

**Margot E. Salomon**

## How to keep promises: making sense of the duty among multiple states to fulfil socio-economic rights in the world

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**Margot E. Salomon**

*London School of Economics and Political Science*

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# How to Keep Promises: Making Sense of the Duty Among Multiple States to Fulfil Socio-Economic Rights in the World

*Margot E. Salomon*\*

## 1. Introduction

This Chapter explores bases for assigning positive duties of international assistance and cooperation to fulfil socio-economic rights in the world.<sup>1</sup> A difficulty at present is that states can only be said to have imprecise obligations to fulfil socio-economic rights beyond their borders: they are largely aggregated duties of an undifferentiated international community (to use Philip Alston's term), to cooperate in addressing hunger, malnutrition and related deprivations that find expression in human rights treaties.

There are two main benefits that could come from determining the bases for assigning obligations in this area. First, clarity as to the scope of obligations of international assistance and cooperation could compel states to act in order to give them effect. Second, it would facilitate the determination of a breach of an international obligation of a state or states and thus responsibility for an internationally wrongful act. International responsibility could be attributed as a result of an action or omission – things states have and have not done to contribute to securing socio-economic rights elsewhere. Insofar as all states are bound by obligations of international cooperation under the United Nations (UN) Charter,<sup>2</sup> and states

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\* Dr Margot E. Salomon is Acting Director at the Centre for the Study of Human Rights, London School of Economics and Political Science where she also directs the Laboratory for Advanced Research on the Global Economy, and is Associate Professor in the Law Department. This Chapter is adapted from the extended coverage found in the work M.E. Salomon, 'Deprivation, Causation and the Law of International Cooperation', in M. Langford, W. Vandenhoe, M. Scheinin and W. van Genugten (eds.), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge: CUP, 2013), 259.

<sup>1</sup> Although the Committee on Economic, Social and Cultural Rights (CESCR) has not formally elaborated any distinction between obligations of 'international assistance' and of 'cooperation', international assistance tends to be equated with the transfer of resources between states, as well as at times with technical support. International cooperation is understood more broadly, encompassing requirements of separate and joint action towards the realisation of socio-economic rights, including through the creation of an internationally enabling environment conducive to those ends. More recent instruments, such as the Convention on the Rights of Persons with Disabilities, New York, 13 December 2006, in force 3 May 2008, 2515 UNTS 3, but also the Convention on the Rights of the Child, New York, 20 November 1989, in force 2 September 1990, 1577 UNTS 3 (CRC), as well as the Declaration on the Right to Development, UN Doc. A/RES/41/128, Annex, UNGAOR, 41<sup>st</sup> Sess., Supp. No. 53, at 186, UN Doc. A/RES/41/53 (1986), refer only to international cooperation in the achievement of the relevant rights therein, reflecting the preference of high-income countries to do away with the idea that resource transfer constitutes a legal obligation.

<sup>2</sup> Charter of the United Nations, San Francisco, 26 June 1945, in force 24 October 1945, 1 UNTS 16.

party to the relevant treaties addressing economic, social and cultural rights are bound by obligations of international assistance and/or cooperation,<sup>3</sup> a central task that remains is to identify the basis or bases upon which duties might be disaggregated and thus more clearly assigned.

When it comes to positive duties to fulfil socio-economic rights, causation may provide a basis for assigning obligations of international assistance and cooperation, however it hardly exhausts the possible grounds in this regard. States acting singly or jointly need not have caused harm in order to be under a positive duty to address the non-fulfilment of socio-economic rights elsewhere, nor in order to be held responsible for an internationally wrongful act derived from a failure to comply with a human rights obligation to assist and cooperate internationally.

Although it may be difficult to conclude that there exists a legally binding obligation for a given state to provide any particular form of material assistance to any other specific state(s), decades of UN consideration and standard setting in this and related areas have advanced interpretations of the obligation, whereby economic, financial, monetary and other policies should be designed in such a way as to avoid causing injury to the interests of other states and to the rights of their peoples,<sup>4</sup> and moreover, should actively seek to address existing

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<sup>3</sup> The sources of the obligation to cooperate internationally in the realisation of socio-economic rights can be traced back to the UN Charter's emphasis on international cooperation in the achievement of social justice and human rights which forms a defining element of that foundational treaty (Articles 1(3), 55 and 56). The Universal Declaration of Human Rights, Paris, 10 December 1948, UN Doc. A/RES/217A(III), UNGAOR, 3<sup>rd</sup> Sess., UN Doc. A/810 (1948), recognises the significance of international cooperation in the realisation of human rights (Articles 22 and 28); and obligations of international assistance and cooperation in the International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, in force 3 January 1976, 993 UNTS 3 (ICESCR) and similar formulations in the CRC, n. 1, form part of the general legal obligations in those widely ratified treaties: ICESCR, *ibid.*, Article 2(1) provides that '[e]ach State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.' The 1986 Declaration on the Right to Development, n. 1, at Article 4(2) asserts the following: '[a]s a complement to the efforts of developing countries, effective international cooperation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development.' The UN Millennium Declaration, A/RES/55/2 (2000), UN GAOR, 55<sup>th</sup> Sess., Supp. No. 49, at 4, UN Doc. A/55/49 (2000), recognises a 'shared responsibility' for managing worldwide economic and social development. International cooperation for human rights has found its most recent reaffirmation in the Convention on the Rights of Persons with Disabilities of 2006, n. 1.

<sup>4</sup> P. Alston and G. Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9(2) HRQ 156, at 191; see generally, M. Bulajić, *Principles of International Development Law: Progressive Development of the Principles of International Law Relating to the New International Economic Order*, 2<sup>nd</sup> ed. (Dordrecht: Martinus Nijhoff Publishers, 1993); M.E. Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (Oxford: OUP, 2007).

deprivations.<sup>5</sup> I have elsewhere explored the former issue whereby international policies that impact for example on the right to food and on the right to an adequate standard of living, are concerned with possible breaches of obligations to ‘respect’ socio-economic rights elsewhere (i.e.: do no harm).<sup>6</sup> This Chapter, for its part, addresses the parameters of a state’s obligations to ‘fulfil’ socio-economic rights beyond its own borders.

When seeking to confront deprivation, obligations to fulfil socio-economic rights beyond borders are not limited to the transfer of financial resources and related aid. Although in this area the strongest argument regarding the role of individual states may be for a general duty amongst developed states to provide 0.7 per cent gross national income (GNI) in official development assistance,<sup>7</sup> states also have duties when acting collectively, and through myriad methods beyond the transfer of resources. These could include addressing trade protectionism by industrialised states,<sup>8</sup> as well as the policies of importing states that fuel resource-cursed countries<sup>9</sup> including international corruption<sup>10</sup> and support for illicit financial flows out of poor countries through tax havens and secrecy jurisdictions.<sup>11</sup> A failure to comply with the obligation of international cooperation for the realisation of human rights

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<sup>5</sup> Salomon, *ibid.*

<sup>6</sup> Salomon, ‘Deprivation, Causation and the Law of International Cooperation’, n. \*.

<sup>7</sup> Notwithstanding the various arguments questioning the benefits of aid, see, among others, D. Moyo, *Dead Aid* (London: Allen Lane [Penguin Books], 2009); R.C. Riddell, *Does Foreign Aid Really Work?* (Oxford: OUP, 2008).

<sup>8</sup> See I. Goldin and K. Reinert, *Globalization for Development: Trade, Finance, Aid, Migration, and Policy* (New York/Washington, DC: World Bank/Palgrave Macmillan, 2006), at 66, 75: ‘[w]hat are the costs of trade protectionism for the developing world? A number of studies have tried to assess this. To take one example, the World Bank has considered the impact of a “pro poor” trade liberalization scenario. This scenario involves only tariff reductions and agricultural subsidies reform. The welfare gains to developing countries of this liberalization scenario are estimated to be over US\$250 billion in 2003 prices. This is four times the value of foreign aid. (...) The possibility of exports helping to alleviate poverty is significantly curtailed by trade protectionism in rich countries. This occurs in the form of tariffs, subsidies, quotas, standards, and regulations. (...) Rich-country protectionism poses a significant barrier to poverty alleviation, not to mention the overall participation of the developing world in the global economy.’

<sup>9</sup> For an overview and sources on the correlation between the export of high-value extractive resources such as oil, gas, metals and gems, and curses such as authoritarianism, corruption, conflict and economic dysfunction, see L. Wenar, ‘Clean Trade in Natural Resources: A Policy Framework for Importing States and Multinationals in the Extractive Industries’ (2010) at [www.cleantrade.org/policy\\_brief.pdf](http://www.cleantrade.org/policy_brief.pdf).

<sup>10</sup> *Ibid.* at 7: ‘[t]he Netherlands allowed tax deductions on bribes to foreign officials until 2006. It was not until 2009 that Britain successfully prosecuted a foreign corruption case. “Facilitation payments” are still permitted by Australia, Canada, New Zealand, South Korea and the US. Export credit agencies in many [resource] importing states fund and insure firms that pay off local officials.’ See, further, P. Maass, *Crude World: The Violent Twilight of Oil* (London: Peter Lane [Penguin Books], 2009). As for recent developments, note the illegality of facilitation payments and the extraterritorial reach of the United Kingdom’s Bribery Act 2010 c. 23, in force 1 July 2011.

<sup>11</sup> See D. Kar and D. Cartwright-Smith, ‘Illicit Financial Flows from Africa: Hidden Resource for Development’ (Global Financial Integrity, 2010), [www.gfintegrity.org](http://www.gfintegrity.org), at 1: ‘[t]his massive flow of illicit money out of Africa is facilitated by a global shadow financial system comprising tax havens, secrecy jurisdictions, disguised corporations, anonymous trust accounts, fake foundations, trade mispricing, and money laundering techniques. The impact of this structure and the funds it shifts out of Africa is staggering.’ See also N. Shaxson, *Treasure Islands: Tax Havens and the Men Who Stole the World* (London: The Bodley Head, 2011).

can also be found in a global policy of the past four decades that has been marked by gross inequality in wealth and income<sup>12</sup> under a scheme that one commentator pointedly refers to as ‘accumulation by dispossession’.<sup>13</sup> Cooperative conduct to fulfil human rights can take the form of domestic regulatory measures and policies with international effect or of international measures and policies.

The obligations of which we speak were not borne of globalisation; the treaties that underpinned the new world order in 1945 underscored 70 years ago that cooperation was essential to the establishment of a peaceful and just world. That said, the harms of globalisation and its attendant institutions reinforce the current significance of obligations of international assistance and cooperation to the ends of socio-economic justice. The forces of globalisation compel the cosmopolitan ethic that animates these obligations today.

## **2. Bases for assigning obligations of international assistance and cooperation**

### *2.1 The International Covenant on Economic, Social and Cultural Rights and the Committee*

In a state-centric system that remains largely circumscribed territorially, international human rights law generally recognises that the primary obligation to fulfil socio-economic rights rests with the state acting domestically. Whereas extraterritorial obligations to ‘respect’ and ‘protect’ socio-economic rights exist alongside those of the domestic state, international action to fulfil socio-economic rights by states other than the rights-holders’ own, where required, is often said to be based on a secondary or subsidiary duty in those circumstances where the primary duty-bearer is unable or unwilling to fulfil said obligations. However, this latter point should not be overstated: the obligation to cooperate internationally to fulfil socio-economic rights is determined on the basis of the failure of rights-holders to exercise their rights<sup>14</sup> and since socio-economic rights remain so dramatically unmet globally we

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<sup>12</sup> See M.E. Salomon, ‘Why Should it Matter that Others Have More: Poverty, Inequality and the Potential of International Human Rights Law’, *Proceedings of the Oxford University Conference on International Law and Global Justice* (2011) 37(5) RIS 2137.

<sup>13</sup> D. Harvey, *A Brief History of Neoliberalism* (Oxford: OUP, 2005), 160 et seq. Harvey’s accumulation of dispossession comprises four main features: privatisation and commodification; financialisation; the management and manipulation of crisis; and various forms of state redistributions in wealth and income that flow from lower to upper classes.

<sup>14</sup> The significance of distinguishing between whether the domestic state is unable or unwilling to comply with its obligations is important in determining its own responsibility for failure to meet its human rights obligations, inability giving rise to possible defences that might preclude wrongfulness. However the distinction bears no relevance as regards the assignment of secondary duties to external states, which is determined on the

should best understand these obligations amongst external states to remedy the state of affairs as complementary to those of the right-holder's own state.<sup>15</sup> To ignore the existence of an obligation to take remedial international action would be to hollow out the value of the positive obligation of international cooperation for the realisation of socio-economic rights. It is difficult, however, to determine when an obligation of international assistance and/or cooperation has been breached, thereby giving rise to a claim of international legal responsibility, because there is a paucity of judicial elucidation as to what directives would indicate that a given state was required to act in a particular situation, and how, in order to contribute to fulfilling socio-economic rights in the world.

The Committee on Economic, Social and Cultural Rights (CESCR or Committee) has given little detailed direction as to the content of the obligation of international assistance and cooperation under the International Covenant on Economic, Social and Cultural Rights (ICESCR or Covenant),<sup>16</sup> the general human rights treaty on the subject of socio-economic rights. On the terms of the treaty itself, states that might be said to have particular duties are those with economic and technical capacity. This basis is deduced from the 'obligation of all States parties to take steps, individually and through international assistance and cooperation, especially economic and technical', towards the full realisation of the rights.<sup>17</sup> Arguably, it can be further deduced from Article 23 of the Covenant that a particular duty also rests with states that are most influential when it comes to the 'conclusion of conventions and the adoption of recommendations' that would propel 'international action for the achievement of the rights' recognised in the Covenant.<sup>18</sup>

Only one general basis for assigning obligations has so far been adopted by the Committee: that international cooperation for development and thus for the realisation of economic, social and cultural rights, while an obligation of all states, 'is particularly incumbent upon

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basis of the failure of the rights-holders to exercise their rights. See L. Wenar, 'Responsibility and Severe Poverty', in T.W. Pogge (ed.), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (Oxford: OUP/UNESCO, 2007), 255, at 265. Analogously, the responsibility of the international community to protect people from gross violations of human rights is triggered by the 'manifest failure' of national authorities to afford protection and not whether that failure is due to a government's inability or unwillingness. 2005 World Summit Outcome, UN Doc. A/RES/60/1 (24 October 2005), para. 139. I thank Jennifer Welsh for bringing this aspect of paragraph 139 to my attention.

<sup>15</sup> Salomon, *Global Responsibility for Human Rights*, n. 4 above, at 189-95.

<sup>16</sup> ICESCR, n. 3.

<sup>17</sup> Article 2(1) ICESCR, n. 3. On technical assistance, see also Articles 22 and 23.

<sup>18</sup> Article 23 ICESCR, n. 3: '[t]he States Parties to the present Covenant agree that international action for the achievement of the rights recognized in the present Covenant includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the Governments concerned.'

those States in a position to assist’, a point to which we will return.<sup>19</sup> A second and merely hortatory reference indicates that the inability of people in developing countries to exercise their socio-economic rights is ‘of common concern to all countries’,<sup>20</sup> the Committee’s pronouncement on the existence of a ‘common concern’ implying an *erga omnes* or indeed an *omnium erga omnes* obligation.<sup>21</sup>

## 2.2 Causation as a basis for assigning obligations of international cooperation

The allocation of injury or loss to a wrongful act requires the existence of a causal link that also meets the criterion of, for example, directness, foreseeability or proximity.<sup>22</sup> A finding of international responsibility may *subsequently* (as part of or separately from the reparations owed) indicate a basis for assigning obligations of international assistance and cooperation: a state or states found to have caused harm could reasonably be said thereby to have particular duties of international cooperation when it comes to giving effect to its (treaty) obligations in the area of socio-economic rights. However, concluding that causation should offer the sole or primary basis for assigning obligations of international assistance and cooperation is unduly restrictive. States acting singly or jointly need not have caused harm in order to be under a positive duty to address the non-fulfilment of socio-economic rights elsewhere, nor in order to be held responsible for an internationally wrongful act derived from a failure to comply with an obligation to assist and cooperate internationally. Notably, as per Article 2(1) of the ICESCR as elsewhere, they are under a prescriptive obligation to act towards the fulfilment socio-economic rights, regardless of causation.<sup>23</sup>

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<sup>19</sup> CESCR, General Comment No. 3, ‘The Nature of States Parties’ Obligations’ (Article 2(1) of the Covenant) (5<sup>th</sup> Sess., 1990), UN Doc. E/1991/23 (1991) Annex III, para. 14.

<sup>20</sup> CESCR, General Comment No. 14, ‘The Right to the Highest Attainable Standard of Health’ (Article 12) (22<sup>nd</sup> Sess., 2000), UN Doc. E/C12/2000/4 (2000), para. 38.

<sup>21</sup> ‘[O]bligations *erga omnes*, according to which there are some obligations with respect to which every State has a right to insist on their observance; and that of *obligations omnium*, according to which some obligations are incumbent upon all States without exception’. On obligations omnium, see, generally, P. Weil, ‘Towards Relative Normativity in International Law’ (1983) 77(3) AJIL 413. The definition just provided is from J. Tasioulas, ‘In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case’ (1996) 16(1) OJLS 85, at 86.

<sup>22</sup> Commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA Commentary), Commentary to Article 31, para. 10. . The ILC remarks: ‘[i]n other words, the requirement of a causal link is not necessarily the same in relation to every breach of an international obligation. (...)The notion of a sufficient causal link which is not too remote is embodied in the general requirement in article 31 that the injury should be in consequence of the wrongful act, but without the addition of any particular qualifying phrase.’ (Ibid.)

<sup>23</sup> M.E. Salomon and I. Seiderman, ‘The Maastricht Principles on Extraterritorial Obligations of States in the



Insofar as causation might shape the scope of subsequent obligations, a broader reading of the causation doctrine could have obligations assigned on the basis of the contribution that a state has made through its conduct to the emergence of the problem (historically or recently) and/or to the persistence of the problem. Obligations of international cooperation could be determined on the basis of the relative power it wields in international affairs manifested as influence over the direction of international trade, investment, taxation, finance, environmental policy and development cooperation.

When it comes to the obligations of states other than the right-holder's own to respect and protect socio-economic rights, in addition to direct causation, international legal responsibility could be attributed on the grounds that the actions or omissions (whether international or internal decisions with external effect) had reasonably foreseeable international consequences<sup>24</sup> and/or because of the lack of due diligence undertaken to prevent the violation or to respond to it as required.<sup>25</sup> In the case of indivisible harms whereby establishing direct causal links between the actions of a particular state and its impact on the exercise of rights can be difficult, causation determined via a 'but for' test and an assessment as to whether sufficient precaution was taken can be important elements in attributing responsibility. If we take the case of biofuels: global food prices would not have skyrocketed but for the European Union and United States (US) policies on production.<sup>26</sup> Similarly if we consider agricultural subsidies, in the *United States–Cotton* case brought by Brazil against the US, the World Trade Organization (WTO) Panel, as upheld by the Appellate Body, found that the world market price for cotton on which so many developing country farmers rely would have increased significantly had it not been for the US subsidies provided to its cotton producers, users and/or exporters.<sup>27</sup> In short, the violations of the socio-

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area of Economic, Social and Cultural Rights', *Special Section on International Law, Human Rights and the Global Economy: Innovations and Expectations for the 21<sup>st</sup> Century*, Guest Editor M.E. Salomon, (2012) 3(4) GP 458.

<sup>24</sup> See, *Munaf v. Romania*, Communication No. 1539/2006, Human Rights Committee, Admissibility and Merits, UN Doc. CCPR/C/96/D/1539/2006 (21 August 2009), para. 14.2.

<sup>25</sup> *Velásquez Rodríguez v. Honduras*, IACtHR, (Ser. C) No. 4 (1988), para. 172.

<sup>26</sup> Salomon, 'Deprivation, Causation and the Law of International Cooperation', n. \*, at 263-72.

<sup>27</sup> The price suppression claim by the Panel – upheld by the Appellate Body – was determined via the application of a 'but for' test. In upholding Brazil's claim, the Panel examined whether the world market price for cotton would have increased significantly 'but for these subsidies'. *United States – Subsidies on Upland Cotton*, Appellate Body Report, WT/DS267/AB/R, adopted 3 March 2005, para. 763(c)(i)(B). The subsidies paid by the United States to its 25,000 cotton farmers exceed the entire GNI of virtually every cotton exporting country in West and Central Africa. B. McGivern, *WTO Appellate Body Report: United States-Cotton Case Summary*, 10 June 2008, White and Case LLP, Geneva. In Benin alone, the fall in cotton prices in 2001-2002 was linked to an increase in poverty from 37 per cent to 59 per cent. United Nations Development Programme (UNDP), *Human Development Report 2005: International Cooperation at a Crossroads: Aid, Trade and Security in an Unequal World* (New York: OUP, 2005), 131.

economic rights abroad would not have occurred but for the actions and omissions of the relevant states, including their *prima facie* failures to exercise due diligence in order to prevent the harms.<sup>28</sup> These indirect causal links could offer a basis for subsequently assigning particular duties of international assistance and cooperation, including as part of reparations where a state is found internationally responsible based on the failure to exercise due diligence.

Indirect causation might also be relevant insofar as the very design of existing global arrangements causes and/or fails to remedy widespread deprivation. On this account, the failure is that of the international political economy as a whole, and all states – to greater or lesser degrees – are thereby responsible for ‘causing’ the harms and are duty-bound to remedy them.<sup>29</sup> (That said, this structural thesis leads us back to having to disaggregate duties.)

### *2.3 Historical responsibility as a basis for assigning obligations of international cooperation*

On this account contemporary obligations would be assigned on the basis of historical responsibility for past exploitation. Although not a precondition, the harmful effects of past actions may be traceable to current deprivations in the form of the non-fulfilment of socio-economic rights and/or can be shown to have benefited the external state over time. It follows that, initially, a form of corrective justice should be forthcoming to the extent that certain countries have been disadvantaged as a result of past injustices,<sup>30</sup> and on the

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<sup>28</sup> Due diligence could require *ex ante* impact assessments on cross-border or global impacts. In the *Pulp Mills case* the ICJ concludes that it ‘may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context’. Moreover, due diligence would not be considered to have been exercised where there was liable to be a negative effect and the relevant party failed to undertake an impact assessment. *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, 14, para. 204. As for international decision making – human rights treaty bodies regularly call upon states to prepare human rights impact assessments of the trade and investment agreements that they conclude, and call on other actors in urging the use of mechanisms for measuring human rights impact of their international policies: UN Committee on the Rights of the Child, concluding observations on El Salvador, UN Doc. CRC/C/15/Add.232 (2004), para. 48; Committee on the Elimination of Discrimination against Women, concluding observation on Philippines, UN Doc. CEDAW/C/PHI/CO/6 (2006), para. 26, CESCR, ‘Statement on Globalization and Economic, Social and Cultural Rights’, UN Doc. E/1999/22-E/C.12/1998/26 (1998); ch. VI, sect. A, para. 515, at para 7.

<sup>29</sup> See further, Salomon, *Global Responsibility for Human Rights*, n. 4; 1986 Declaration on the Right to Development, n. 1, Article 3(1): ‘[s]tates have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development.’

<sup>30</sup> D. Shelton, ‘Describing the Elephant in the Room’, in J. Ebbesson and P. Okowa (eds.), *Environmental Law and Justice in Context* (Cambridge: CUP, 2009), 55, at 61.

principle that people should not benefit from their wrongdoing and should compensate those who have suffered as a result. The basis of historical responsibility takes a compensatory approach based on some determination of liability for contributing to a problem. Needless to say, it is a claim traditionally advanced by developing countries and is politically contentious.<sup>31</sup> In practice, however, former colonial powers do tend to direct international assistance to their former colonies, in particular based on a moral sense of historical responsibility; recent empirical studies demonstrating the long-term effects of colonialism and slavery on current economic performance could provide a legal grounding.<sup>32</sup> Historical responsibility as a relevant basis for assigning obligations of international assistance and cooperation should not preclude the adoption of other bases, including notably that of capacity.

#### *2.4 Capacity as a basis for assigning obligations of international cooperation*

As noted above, the CESCR has emphasised that particular obligations of international assistance and cooperation are incumbent on those states in ‘a position to assist’, and as such indicates capacity as a basis for assigning obligations. Capacity offers both a specific and a general requirement: specific in that it is one of the bases that points to the requisite international duty-bearers, and general in that it is a prerequisite to discharging any obligation. Thus, one could argue for example that historical responsibility should form a basis for assigning international obligations, but capacity would still be a necessary element in order to see that obligation fulfilled.

A full examination of what constitutes capacity to assist is beyond the scope of this Chapter, however the list could include economic, technical and technological capacities, available resources, and influence, including in international decision-making processes.<sup>33</sup> In the narrower context of providing disaster relief and humanitarian assistance in times of emergency, we see capacity as the basis for assigning obligations to cooperate. The CESCR refers to the requirement that ‘each State should contribute to this task to the maximum of

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<sup>31</sup> It has been given considerable focus in climate change debates as part of ‘climate debt’ demands. See the submission by the state of Bolivia to the Ad Hoc Working Group on Long-term Cooperative Action: Outcome of the World People’s Conference on Climate Change and the Rights of Mother Earth (April 2010).

<sup>32</sup> N. Nunn, ‘The Long-Term Effects of Africa’s Slave Trades’ (2008) 123(1) QJE 139.

<sup>33</sup> See Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2011), at [www.maastrichtuniversity.nl](http://www.maastrichtuniversity.nl), Principle 31; Salomon, *Global Responsibility for Human Rights*, n. 4, ch. 5: ‘Attributing Global Legal Responsibility’, 180.

its capacities'. Furthermore, all states are to fulfil their 'collective responsibility' due to the risk of the spread of disease across borders. In the case of humanitarian assistance, the dilemma of choosing amongst a multiplicity of possible duty-bearers is resolved by the Committee: the degree to which each state should assist depends on its individual (maximum) capacity – with the 'economically developed states parties [having] a special responsibility (...) to assist the poorer developing states'.<sup>34</sup> In the *Genocide* case, the International Court of Justice (ICJ) took the approach of devising allocative principles to identify state's with the greatest duty to prevent genocide. Criteria included 'the capacity to influence effectively' (the action of persons likely to commit, or already committing, genocide) and the 'geographical distance of the State concerned from the scene of the events'.<sup>35</sup>

A turn to capacity and thus differentiated duties as a basis for assigning obligations in the area of socio-economic rights is bolstered by what one commentator sums up as the dissolution of the 'traditional egalitarian fiction and the emergence of a new legal polycentricity',<sup>36</sup> which has been brought to the fore by the principle of 'common but differentiated responsibility' (CBDR) in international environmental law. In advancing an ethic that certain countries will take the lead in meeting internationally agreed objectives, the approach based on CBDR serves to influence the interpretation of environmental instruments, as well as affirms the contemporary significance of global partnerships.<sup>37</sup> The principle of CBDR is justified intellectually based on the reality of both historical differences in the contributions made by developed and developing states to global environmental problems, the responsibility of developed countries for present and future pursuit of sustainable development, differences in respective economic and technical capacity to tackle the problems, as well as different needs. Thus it translates into differentiated environmental

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<sup>34</sup> CESCR, General Comment No. 14, n. 20, para. 40.

<sup>35</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, 43, para. 430 (*Genocide* case).

<sup>36</sup> P.H. Sand, 'The Evolution of International Environmental Law', in D. Bodansky, J. Brunnée and E. Hey (eds.), *The Oxford Handbook of International Environmental Law* (Oxford: OUP, 2007), 29, at 40.

<sup>37</sup> See Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (Vol. I) (1992); 31 ILM 874 (1992), Principle 7: '[s]tates shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command'; UN Framework Convention on Climate Change, New York, 9 May 1992, in force 21 March 1994, 1771 UNTS 107, Article 3(1): '[t]he Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.'

standards set on the basis of the range of factors, including special needs and circumstances, future economic development of countries, and historical contributions to the creation of an environmental problem.<sup>38</sup>

In international environmental law, the principle of CBDR does not in itself offer a basis for assigning obligations of international cooperation, nor for dividing duties amongst those states with the greater responsibilities. These are fleshed out in the provisions of a given instrument that differentiates specific duties by category of states.<sup>39</sup> It is a principle that recognises that states should – for the range of reasons provided earlier – possess different duties, and underpins steps that allow for differential treatment to those ends. Its practical application can take the form of, for example, increased time to implement treaty commitments, exemptions, burden sharing through the allocation of funding, and the transfer of technology. CBDR might be said to offer a general principle of equity, with differential treatment concerned with the realisation of substantive equality over time aimed at enhancing the social and economic development of those worst-off in the world. As such, it seeks to provide remedial measures aimed at achieving what the drafters agree would be a more just society.<sup>40</sup> In sum, although the principle of CBDR may represent merely ‘the nucleus of an emerging framework of global burden sharing’,<sup>41</sup> it can be seen as part of a broader normative development in international law that requires action on the part of those ‘in a position to assist’. It also points to an emerging procedural requirement for states to coordinate with each other in the allocation of particular duties necessary to discharge their respective obligations to cooperate effectively.<sup>42</sup>

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<sup>38</sup> The Centre for International Sustainable Development Law, ‘The Principle of Common but Differentiated Responsibilities: Origins and Scope’, Legal Brief for the World Summit on Sustainable Development 2002 (Johannesburg, 26 August 2002), at [http://cisdl.org/public/docs/news/brief\\_common.pdf](http://cisdl.org/public/docs/news/brief_common.pdf).

<sup>39</sup> See for example, Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 1760 UNTS 79, Article 20(2): ‘[t]he developed country Parties shall provide new and additional financial resources to enable developing country Parties to meet the agreed full incremental costs to them of implementing measures which fulfil the obligations of this Convention and to benefit from its provisions.’

<sup>40</sup> D. Shelton, ‘Equity’, in D. Bodansky, J. Brunnée and E. Hey (eds.), *The Oxford Handbook of International Environmental Law* (Oxford: OUP, 2007), 639, at 659.

<sup>41</sup> J. Brunnée, ‘Climate Change, Global Environmental Justice and International Environmental Law’, in J. Ebbesson and P. Okowa (eds.), *Environmental Law and Justice in Context* (Cambridge: CUP, 2009), 316, at 327; and see J. Scott and L. Rajamani, ‘EU Climate Change Unilateralism’ (2012) 23(2) EJIL 469, at 477: ‘[a]lthough the CDDRRC [common but differentiated responsibilities and respective capabilities] principle has come to play a pivotal role in international environmental law, the core content of the CDDRRC principle, as well as the nature of the obligation it entails, is deeply contested.’

<sup>42</sup> See ‘Maastricht Principles on Extraterritorial Obligations of States’, n. 33, Principle 30; O. De Schutter, A. Eide, A. Khalfan, M. Orellana, M.E. Salomon and I. Seiderman, ‘Commentary to the Maastricht Principles on the Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights’ (2012) 34(4) HRQ 1084, at 1149; A. Khalfan, ‘Division of Responsibility Between States’, in M. Langford et. al. (eds.), *Global*

## 2.5 Capacity and the matter of cost

When relying on those states with the capacity to assist in fulfilling obligations, the division of duties is determined also according to states that could most easily avert or redress the threat or violation to basic well-being in a given situation. The converse is that should it be too difficult for a state to avert or redress the human rights threat or violation, then there is no obligation to do so.<sup>43</sup> A consideration of capacity as a basis for assigning obligations of international cooperation thus begs the subsequent question as to where the line is to be drawn.

In meeting its positive obligations of international assistance and cooperation to fulfil socio-economic rights beyond territory, the question arises as to what would constitute an unreasonable cost on the part of a state acting internationally. It might be assumed that a state having broadly secured a high level of socio-economic rights for its people is in a position to take steps to fulfil socio-economic rights abroad, perhaps requiring an expenditure of financial or other resources. This approach takes as its starting point that states can act in fulfilling rights elsewhere because socio-economic rights have been realised at home. Ooms and Hammonds recognise the risk that this approach invites when it comes to rights that are progressively realised and indeterminate. They argue with regard to the right to health for example, that in order to avoid a situation whereby high-income countries could endlessly refute their obligations of international assistance by referring to their domestic obligations to achieve the ‘moving target of the highest attainable standard of health’, any country that has realised the *minimum* essential level of health domestically is duty-bound to contribute to that same standard elsewhere before aiming for the (progressively realisable) highest attainable standard of health.<sup>44</sup>

I would propose a more exacting test: a state that has not ensured the minimum essential level of rights at home could *still* be said to have positive obligations to fulfil the human rights of people outside its borders on the basis of an objective determination as to what constitutes the ‘adequate and reasonable’ use of its ‘available resources’ towards the realisation of rights.<sup>45</sup> A

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*Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge: CUP, 2013), 299.

<sup>43</sup> See Wenar on the ‘least-cost principle’: Wenar, ‘Responsibility and Severe Poverty’, n. 14, at 269.

<sup>44</sup> G. Ooms and R. Hammonds, ‘Taking Up Daniels’ Challenge: The Case for Global Health Justice’, (2010) 12(1) HHR 29, at 36.

<sup>45</sup> The references to the requirement to use maximum available resources are found in Article 2(1) ICESCR, n. 3, and Article 4 CRC, n. 1. In a 2007 statement, the CESCR indicated that under a future communications

state that has not fulfilled the minimum essential levels of socio-economic rights at home might nonetheless be required to comply with its obligations to people elsewhere if, by objective criteria, it can be said to possess adequate resources. In circumstances whereby the state is deemed to possess the resources necessary to meet minimum standards at home and contribute to the fulfilment of rights in the world, it would be for that state to justify any retrogression in the exercise of the rights of its own citizens that occurs alongside the dispensation of foreign assistance.<sup>46</sup> These tests may go some way to addressing the problem of multiplicity just touched on at least in the area of resource transfer: all states that have fulfilled basic socio-economic rights at home, or are determined objectively to possess adequate resources but have shown themselves unwilling to fulfil their minimum obligations at home, are all *equally* required to contribute to the fulfilment of rights elsewhere. The subsequent determination as to which foreign state(s) should assist which particular recipient state(s), and how, becomes merely a matter of coordination.

At least two issues should be highlighted here: that eliminating deprivation globally is a manageable collective enterprise, and that the perpetuation of need is avoidable under just international institutions. Although mechanisms for financial global redistribution akin to the national welfare state do not exist at present,<sup>47</sup> substantial improvements in the position and living conditions of the world's poor are possible at small opportunity costs to the rich world. Doubling the wealth of all in the bottom two quintiles would take only 1.55 per cent of the wealth of the top 1 per cent of the human population;<sup>48</sup> 0.7 per cent of the global product, or less than 1 per cent of the combined GNIs of the high-income countries, is all that is needed to address the aggregate shortfall from the World Bank's two US dollar-a-day poverty line.<sup>49</sup>

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procedure, it would apply an 'adequate and reasonable' test in determining whether a state party acting at the domestic level has failed to take steps to the maximum of its available resources in meeting its obligations under the Covenant. CESCR, 'Statement on an Evaluation of the Obligations to Take Steps to the "Maximum Available Resources" under an Optional Protocol to the Covenant' (38<sup>th</sup> Sess., 2007), UN Doc. E/C12/2007/1 (2007), para. 8. The CESCR indicates that the requirement is for 'principled policy-making' to be undertaken. Article 8(4) of the new Optional Protocol to the International Covenant on Economic, Social and Cultural Rights directs the Committee in its examination of communications towards a reasonableness standard of review: '[w]hen examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.' Optional Protocol to the ICESCR, 10 December 2008, in force 5 May 2013.

<sup>46</sup> CESCR, General Comment No. 3, n. 19, para. 9: 'any deliberately retrogressive measures (...) would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources'.

<sup>47</sup> R.H. Wade, 'Globalization, Growth, Poverty, Inequality, Resentment, and Imperialism', in J. Ravenhill (ed.), *Global Political Economy*, 2<sup>nd</sup> ed. (Oxford: OUP, 2008), 373, at 403.

<sup>48</sup> T.W. Pogge, 'Growth and Inequality: Understanding Recent Trends and Political Choices' (2008) 55(1) *Dissent*, 66 at 72.

<sup>49</sup> *Ibid.*, at 73.

A mere 0.1 per cent of the GNI of the sixty-six economies classified as high-income by the World Bank is all that would be required to meet what the CESCR considers to constitute the core obligations as regards the right to health.<sup>50</sup> Because taken together funds are easily available, and because meeting global need requires resources beyond that of any one state, obligations of international cooperation (differentiated by capacity) need also include the collective duties of the appropriate members of the international community of states, in this case as regards the transfer of financial resources.

It is immaterial to the finding of a breach of an obligation of conduct for a single state whose responsibility is in issue to claim that it could make little difference on its own in the prevention of a violation, even had it used all means reasonably at its disposal, as the ICJ has noted in a different context: ‘the more so since the possibility remains that the combined efforts of several states, each complying with its obligation to prevent, might have achieved the result [of averting the harm] (...) which the efforts of only one state were insufficient to produce’.<sup>51</sup> In addition, although it is not certain that a given intervention would have prevented the harm, that actuality is irrelevant to establishing responsibility.<sup>52</sup> In circumstances where more than one state is responsible, each state is separately responsible for conduct attributable to it and that responsibility is not diminished by the fact that it is not the only responsible state. This is equally the case in a situation where a single course of conduct is at the same time attributable to several states and is internationally wrongful for each of them.<sup>53</sup> The preliminary conclusions on this matter are twofold: on the one hand, we can recognise the existence of collective legal obligations while relying, so far, on an individualised regime of legal responsibility in the event of a breach of those obligations. On the other hand, the truly collective action required to fulfil this obligation might best invite the application of a standard of joint and several responsibility whereby the victim could claim for the full amount against any wrongdoing state, even if no one state is likely to be able adequately to compensate for the collective failure when it comes to reparations, and other methods will need to be devised. The responsible state will also have the option, in principle, of claiming against the other wrongdoing states for their contribution to the harm.<sup>54</sup> As

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<sup>50</sup> Ooms and Hammonds, ‘Taking Up Daniels Challenge’, n. 44, at 37. In December 2013, there were seventy-five high-income economies: see [http://data.worldbank.org/about/country-classifications/country-and-lending-groups#High\\_income](http://data.worldbank.org/about/country-classifications/country-and-lending-groups#High_income).

<sup>51</sup> *Genocide* case, n. 35, para. 430.

<sup>52</sup> *Ibid.* Although the ICJ concluded in the *Genocide* case that it is not irrelevant to the determination of financial compensation since the actual damage could not be causally linked to the wrongdoing state. *Ibid.*, para. 462.

<sup>53</sup> ARSIWA Commentary, n. 22, Commentary to Article 47.

<sup>54</sup> Nollkaemper and Jacobs highlight, however, that in practice, ‘the decentralized nature of the international



Nollkaemper and Jacobs rightly point out, when obligations require collective action, it is reasonable for shared responsibility to be implied in the event of a breach.<sup>55</sup> The standard of joint and several responsibility is instructive, as Judge Simma explains in his separate Opinion in the *Oil Platforms* case: ‘on the one hand it recognizes the difficulty of a finding of responsibility where apportionment is impossible. On the other hand, it excludes as unfair a solution in which no one would be held responsible’.<sup>56</sup>

The second issue warranting note is that poverty and the widespread violation of socio-economic rights are avoidable through the creation of fairer international institutions,<sup>57</sup> the imperative being to elaborate, interpret and apply international rules in a manner consistent with internationally accepted standards of decency, in many instances as articulated through human rights.<sup>58</sup> International cooperation is not limited to the distribution of resources and goods, but also includes the establishment of just institutional procedural principles<sup>59</sup> and a system of rules that distributes the consequential effects of the law fairly.<sup>60</sup>

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legal order, combined with the lack of courts with compulsory jurisdiction, suggests that the international legal order is much less conducive to application of joint and several responsibility’. P.A. Nollkaemper and D. Jacobs, ‘Shared Responsibility in International Law: A Conceptual Framework’ (2013) 34(2) *MIJIL* 359 at 423.

<sup>55</sup> *Ibid.*, at 394.

<sup>56</sup> *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, ICJ Reports 2003, 161, Separate Opinion of Judge Simma, para. 68. On joint and several responsibility see Salomon, ‘Deprivation, Causation and the Law of International Cooperation’, n. \* above. See also P. d’Argent, ‘Reparation, Cessation, Assurances and Guarantees of Non-Repetition’, in P.A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: CUP, 2014); L.A. Kornhauser, ‘Incentives, Compensation, and Irreparable Harm’, in P.A. Nollkaemper and D. Jacobs (eds.), this volume, at \_\_\_\_; and A. van Aaken, ‘Shared Responsibilities in International Law: A Political Economy Analysis’, in P.A. Nollkaemper and D. Jacobs (eds.), this volume, at \_\_\_\_.

<sup>57</sup> See Pogge, ‘Growth and Inequality’, n. 48, at 73-4; T.M. Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1995).

<sup>58</sup> See Maastricht Principles on Extraterritorial Obligations of States, n. 33, Principles 17 and 29(a). See also the work of R. Howse that points to the positive impact that would come to bear on poverty through changing the interpretative practices and culture surrounding the existing rules (especially integrating existing positive international human rights law into the interpretation of economic rules), over changes to the formal rules themselves. R. Howse, ‘Accountability Issues in International Economic Governance’, Conference on the Accountability for Human Rights Violations by International Organizations, International Law Association Belgian Branch, Brussels, March 2007 (on file with author); R. Howse, ‘Mainstreaming the Right to Development into International Trade Law and Policy at the World Trade Organization’, UN Doc. E/CN.4/Sub 2/2004/17 (9 June 2004); R. Howse and R. Teitel, ‘Global Justice, Poverty, and the International Economic Order’, in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (Oxford: OUP, 2010), 437, at 447.

<sup>59</sup> V. Zanetti, ‘Egalitarian Global Distributive Justice or Minimal Standard? Pogge's Position’, in A. Follesdal and T.W. Pogge (eds.), *Real World Justice: Grounds, Principles, Human Rights, and Social Institutions* (Berlin: Springer, 2005), 199, at 208; and see Franck, *Fairness in International Law and Institutions*, n. 57.

<sup>60</sup> Franck, *ibid.*, at 8; Salomon, *Global Responsibility for Human Rights*, n. 4. For two proposals aimed at embedding systems of distributive justice (the consideration or adoption of which might themselves constitute giving effect to aspects of the obligation of international cooperation for the realisation of socio-economic rights), see the work of Thomas Pogge on the Health Impact Fund at [www.healthimpactfund.org](http://www.healthimpactfund.org), and of Leif Wenar on Clean Trade at [www.cleantrade.org](http://www.cleantrade.org).

### 3. Accountability

Undoubtedly there currently exist accountability failures in the area of ensuring socio-economic rights globally. There has been little done to address widescale violations of socio-economic rights in a system, in large part, structured around redress for individual territorial victims of human rights violations. So far there is inadequate mobilisation in response to the CESCR's view that poverty reflects 'a massive and systemic breach' of international human rights law.<sup>61</sup> The adoption by the General Assembly of an Optional Protocol to the ICESCR in 2008<sup>62</sup> offers some possibilities of redress for the breach of obligations by those states other than the right-holders own, including when the obligations are shared among several states parties. Through its system of inter-state complaints,<sup>63</sup> and the inquiry procedure triggered by reliable information indicating grave or systematic violations of Covenant rights,<sup>64</sup> the Committee could address issues regarding the failure of a state (or states) to comply with their positive obligations of international cooperation in a manner that it cannot readily consider in the context of individual communications.

Extraterritorial obligations, and notably international cooperation for development and thus for the realisation of economic, social and cultural rights, are understood both normatively and practically as essential to fulfilling the aspirations of many countries and the human rights of their peoples. Under the Optional Protocol there would seem to be no procedural bar to having, for example, a developing state, acting in its capacity as an injured state to which the obligation is owed (or as non-injured state(s) acting in the wider common interest), from invoking the responsibility of a developed state (or several states) under the inter-state procedure (subject to a declaration recognising the competence of the Committee to receive communications), for non-compliance with its negative and positive international obligations. In the former case, a developing country could submit a communication claiming that other state parties (or another state party) are not meeting their obligations of international assistance by failing to contribute 'the maximum of its available resources' towards the socio-economic rights of its people.<sup>65</sup> Further, a developing country could

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<sup>61</sup> CESCR, 'Statement on Poverty and the International Covenant on Economic, Social and Cultural Rights' (25<sup>th</sup> Sess., 2001), UN Doc. E/C.12/2001/10 (2001), para. 4.

<sup>62</sup> Optional Protocol to ICESCR, n. 45.

<sup>63</sup> *Ibid.*, Article 10.

<sup>64</sup> *Ibid.*, Articles 11 and 12.

<sup>65</sup> As discussed above and further see, Maastricht Principles on Extraterritorial Obligations of States, n. 33, Principle 33: '[a]s part of the broader obligation of international cooperation, States, acting separately and jointly, that are in a position to do so, must provide international assistance to contribute to the fulfilment of economic, social and cultural rights in other States.'

submit a communication claiming that other state parties (or another state party) are not taking the necessary steps, separately, and jointly through international cooperation, to create an international enabling environment conducive to the universal fulfilment of economic, social and cultural rights by failing to elaborate or review multilateral and bilateral agreements, so as to render them consistent with international human rights standards.<sup>66</sup> As for concerns pertaining to grave or systematic violations under the inquiry procedure, where the Committee is granted competence it should have no shortage of issues to examine in a world where the realisation of human rights is being brought to its knees by food, financial and environmental crises.

#### **4. Concluding remarks**

As a matter of positive international human rights law obligations of international assistance and cooperation are not discretionary. But unless we begin to see delineated what is required, when, and by which state(s), they may as well be voluntary. While this Chapter has only scratched the surface as to how we might think about establishing international responsibility in a world of great deprivations where duties to confront need extend beyond the right-holders own state, it is clear that our doctrines and mechanisms are hardly fit for purpose. A thoughtful commentator remarked recently that the biggest blind spot in global human rights is the political economy,<sup>67</sup> it is high time this changed or justice will continue to evade us.

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<sup>66</sup> Ibid., Principle 29.

<sup>67</sup> V.K. Nagaraj, 'Global Human Rights: For Futures unlike the Past', OpenDemocracy, 31 July 2013, at [www.opendemocracy.net](http://www.opendemocracy.net).