disabilities, which deals with international cooperation, stipulates that its provisions are "without prejudice to the obligations of each State Party to fulfil its obligations under the present Convention". A similar provision is repeated in Article 14(4) of the Optional Protocol to the ICESCR. However, the authors in this book prefer not to use the term 'secondary' to characterise the obligations of extraterritorial States on the grounds that it can be misleading. The precise obligations may vary according to type and context. Vandenhole and Benedek characterise the extraterritorial obligations to respect and protect as simultaneous, and to fulfil as subsidiary.

Khalfan illustrates how respective responsibility for the obligation to respect may vary dramatically. In some instances, the extraterritorial State may bear full responsibility because it alone caused the harm through a direct violation or coercing the domestic State to violate a right (e.g. an aid conditionality for a much-needed development project). However, the domestic State would need to demonstrate that it had done everything in its power to prevent such a scenario, in accordance with its own territorial obligation to protect. In other circumstances, both States would bear joint responsibility to the same or different degrees. Following the ILC Articles on State Responsibility, Khalfan argues that extraterritorial responsibility would follow even when the domestic State is the actor directly causing the injury: if the extraterritorial State involved or providing assistance has knowledge of the circumstances of the internationally wrongful act and it would have been internationally

wrongful if committed by that State. The extraterritorial State, however, is responsible for only the consequences of the violation that flow from its own conduct.

These varying levels of responsibility for the obligation to respect (and also protect) are further problematised. Khalfan asks whether the same findings would apply if harmful extraterritorial acts were undertaken to meet the extraterritorial State's obligation to fulfil, for example, trade subsidies. In his view, the answer would depend on the structuring of the subsidies and whether they could be redesigned to avoid retrogressive effects on the local population in the extraterritorial State, particularly to protect the minimum essential level of ESC rights. Vandenhole and Benedek assert that this threshold could certainly not be met in the case of the EU's Common Agricultural Policy but Khalfan notes that it might be met more easily in developing countries, which have limited scope to reduce domestic subsidies without affecting domestic core obligations.

The case of climate change presents a dilemma regarding the extraterritorial obligation to protect. Corporate actors and individuals may produce carbon emissions as part of domestic efforts to fulfil ESC rights, but there are globally harmful effects. To what extent is a State obliged to regulate? Khalfan argues that the ICESCR provides significant support for arguments, common in climate change debates, that 'subsistence emissions' should receive priority over 'luxury emissions' in carbon emission rights. He acknowledges that such a formulation is more complex than the trade case in attributing specific responsibility to States for damages (see further below) but is useful in defining the extent of each State's obligations and future (and thus attributable) responsibility.

5.2 Continuing Puzzles

It might be asked to what extent these conclusions are squarely in the domain of *lex lata* or *lex ferenda* or whether they hover on the boundary and whether that really matters. Determining what is *lex lata*, 'hard law', is no simple task. It does not only mirror 'hard' instruments, such as treaties, international customary law and general principles of law. Soft law instruments may not only correspond with *lex ferenda*, emerging or evolving law, but also represent a legitimate interpretation of hard law or constitute an element of it (e.g. under international customary law). Instruments such as resolutions, declarations or documents issued by the human rights treaty bodies, or guidelines adopted by nongovernmental organisations or experts (e.g. recent Maastricht ETO Principles), are therefore all relevant. As Boyle and Chinkin have argued, "once soft law begins to interact with binding instruments its non-

binding character may be lost or altered”,⁴⁴ so that soft law is “potentially law-making”.⁴⁵ One needs to evaluate each so-called soft law instrument on its own terms and its relationship with other norms. Thus, although some issues clearly belong to the realm of *lex ferenda*, the evolution of others may be much more advanced.

A better way to look at ongoing puzzles is to look at the issues that tend to permeate the book and that therefore suggest a degree of irresolution or reasonable disagreement. Three leap out: the definition and scope of jurisdiction, the existence and nature of an international obligation to provide assistance and the collective responsibility dilemma, in situations where multiple States potentially carry extraterritorial duties. Whereas authors provide solutions to these doctrinal and institutional design questions at various turns, their prominence indicates that they might be viewed as the ‘hoary old chestnuts’ or ‘Gordian knots’ that will continue to trouble the field.

Taking each in turn, the *notion of jurisdiction* arises in different ways throughout the book. It appears to restrict or shape the articulation of legal obligations, constrain the identification of legal causation, affect the division of responsibility between domestic and third States and limit the application of international complaint/accountability mechanisms. It is clear that the notion of jurisdiction in international human rights law differs from general international law. The former imputes sovereign responsibility and the latter restrains the exercise of sovereign power. It remains unsettled as to when jurisdiction plays a role in human rights law, how it is defined and how widely it extends.

As to the role, some authors see jurisdiction as defining *obligations* rather than establishing responsibility. In that case, jurisdiction does not play a role in the *attribution of responsibility*. Den Heijer and Lawson fall in this camp, and some other authors occasionally point in this direction. A number of others in this volume, however, hold that jurisdiction is part and parcel of the attribution process of responsibility, possibly as an analytically distinct concept. Scheinin goes further and merely views it as an expression to describe the different parts of the existing procedures of international law and adjudication.

⁴⁴ A. Boyle and C. Chinkin, *The Making of International Law* (Oxford: Oxford University Press, 2007), p. 213.

⁴⁵ *Ibid.* p. 212.

Whether one begins or ends with jurisdiction, the key question is the type of test to apply. At one end is a meta-perspective that tends towards ‘overall control’ or ‘effective control’ tests. The institutional powers of a State over territory, persons or possible situations are determined independently of the particular act or omission in question. At the other end is a contextual and inductive perspective that leans towards attributive or ‘facticity’-based tests. Here, the focus is on the actual or potential *use* of power and its *effects* on rights-holders. In resolving this doctrinal question, international jurisprudence takes us only so far. The ICJ and the European Court of Human Rights incline, but not consistently, towards the former; the UN treaty bodies and Inter-American Court of Human Rights towards the latter. The authors in this book likewise vary in their views. However, overly strict control-oriented tests can be questioned on both normative and legal grounds. They appear to permit States to violate human rights abroad with impunity, which raises not only ethical concerns but frustrates the object, purpose and arguably the wording of international human rights standards.

In any case, the meaning of jurisdiction deserves to be re-examined in at least the context of ESC rights. In this volume, Shelton argues that a restrictive approach to jurisdiction often may be legitimate and appropriate for civil and political rights. It is difficult for States to regularly and effectively assert power over these rights in another State’s territory. However, economic globalisation creates a totally different setting for the exercise of ESC rights. A State’s power can reach much further with more ease: it is simpler to move money and minerals than men and machines. Taming the global effects of a State’s economic decisions is a core part of international trade law; it would not be so radical to extend the same understanding to international human rights law.

This broader attribution-based perspective on jurisdiction seems consistent with the actual drafting of international human rights instruments. Only one substantive treaty covering ESC rights includes jurisdiction as a limitation, the CRC. This is primarily because it covers civil and political rights as well as ESC rights. At the same time, all international complaint mechanisms for treaties covering ESC rights require, as a condition for admissibility, that the complainant fall under the jurisdiction of the State. This suggests that the core role of jurisdiction is not to limit *obligations* but only to ensure that an individual with a complaint against a State has a sufficient connection with that State regarding a *violation*. Making this jurisdictional connection at the violations, rather than obligations, stage suggests that an attribution test is more appropriate. The underlying logic appears to be ensuring a relationship between a State and a particular individual in practice rather than

addressing the situation of an individual who is generally linked to the State through only citizenship or residence. Thus, if one begins from the perspective of general extraterritorial obligations contained in international law, jurisdiction acts as a filtering device for the purpose of the admissibility of claims (which coincides with Scheinin's position).

The second puzzle or lightning rod is the obligation to provide international development assistance. As the authors of the legal status section make quite clear, there is an ongoing legal debate amongst States and scholars as to whether States carry bilateral obligations to provide development assistance to particular countries or rights-holders in other countries. Under treaty and customary law, it is difficult to argue that such a duty exists, and the debate will nonetheless continue. An examination of the *travaux préparatoires* of the treaties and ongoing statements by wealthier States, particularly in the context of the right to development, problematises such a conclusion.

However, it is clear that there is a general duty to provide assistance as part of a community of States, through international cooperation. The question is the following: what does that entail, even if it is a shared duty? Authors such as Alston have argued for a political resolution of the problem through, for example, global compacts,⁴⁶ but a number of authors highlight the role of legal interpretation. As discussed earlier in this chapter, Salomon notes how different approaches to causation could provide a means of establishing responsibility for fulfilling obligations. Khalfan sets up a schema of procedural and substantive tests that draw from the jurisprudence of the CESCR and national courts. A State must first satisfy a procedural test to demonstrate it has developed a plan of action for the progressive fulfilment of ESC rights extraterritorially. A developed State must substantively show that it has achieved internationally agreed-upon benchmarks and unilateral commitments (such as 0.7 per cent of its gross national product [GNP] for development assistance and possibly 0.15 to 0.20 per cent of GNP towards the 'least developed countries' (to which could be added the numerous commitments tracked by Vandenhole and Benedek). The test would not be

⁴⁶ P. Alston, 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals', *Human Rights Quarterly*, Vol. 27, No. 3 (2005), pp. 755–829, at 777. This draws on the work of Dr Arjun Sengupta. See, for example, UN Commission on Human Rights, *Fourth Report of the Independent Expert on the Right to Development*, Mr Arjun Sengupta, submitted in accordance with Commission resolution 2001/9 (Fifty-eighth Session, 2001) UN Doc. E/CN.4/2002/WG.18/2 (2001), paras. 66 and following).

absolute, and States could bear the burden of proof of showing that such failure was due to inability rather than unwillingness. Alternatively, one could assess whether a State has taken steps that are reasonable in comparison to peer States although it may be difficult to operationalise. A final substantive approach is more diachronic and examines whether the State has progressively increased the extent of its assistance and cooperation as its available resources increase and has avoided retrogression in levels of assistance without cause.

Whether one agrees with all of these tests or not, they show the potential for review mechanisms to develop specific tests. This might apply to human rights treaty bodies, emerging review mechanisms in the development field, such as the newly constituted UN Accountability Commission for Health of Women and Children, as well as general political review mechanisms, such as the follow-up by the UN General Assembly to the Millennium Development Goals or the Universal Periodic Review mechanism of the UN Human Rights Council.

The third puzzle is the conundrum created by a multiplicity of actors who may bear obligations. In law and political theory, there is generally a reluctance to assign duties in the absence of clarity as to responsibility. As O'Neill contends, "We normally regard claims or entitlements that nobody is obligated to respect and honour as null or void, indeed undefined."⁴⁷ As we saw in the previous subsection, for both negative and positive obligations, including those covering ESC rights, international law has increasingly set out standards for what is expected of States, from the regulation of child trafficking to the provision of access to affordable medicines. As to attribution of responsibility, international law is quite clear as to the division. Where several States jointly contribute to a violation, the ILC Articles on State Responsibility indicate that an injured State may invoke the responsibility of each State.⁴⁸ Such responsibility is fully imputed even if a State only aids or assists another in the commission of an internationally wrongful act,⁴⁹ but the injured State may not claim more compensation than the damage it has suffered.

⁴⁷ O. O'Neill, 'The Dark Side of Human Rights', *International Affairs*, Vol. 81 (2005), pp. 427 and 430.

⁴⁸ Article 47: "Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act."

⁴⁹ Article 16: "A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State."

However, the multiplicity of States may prevent one from getting to this stage of assessing responsibility. Putting aside the issue of proof, can one assess individual State obligations independently of collective action? This challenge regards not only international assistance, as we have just discussed, but also negative obligations: For example, do States have the same or undifferentiated responsibilities for greenhouse gas emissions as earlier discussed? Moreover, multiplicity can confound identification of jurisdiction because States may have varying levels of control or influence over a situation. This may be one reason why the European Court of Human Rights took a restrictive approach to jurisdiction in the notorious *Bankovic* case: all North Atlantic Treaty Organization (NATO) member States were named as defendants in the bombing of a television station by NATO-authorized planes in Serbia but were involved in the act in varying ways. Equally, it may explain why the Inter-American Commission has delayed adjudging a similar case against influential member States of the World Bank and Inter-American Development Bank for complicity in land evictions and extrajudicial killings in Guatemala.

Nonetheless, international law provides that each State is responsible for its respective contribution. The challenge may therefore lie in the failure of international litigation mechanisms, unlike domestic procedures, to adapt to cases against many defendants. Although it has been attempted in a number of international cases, it is not particularly simple. Much of the burden lies with the complainant rather than the adjudicatory body for the management of third-party liability and joinders. This complicates the use of adjudication for cases against multiple actors. All these problems are not insurmountable, but they arguably require greater attention to legal obligations, procedural reforms for adjudication and the refinement of empirical evidence.

5.3 The Relevance and Effectiveness of International Law

Beyond these challenges, this book raises some questions about the role of international law itself. First, it is not clear whether general principles of international law have developed sufficiently to accommodate human rights. For instance, the international law of State responsibility has been codified in the ILC Articles on State Responsibility. State responsibility arises due to an act or omission attributable to a State that is a breach of an international obligation; if established, an obligation of reparation follows. Although the relevance of the ILC Articles is not seriously questioned in this volume, and is regularly relied

upon, one cannot escape the conclusion that the law of State responsibility needs to be adapted to the particularities of international *human rights* law.

This becomes prescient when addressing *extraterritoriality*. The ILC Articles are focused on the perspective of an “injured State” rather than other actors in international law, such as individual victims of human rights violations. Skogly notes, for example, that the Commentary to the ILC Articles assumes that a State can be found to be complicit in the commission of an internationally wrongful act only if it acted intentionally in providing aid or assistance. This appears not only to ignore the preeminence of looking at the primary rules in international law and using standard legal concepts such as “foreseeability” and “proximity”, but to elevate the threshold for violations to that of criminal law. Skogly’s call to develop a theoretical framework regarding State responsibility for human rights violations and, in particular, the concept of shared responsibility should be taken seriously.

Second, and perhaps more importantly, one needs to acknowledge the critiques of the liberal assumption that law, including international law and human rights protections, will be respected in practice. A degree of modesty is needed towards the potency of international law. Realists and institutionalists remain rather sceptical of the influence of international human rights law in the absence of hard or self-enforcing structures for implementation.⁵⁰ Extraterritorial obligations that seek to bind States with powerful militaries or economic muscle or force States to regulate global multinationals and institutions seem utopic. Moreover, poststructuralist scholars are sceptical of the likelihood that international human rights law will be even interpreted in any transformative manner.⁵¹ Koskenniemi warns that attempts to place human rights law at the core of efforts to challenge power is likely to be misguided.⁵² The moment human rights are transformed into law – particularly in a relative fashion that permits exceptions and other delimiting considerations – their moral power is dissipated. Instead, power is placed in the hands of bureaucrats and lawyers to depoliticise the rights and interpret them technically, cautiously and conservatively.

⁵⁰ See overview of positions in E. Neumayer, ‘Do International Human Rights Treaties Improve Respect for Human Rights?’, *Journal of Conflict Resolution*, Vol. 49, No. 6 (2005), pp. 925–53.

⁵¹ K. Klare, ‘Legal Culture and Transformative Constitutionalism’, *South African Journal of Human Rights*, Vol. 14 (1998), pp. 146–88; D. Kennedy, *Critique of Adjudication (fin de siècle)* (Cambridge: Harvard University Press, 1997).

⁵² M. Koskenniemi, ‘Human Rights Mainstreaming as a Strategy for Institutional Power’, *Humanity: An International Journal of Human Rights, Humanitarianism and Development*, Vol. 1, No. 1 (2010), pp. 47–58.

These critiques should be taken seriously, but they arguably underestimate the potential of human rights as legal norms. It can be said that international human rights law, jurisprudence and procedure have shown the potential to partly adapt to the new scenario of enhanced extraterritorial power. Moreover, the language of human rights and the doctrinal developments in this emerging field have been found increasingly at the forefront of civil society demands for global justice. As to the realist challenge, scholars have been able to increasingly empirically demonstrate the material effects of international human rights law in practice, particularly when it forms part of national or international politics⁵³ and judicial review.⁵⁴ Others have pointed to the ideational or constructive influence of international law in shaping our normative views and actual preferences.⁵⁵ Hurrell contends that, “How we calculate consequences is often far from obvious and not easily separable from our understanding of legal or moral norms ... over time the obviousness of certain sorts of norms (for example against slavery or military conquest) becomes such an accepted part of the international political landscape that it becomes part of how actors routinely calculate consequences.”⁵⁶

Although the development of the field of extraterritorial obligations has the potential to emulate these positive effects elsewhere in international human rights law, serious consideration needs to be given to the realist and institutional critique. Khalfan’s final chapter demonstrates that a number of accountability mechanisms exist but they are not particularly strong, particularly when examining the political, economic and military power that extraterritorial duties seek to address. Moreover, they pale in comparison to the powers of other forms of international adjudicatory review, such as for trade and international

⁵³ B. Simmons, *Mobilizing for Human Rights. International Law in Domestic Politics* (New York: Cambridge University Press, 2009); T. Risse, S. Ropp and K. Sikkink, *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999).

⁵⁴ L. Helfer and E. Voeten, ‘Do European Court of Human Rights Judgments Promote Legal and Policy Change?’, Working Paper (2011), available at <http://papers.ssrn.com/>, accessed 15 January 2012; V. Gauri and D. Brinks, *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (New York: Cambridge University Press, 2008).

⁵⁵ R. Goodman and D. Jinks, ‘How to Influence States: Socialization and International Human Rights Law’, *Duke Law Journal*, Vol. 54, No. 3 (2004), pp. 621–703.

⁵⁶ A. Hurrell, ‘Norms and Ethics in International Relations’, in W. Carlsnaes, T. Riise and B. Simmons (eds.), *Handbook of International Relations* (London: Sage, 2002), pp. 137–53, at 144.

investment law,⁵⁷ ironically in areas in which extraterritorial ESC rights obligations would have particular relevance. There is clearly an imbalance of power between the embryonic system for extraterritorial human rights obligations and the material and legal power of international organisations, transnational corporations and foreign investors, and States themselves. Thus some attention needs to be devoted to structural reform of the international system. One interesting example is the Norwegian Pension Fund: the Norwegian Government must immediately disinvest from companies if its Ethics Council finds they are violating certain civil, labour and environmental rights.⁵⁸ However, care should be taken not to focus only on legalistic forms of review. Other forms of accountability may complement legal mechanisms, particularly collective agreements and arrangements which are self-enforcing or draw more deeply on national self-interest.⁵⁹ Likewise, one needs to be aware of the dangers of human rights professionals depoliticising general justice claims by squeezing them into the framework of law, and, even more narrowly, international law.

5.4 Focus of Scholarship and Final Thoughts

Finally, it is important to ask whether the scholarship and debate on extraterritorial obligations for ESC rights have been focused on the correct substantive issues. An inordinate amount of time seems to have been consumed by debates over duties to provide development assistance and/or to facilitate fiscal resource transfers, as well as the question of jurisdiction. This seems unfortunate for two reasons. First, over the last two decades many large, poor countries have moved into the class of middle-income countries. Sumner estimates that 72 per cent of the world's poor now live in middle-income countries.⁶⁰ For these States, international development assistance is rapidly becoming less relevant, and many are establishing their own development agencies. Even many low-income countries have set themselves a goal of

⁵⁷ R. Suda, 'The Effect of Bilateral Investment Treaties on Human Rights' in O. de Schutter (ed.), *Transnational Corporations and Human Rights* (Oxford: Hart, 2006), pp. 73–160; M. Langford, 'Cosmopolita Competition: The Case of International Investment' in C. Bailliet and K. Aas (eds.), *Cosmopolitanism and Its Discontents* (London: Routledge, 2011), pp. 178–204.

⁵⁸ A. Føllesdal, 'Cosmopolitanism in Practice: The Case of the Norwegian Government Pension Fund', in C. Bailliet and K. Aas (eds.), *Cosmopolitanism and Its Discontents* (London: Routledge, 2011), pp. 205–17.

⁵⁹ See I. Kaul, I. Grunberg and M. Stein, *Global Public Goods: International Cooperation in the 21st Century* (New York: Oxford University Press, 1999) and M. Langford, 'A Poverty of Rights: Six Ways to Fix the MDGs', *IDS Bulletin*, Vol. 41, No. 1 (2010), pp. 83–91.

⁶⁰ A. Sumner, *Global Poverty and the 'New Bottom Billion': What If Three-Quarters of the World's Poor Live in Middle-Income Countries?*, IDS Research Summary of IDS Working Paper 349, 2010.

graduation from development assistance. Thus, the approach of reducing global poverty through fiscal transfer to poorer States has an increasingly limited scope.

Second, extraterritorial obligations may be even more relevant and effective in other areas. This might include the structure of the world economy, behaviour of multinational corporations in poorer States and export processing zones, intellectual property for medicines and other key goods, costs of inputs for the health sector and debt relief. Many of these issues have been addressed in ESC rights scholarship and advocacy but not always in the context of legal articulation and discussion of extraterritorial State obligations. As Vandenhole argues, obligations to respect and protect have often been “neglected”.⁶¹ Moreover, greater attention might be placed on controversial areas such as migration. Economic studies show that migration of low-skilled and low-income individuals brings benefits both for sending and receiving countries and that the level and effect of remittances often far exceed official development assistance. However, borders remain largely closed to major flows of labour, unlike capital. The realisation of some rights, such as the right to social security, one of the ESC rights with the worst realisation throughout the world, also requires long-sighted and more technically oriented planning in addition to some financial support in poor countries. Likewise, technology transfers could be critical in areas like the internet and energy and green technologies, where early and substantial public investment is important.

In conclusion, it is clear that the field of extraterritorial ESC rights is an evolutionary phase. Despite considerable doctrinal and, occasionally, institutional advances, there is, however, a need to clarify more systematically the notion of extraterritorial obligations develop more effective accountability mechanisms. Human rights have always functioned as a lighthouse, but its light is somewhat pale before the continuing challenges of a globalised world beset by stark inequalities and a race for new markets, lands and resources.

⁶¹ Vandenhole, ‘Economic, Social and Cultural Rights in the CRC’ (n. 28 above), p. 24.