



INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY

Duties sans  
Frontières

Human rights  
and global social  
justice



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Human rights and global social justice

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# Duties sans Frontières

## Human rights and global social justice

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## BACKGROUND AND ACKNOWLEDGEMENTS

Work on this report began in January 2001, when the Council convened a group of experts to discuss transnational obligations in relation to economic and social rights. The following individuals participated in the meeting:

- |                      |  |
|----------------------|--|
| Michael Freeman      | Professor at Essex University and Director of the MA in the Theory and Practice of Human Rights.   |
| Dharam Ghai          | Development economist, Adviser at the International Institute of Labour Studies in Geneva, former Director of the United Nations Research Institute for Social Development (UNRISD), and Member of the International Council on Human Rights Policy. |
| Paul Hunt            | UN Special Rapporteur on the Right to Health and former Member of the UN Committee on Economic, Social and Cultural Rights, who teaches in the Department of Law at Essex University.  |
| Mia Horn af Rantzien | Senior Swedish diplomat who has represented Sweden at the ILO, and directed GLOBKOM, a Swedish Parliamentary Committee set up to examine Swedish development aid policy.   |

Subsequently, between March and July 2001, three consultants prepared papers that discussed legal, ethical and economic arguments in favour of transnational obligations. The papers and their authors were:

“Extra-national Obligations – a survey of moral philosophy” by Christopher Boyd, a Fullbright scholar currently pursuing graduate studies in philosophy at the University of Geneva.

“Global Public Goods Arguments for Collective Action” by Martin Brookes and Zaki Wahhaj, both economists. Martin Brookes formerly worked with Goldman Sachs and Amnesty International. Zaki Wahhaj is working on his PhD at MIT.

“Extra-national Obligations Toward Economic, Social and Cultural Rights” by Sigrun Skogly who teaches law at the University of Lancaster. Her PhD thesis, shortly to be published, examines the application of international human rights law at the World Bank.

These papers can be accessed directly on the International Council’s website at [www.ichrp.org/cgi-bin/show?what=project&id=108](http://www.ichrp.org/cgi-bin/show?what=project&id=108)

In April and May 2002, an independent consultant, Anne-Marie Smith, prepared the first version of this report, drawing in particular on the three papers. Ms Smith has written several monographs on law, international conflict resolution and development. Resident in Geneva, she is currently associated with the United States Institute of Peace.

The draft was further revised and developed by Robert Archer, Executive Director of the International Council, and David Petrasek, former Research Director at the International Council and currently Senior Director of Policy and Evaluation at Amnesty International.

Comments on the draft were received from several of those involved in earlier consultations or writing. In addition, we received comments, for which we are grateful, from Judith Bueno de Mesquita, Danwood Mzikenge Chirwa, Thomas Hammarberg, Scott Jerbi, Chandra Muzaffar, Arjun Sengupta, and Theo van Boven.

## PREFACE

Modern governments acknowledge that they have a responsibility to work actively to end international poverty, protect humanity from dangerous diseases, provide children with education, preserve the environment for our descendants, and ensure that everyone has access to reasonable housing and clean water.<sup>1</sup>

What do these responsibilities amount to in practice? *When* do wealthier societies have a duty to help much poorer ones? What *limits* can the governments of those societies reasonably impose on such obligations, and to what extent do they take priority over other duties, for example to their own citizens? Are such obligations of a merely ethical nature – matters of choice, or values – or do they include a more formal, even legal dimension?

There has never been a greater need for simple and convincing arguments that explain, to governments and people alike, why action to end poverty, illiteracy, oppression and disease is right, is in the interests of everyone – richer and poorer – and requires combined and persistent effort from all parties.

This short report attempts to shape such arguments. In doing so, the International Council recognises that, in the end, political leaders, in their public capacity, and citizens in their private capacity, act to help others because they believe it is right to do so. Ethical commitment is an essential component of any strategy to make the world a safer and better place for all who live in it. Action to end poverty, illiteracy and oppression will not succeed in the absence of such values.

Yet states do not operate on the same terms as individuals. They are subject to national and international law, and governments are obliged to take proper account of national interests. Though the ethical beliefs of individual politicians often influence their decisions, most political leaders consider that their first duty is to their own citizens, then to societies with which they have close ties. Simply asserting that richer countries should show more political determination in acting internationally to end poverty and illiteracy will not serve – unless political leaders and officials can demonstrate to one another

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<sup>1</sup> These are among the objectives set out, for example, in the International Covenant on Economic, Social and Cultural Rights, which 146 states have ratified and 7 have signed. More recently, all 189 member states signed the United Nations Millennium Declaration in 2000, which formally commits them to take practical and co-operative action in these and other areas.

and their publics that they have a duty to take international action, and that the action they take is lawful and responsible, and respects other obligations that they have, notably to their own people.

Here, by focusing on human rights, this report makes a specific contribution. Arguments for action that draw on human rights are more than moral appeals, because the values of human rights are embedded in a framework of international law that has been negotiated and agreed by states, and that takes account of the character of state obligations. The human rights framework reflects and promotes core moral values that most people in most societies can identify with, but at the same time it is legal in character.

This offers three benefits. First, the framework is precise: it sets out clearly who has obligations and duties and who has not, and what those obligations and duties are. Secondly, it is practical: it provides states with a formal language they can use to negotiate and co-operate with one another. Thirdly, it can be binding: when governments ratify human rights agreements, they accept a formal duty to implement the commitments they have thereby made.

Reality, of course, is not so simple. Like other forms of human enterprise, human rights is not always as specific as might be wished, governments may interpret their international commitments differently (or disregard them), and in many instances laws may not be enforced effectively. Nevertheless, albeit imperfectly, human rights legal standards add rigour and precision to moral argument; they have practical application; and they create conditions in which political clarity can be achieved.

The intellectual case set out here is not a finished work. It more resembles a path that others must develop into a thoroughfare and eventually, perhaps, a paved road. In suggesting that human rights arguments can strengthen more familiar appeals to ethics and legitimate self-interest, it offers additional tools that citizens and officials can use – in richer countries certainly, but in poorer societies too – to generate the dynamic and effective action that will be required if we are to solve the numerous injustices and inequities that afflict our society, and pass on a more fitting world to future generations.

### **Mary Robinson**

Executive Director

Ethical Globalisation Initiative

## INTRODUCTION

### **From citizens' to human rights**

The world is sometimes called a “global village”, as if it has the characteristics of a single community. If we think in such terms, the inequities it displays can be compared to those which characterised industrialising countries (such as England or France) in the 19<sup>th</sup> century, when similarly profound disparities existed between rich and poor. At that time, a minority controlled most of the wealth, the professional middle class was small and unevenly spread, and a large proportion of the population had no access to the benefits that prosperous people took for granted – schooling, health care, leisure, a decent diet.<sup>2</sup>

In the course of the 19<sup>th</sup> century, many governments in richer countries came to realise, or were pressured to accept, that extreme social and economic inequities were unsustainable. Political parties of the centre, left and right eventually accepted that governments had a responsibility to ensure that people had basic education, sanitation and enough to eat, and that workers' rights to organise ought to be protected. Over time, and to varying degrees, systems of universal health care, social security, unemployment insurance and public housing were put in place. They have been expanded, amended, and reduced over the years, but the essential structures remain in place, as does the progressive taxation required to finance such programmes.

In most societies, particularly under the influence of religious teachings, wealthy people have always been expected to help those who are poorer through acts of charity. What emerged in a new way in industrial countries in the 19<sup>th</sup> century was the belief, first, that the state represented society as a whole, and bore a responsibility for its welfare and progress; and second, that many of the problems associated with poverty, and poverty itself, could be addressed successfully by continued and systematic government intervention.<sup>3</sup>

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2 Of course, in the 19<sup>th</sup> century and now, inequality may co-exist alongside economic progress. An economy can grow in size and most people can benefit from that growth, while inequalities continue to increase and a significant proportion of people continue to lack some of the resources necessary for life.

3 Intervention is not understood here to imply that governments must themselves operate all the necessary services. The claim is rather that governments alone can focus the resources and create the political and legal frameworks necessary to deliver core services (health, education, social welfare, infrastructure, environmental protection, governance), either through public or private institutions.

Over a period of two hundred years, the idea of a national community, represented by the nation state, emerged alongside ideas of citizenship and citizens' rights and responsibilities. Modern governments are increasingly expected to demonstrate capacity to act decisively to protect their citizens' well-being, not least by removing illiteracy, disease and poverty; and in modern democracies the performance of governments has increasingly been judged in these terms.

Today, as people living in different societies become increasingly interdependent, and global communications systems make us more aware, the idea of global citizenship, implying the acceptance of *global* responsibilities towards one another, is emerging. Will the new levels of organisational capacity that now exist enable us to begin, on a global scale, a new process of political and economic reform and action?

The analogy can only be taken so far. European disparities existed within identifiable and distinct political communities where, at least in principle, those governing accepted that they governed on behalf of society as a whole (the nation). Though the era was marked by revolutions and gave rise to modern revolutionary theory, it was possible to conceive of meaningful change without demanding a complete re-shaping of the system of government. The achievement of universal adult suffrage was crucial to such processes of non-revolutionary reform.

Today's 'global society' is a looser and less coherent entity. It includes numerous political, cultural, historical and religious divides and its societies have radically different levels of economic and social development. In addition, the modern world is deeply marked by the emergence during the last century of the modernising industrial economy, and its vastly increased military and organisational capacity and appetite for trade. We still live with the complex effects that these forces helped to generate, including the effects of colonialism and modern forms of authoritarian government. Above all, perhaps, we possess no model of global government that can be compared with the emergence of the 19<sup>th</sup> century state – nor is it likely that the vast majority of the world's inhabitants would currently identify with such an authority.

Despite these differences, the fact remains that gross inequities are probably unsustainable, politically and environmentally. Global integration has created a situation where richer countries cannot altogether avoid the *effects* of extreme inequity and poverty in other countries, while the ability of poorer countries to raise the living standards of their populations is crucially dependent on decisions made in richer countries.

Is it utopian to expect the world's richer and more powerful countries to take serious action to tackle global inequity and poverty? Perhaps. Yet their failure

to respond adequately so far is increasingly indefensible for a number of reasons. First, by most accounts the unacceptably wide gaps between rich and poor countries (and the even wider gap between very rich and very poor people) continue to widen on several indicators of human well-being. Second, increased international co-operation in many fields and greater integration of the world economy mean that rich societies and poor societies are more interdependent – and that the influence of richer societies on poorer societies continues to increase. Third, scientific and technological advances have increased our capacity to address problems of poverty in general, and hunger, illiteracy, and ill-health in particular. The costs of doing so, estimated at an additional \$50-60 billion per year, are hardly prohibitive.<sup>4</sup>

Can we discover a new imagination that will generate the political energy required to achieve change on such a scale? More to the point, what arguments might convince officials of governments in richer industrialised countries to take more seriously their commitments to global social justice? This report attempts to identify and set out some of the arguments that might be relevant.

In doing so, it focuses particularly on arguments that draw on human rights and international human rights law.

## **Human rights**

Economic, social and cultural (ESC) rights, like other human rights, give rise to duties on different actors. The primary duty falls on the state in which a person lives, but, to different degrees and according to circumstances, obligations may also fall on other actors, such as companies, communities, organisations, or parents.

Such duties also fall on foreign states and international institutions. Those whose economic and social rights are unfulfilled or violated are entitled, in certain circumstances, to look beyond their own borders for redress. This report refers to such duties as transnational obligations, and sets out the basis for such duties in morality, law and arguments grounded in self-interest.

The notion of transnational obligations applies to all types of human rights, not just those promoting economic and social well-being. Serious abuses of civil and political rights give rise to claims on outside states to act to the extent possible to prevent or punish such abuses. This report is primarily concerned with economic, social and cultural rights, but the notion of transnational obligations is wider than this category of rights.

The report draws on human rights and human rights law to complement the

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<sup>4</sup> World Health Organisation, *Report of World Health Organisation Commission on Macroeconomics and Health*, Geneva: World Health Organisation, 2002.

many ethical and pragmatic justifications for fairer social and economic conditions in the world. It argues that using a human rights framework might help public institutions to respond more effectively to the unmet needs of the poor – in education, housing, health care, food, etc. – because it focuses attention on accountability and responsibility. It therefore becomes easier to decide whether rights have been violated, and (if so) by whom, and who should take action to ensure that rights are respected.

The report concentrates on poverty and on ESC rights – though poverty is not co-extensive with economic and social rights and is not the same thing – because poverty reduction is at the heart of the mandate and operations of key international institutions and processes. There is a more direct reason: the vast majority of those who are homeless, illiterate, without employment, or who lack access to health care, clean water, land or food, are also poor.

Our starting point is that if we understand deprivation and poverty in terms of denials of human rights, we will understand more readily when outside actors have an obligation to respond and what the limit and extent of those obligations might be.

It is right to speak of a starting point. This document advances a general argument. It shows that there are transnational obligations and that human rights law is relevant to them, particularly when interpreted alongside ethical and other arguments; in broad terms, it also distinguishes certain categories of transnational obligation. To make the argument truly useful, however, more work needs to be done. It must be applied to specific cases. It will also be necessary to develop more precise agreements about mechanisms for evaluating and regulating the various responsibilities described here, as well as the violations that give rise to them.

## Worlds apart

In 2000 the world's population was just over 6,000 million.<sup>i</sup> In that year, of the world's people, 15% lived in high income countries, 45% in middle income countries and 40% in low income countries.<sup>ii</sup>

<p>In Africa, household water use averages 47 litres per person per day. In Asia, the average is closer to 95 litres per person per day.<sup>iii</sup></p>	<p>Humans require 11.5 litres of water per day for healthy living.<sup>iv</sup></p>	<p>Residents of the United Kingdom average 334 litres per person per day. The United States leads the world at an estimated 578 litres per person per day.<sup>v</sup></p>
<p>Area consumed by average citizen of Africa and India: 1.4 hectares.<sup>vi</sup></p>	<p>Available area of productive land and sea for each person on Earth: 1.9 hectares.<sup>vii</sup></p>	<p>Area consumed by average citizen of US and Canada: 9.6 hectares.<sup>viii</sup></p>
<p>Half the world's population live on a cash income of less than US\$2 a day, and 1 billion people live on less than US\$1 a day.<sup>ix</sup></p>	<p>The richest 20% of the world's population receive more than 80% of global incomes.<sup>x</sup></p>	<p>In Europe, every cow receives a daily subsidy of US\$2.20 from the taxpayer.<sup>xi</sup></p>
<p>Of the world's diseases, about half are tropical; just 3 per cent of funds for medical research are devoted to their study.<sup>xii</sup></p>	<p>Of 1,393 new medicines brought to market between 1975 and 1999, only 16 were for tropical diseases and TB.<sup>xiii</sup></p>	<p>US\$50 to 60 billion is spent world-wide annually on health research. Of this, only US\$5 to 6 billion is spent for the study of the health problems of 90 per cent of the world population.</p>
<p>Sub-Saharan Africa, the world's poorest region, spends as much on arms as it does on its primary schools.<sup>xiv</sup></p>	<p>Total world military spending for 2001 was US\$839 billion.<sup>xv</sup></p>	<p>The achievement of universal primary education within a decade would cost about US\$8 billion annually over and above existing expenditure – about four days' worth of global military spending.<sup>xvi</sup></p>
<p>One in five people are under-nourished. Every minute 13 people die of hunger and hunger-related diseases.<sup>xvii</sup></p>	<p>The basic health and nutrition needs of the world's poorest people could be met for an additional US\$13 billion a year.<sup>xviii</sup></p>	<p>North Americans and Europeans spend more than US\$13 billion on pet food each year.<sup>xix</sup></p>

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## The report

**Part One** presents the case for ESC rights and transnational obligations, drawing on human rights concepts and international law. It sets these concepts and laws out in **Chapters II and III**. **Chapter IV** suggests a preliminary framework for judging when governments and other actors have a duty to take action in relation to non-fulfilment or violations of economic and social rights abroad.

**Part Two (Chapters V, VI)** considers the principle of state sovereignty and its evolution. How can transnational obligations be applied in a world of sovereign states which lacks legitimate global institutions to ensure such obligations are implemented?

**Part Three** discusses religious values and ethical arguments that support the notion of transnational obligations. **Chapters VIII and IX** discuss the idea of community, the degree to which responsibility to act increases with capacity to act, the relevance of global public goods, and the legitimacy of arguments that appeal to self-interest.

A brief **Conclusion** summarises the arguments developed and suggests that, taken together, they create a strong presumption that governments and other institutions have a legal as well as moral duty to act when economic and social rights are unfulfilled or violated abroad.

# PART ONE

## THE HUMAN RIGHTS FRAMEWORK

Part One discusses the legal framework of human rights, the status of economic and social rights in relation to other human rights, and the types of obligations that ESC rights give rise to. A first chapter looks at the legal and historical relationship between economic, social and cultural rights and civil and political rights, and goes on to discuss rights in relation to duties, and duty-bearers in relation to violators. Chapter II discusses poverty. Does the presence of poverty imply a violation of human rights? If so, must someone be responsible – and if not, who has the duty to respond?



## I. THE HUMAN RIGHTS FRAMEWORK

### **Concepts and priorities**

Ideas of justice and human dignity can be found in almost all cultures. The world's major religions all attach great moral importance to such values. Since 1945, when the United Nations was formed, states have constructed a legal code that recognises and articulates these ideas in terms of fundamental human rights and freedoms. The various UN standards reflect values and principles that states agree are shared across all societies.<sup>5</sup>

Existing human rights standards include the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Civil and political rights include the rights to life, liberty and security of the person; right to fair trial; freedom from slavery, torture and arbitrary arrest; freedom of thought, conscience, religion, opinion and expression; and rights to assembly and association, and to participation in public affairs.

Economic, social and cultural rights include the right to work and to be justly rewarded for it; the right to rest and leisure; the right to an adequate standard of living, including food and housing; rights to health, education, and to social security; and the right to participate in the cultural life of a community. These rights are widely accepted. The International Covenant on Economic, Social and Cultural Rights has 146 ratifications and the rights it contains have been affirmed at numerous conferences involving the vast majority of the world's governments.

### **Priority of rights**

The status of economic, social and cultural rights in relation to political and civil rights has at times been subject to disagreement. It is often argued that the former cannot be enforced in the same way; and that they are aspirational because in many societies it would be prohibitively expensive to implement them. It is also claimed that wide disparities in living standards between countries mean that they cannot be guaranteed; and that courts cannot (or should not) adjudicate such rights because this would lead to judicial interference in government budget decisions.

Some of these objections are discussed below. Though similar objections can be raised in relation to civil and political rights,<sup>6</sup> the rights to education, health care, an adequate standard of living and other economic, social and cultural

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<sup>5</sup> Almost four fifths of the world's states have ratified the two major UN human rights treaties. A higher percentage have ratified UN treaties to protect women's rights, and children's rights, and to prohibit racial discrimination.

rights are protected in international law on the basis that a state will implement them progressively, over time, and in recognition that a state cannot do more than available resources permit.

The drafting history of the two covenants partly explains why some of these disagreements have arisen. Initially, civil, political, economic, social and cultural rights were to be covered in one UN treaty. In the course of debate, the decision was made to separate the rights into two covenants. Part of the explanation was political: Cold War ideologies lined up in support of different sets of rights. It was also felt, however, that economic and social rights were subject to progressive realisation, and their full implementation was to some extent dependent on resources being available. In addition, civil and political rights were considered to apply within each state, to the “individuals within its territory and subject to its jurisdiction”; they generated state duties in relation to specific populations. Interestingly, in the debate it was argued that the fulfilment of economic rights was not territorially constrained. Achievement of subsistence rights around the world was understood to require joint action and international co-operation. In these respects, therefore, the division of political and economic rights into separate UN covenants related to issues of practical implementation rather than differences in their status as rights.<sup>7</sup>

Even when it has been agreed that both sets of rights are valid, there has often been debate about priorities – and in particular about which rights, if any, come first. Should we first guarantee civil and political rights, as the necessary pre-condition for achieving economic well-being? Or is an educated and economically secure population the necessary foundation for the subsequent flourishing of civil and political freedoms?

The argument that economic development should precede the introduction of full civil and political rights was often advanced by communist states, and in recent years has been put forward by some Asian governments.<sup>8</sup>

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6 It is extremely expensive, for example, to sustain an efficient justice and penal system and an effective police force. These tasks pose immense financial and organisational challenges in many poorer countries.

7 Sigrun I. Skogly, “Extra-national Obligations Toward Economic, Social and Cultural Rights”, paper prepared for the International Council on Human Rights Policy, 2002.

8 Asian governments that take this view tend also to claim that “Asian cultures” differ from those in the “West”, rendering many human rights standards inappropriate. See Joanne Bauer, and Daniel Bell, eds., *The East Asian Challenge for Human Rights*, Cambridge: Cambridge University Press, 1999, p. 91. Critics of “Asian values” reply that political and civil rights are found in Asian traditions; that theories of Asian separateness repeat the fallacies of Orientalism; and that Asian governments contradict themselves when they demand non-interference on grounds of sovereignty, since sovereignty is an even more Western concept than human rights.

## The following human rights are protected under international law

### **Life, liberty and physical integrity of the person**

This includes the right to be treated with humanity and dignity and with due process of law, and prohibitions on arbitrary killing and detention, torture and other cruel treatment.

### **Civic freedoms**

Basic freedoms protected include freedom of thought, opinion and expression, freedom of religious belief and practice, of movement within a state, and the right to peaceful assembly and association. Other civil rights include the protection of privacy and family life, and the right to equality before the law.

### **Political rights**

In addition to freedom of speech and association, international law protects rights to participate in public affairs, and to vote in free and fair elections.

### **Women's rights**

Women's right to equality, and to non-discrimination in the enjoyment of human rights, are protected, and there are also strong prohibitions on gender-specific forms of harassment, violence and exploitation.

### **Worker's rights**

International law protects workers' rights to associate, to organise and bargain collectively, and to a safe and healthy work environment and provides guarantees for a living wage and reasonable working hours.

### **Economic and social rights**

International law guarantees the right to education, to work, to the highest attainable standard of physical and mental health, and to an adequate standard of living, including food and housing.

### **Right to a clean and healthy environment**

This right is protected especially in situations where environmental hazards harm other rights, including to life, health or privacy.

### **Children's rights**

In addition to the general protection of human rights law, children enjoy particular rights including the right to have decisions made in their best interests.

### **Access to information**

This includes the right to receive information held by public or private bodies where key public interests are at stake or where it is essential to protect other human rights.

### **Rights of special groups**

International law protects the rights of indigenous peoples, linguistic, religious and racial minorities, the disabled and the elderly. It prohibits discrimination and exploitation of such groups.

### **Right to justice**

This includes the right to redress for victims of human rights abuses, punishment for perpetrators and access to courts and other procedures.

### **International law prohibits discrimination**

This includes prohibition on grounds including race, colour, sex, language, religion, political opinion, national or social origin, birth or other status.

Such arguments have been widely criticised by human rights thinkers and activists, not least in Asia, who believe that governments which deny civil and political rights in the name of economic development do so essentially to protect authoritarian forms of rule. They also claim that, even where such governments have promoted economic growth, they have not always protected the very poor.

Others assert that civil and political rights deserve priority. Michael Ignatieff, for example, has argued that civil and political rights alone constitute the “defensible core of rights” and that economic and social needs cannot be similarly defended:

That defensible core of rights ought to be those that are strictly necessary to the enjoyment of any life whatever. The claim here would be that civil and political freedoms are the necessary condition for the eventual attainment of social and economic security.<sup>9</sup>

This view too may be countered, primarily by questioning how there can be “enjoyment of any life whatever” (indeed life at all) without some access to food and other resources that are basic to survival.

### **Interdependence of rights**

The mainstream view is that human rights do not need to be prioritised or placed in opposition. In fact, the interaction of *all* rights may be crucial to the achievement of *any*. Amartya Sen, for example, argues that human rights are both the primary end *and* the principal means of development. According to this view, basic civil, political, economic and social rights each have intrinsic value. That is, rights to free speech, to education, or to decent work are worthy of achievement in themselves. Additionally, however, each has an instrumental value in that different types of rights reinforce each other, and respect for one category of rights may be essential to achieving another. Thus, “political freedoms (in the form of free speech and elections) help to promote economic activity. Social opportunities (in the form of education and health facilities) facilitate economic participation. Economic facilities (in the form of opportunities for participation in trade and production) can help to generate personal abundance as well as public resources for social facilities”.<sup>10</sup>

The best known example of this interdependence is from Sen’s own research on famines. Simply put, no functioning democracy has ever had a major famine. Sen discovered this “remarkable empirical connection” to be true in

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<sup>9</sup> Michael Ignatieff, and Amy Gutmann, eds., *Human Rights as Politics and Idolatry*, Princeton: Princeton University Press, 2001.

<sup>10</sup> Amartya Sen, *Development as Freedom*, Oxford: Oxford University Press, 1999, p. 11.

economically rich countries but also in those that are relatively poor, such as post-independence India and Botswana. By contrast, major famines occurred in colonial territories (British India, and Ireland under English rule), one-party states (Ukraine in the 1930s, China during 1958-1961, Cambodia in the 1970s), and in current or recent military dictatorships (Ethiopia, Somalia, Sudan, North Korea). In working democracies, citizens can respond politically to information about the risk of famine, while policy-makers are informed of those risks and made aware of the dangers of ignoring them. In this way, the exercise of political and civil rights is pivotal to conceptualising and inducing social responses to economic needs. Sen's research helped confirm the intrinsic importance of each type of right, as well as the instrumental importance of each in attaining all the others.<sup>11</sup>

These empirical observations rest on a logical foundation. Simple consistency may require simultaneous endorsement of all types of human rights. The guarantee of the security of the person, for example, stands at the heart of political and civil rights; but it means very little if an individual is starving. The right to security can scarcely be said to exist in the absence of a right to subsistence. As one author points out:

The right to life has as much to do with providing the wherewithal to keep people alive as with protecting them against violent death. Dismal expectation about either of these aspects would not be compensated for by sanguine expectation about the other.<sup>12</sup>

Just as subsistence is essential to survival, so it is to the notion of individual autonomy – also an aim of human rights. Malnutrition, lack of shelter and absence of protection from disease render people “incapable of engaging in the autonomous activity the protection of which is often thought to justify concern for civil and political rights in the first place.”<sup>13</sup> This is so not only because those in need suffer obvious harms (hunger, disease, illiteracy), but also because their degree of deprivation makes them dependent on others,

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<sup>11</sup> A second example from Sen's work concerns the importance of social rights (health and education) for the attainment of economic rights. He contrasts the experience of China, which began market-oriented reforms in 1979, and India, which initiated similar reforms in 1991. China has shown more economic dynamism, which Sen explains by China's investment in education and healthcare. He attributes India's less impressive economic record to its poor progress in providing social services. A large proportion of India's people remain illiterate and lack adequate healthcare. Sen's comparative study demonstrates that meeting social needs, including education and health, promotes the realisation of economic potential. Sen, *Development as Freedom*, p. 42.

<sup>12</sup> R.J. Vincent, *Human Rights and International Relations*, Cambridge: Royal Institute of International Affairs, 1986, p. 90.

<sup>13</sup> Charles Jones, *Global Justice: Defending Cosmopolitanism*, Oxford: Oxford University Press, 1999, p. 60.

and therefore subject to coercion or deception. In this way too, denial of economic rights threatens civil and political rights.

## Duties

To have a right is to be owed a duty by another. Conceptually, human rights have three elements. Human rights specialists usually refer to them as the *rights holder*; the *content of the right* (that is, what the holder is entitled to claim); and the *duty-bearer*, the person or institution that must respond to the claim.

The first is least controversial, at least theoretically: all human beings have human rights. Debate concerning the second has lessened: UN standards describe the scope of internationally-agreed human rights.

The third element still raises issues. If rights are understood as claims, someone must be obliged to respond to or respect that claim. Ascribing a right, therefore, implies identifying a duty-bearer. In relation to ESC rights, there has been argument about both the scope of duties involved and the identity of duty-bearers. Exactly who is required to do what to give effect to these rights?

Duties themselves are also usually assessed at three levels, in terms of respect, protection, and fulfilment:

- *To respect* is to refrain from directly or indirectly depriving individuals of their rights, including refraining from establishing an institutional system that would deprive people of their rights or give incentives to others to deprive them of their rights.
- *To protect* is to enforce that respect; to prevent those who would deprive another of rights from doing so – whether they be government officials, international institutions, private corporations, community elders, vigilantes or family members.
- *To fulfil* is to aid the deprived – including those for whom one has a special responsibility, those who are deprived because there has been a failure of the duty to respect and the duty to protect their rights, and those who are victims of natural disasters. This includes legislative, budgetary, judicial and other action to provide the best possible policy environment for the achievement of rights.

If we take as an example the right to food, therefore, governments have obligations not to steal or arbitrarily seize food, and not to obstruct the capacity of a person to obtain his or her own food. Additionally, they are required to prevent others from obstructing people from achieving their rights, and should avoid creating incentives to do so. Lastly, they are expected to help those who lack the means of subsistence themselves.

Faced by such a list, duties may seem boundless. Are there reasonable limits to the duties we are required to undertake to secure human rights? This is particularly relevant in situations where resources are constrained and capacities are inadequate. Do severe resource constraints relieve states of their duties to fulfil human rights?

With respect to ESC rights, there are clear limits, at least in international law. The covenant states that the obligation on states to fulfil these rights is subject to available resources and is to be implemented progressively. States should use the “maximum” of available resources.

Nevertheless, the duty remains. As one author argues: “[E]ven in a situation in which these rights cannot be immediately secured for all [as due to resource constraints]... individuals or institutions are still duty bound to shape their conduct so as best to promote the realisation of these rights.”<sup>14</sup>

It should be noted that rights may remain unfulfilled even though duties are met. A country may make great strides toward putting in place practices and institutions that respect, protect and fulfil human rights, but enjoyment of human rights may nonetheless remain low. When it comes to evaluating state performance, the enjoyment of rights and the fulfilment of duties should therefore be considered separately. Each is important; the two should not be conflated.<sup>15</sup>

### **Duty-bearers**

With respect to duty-bearers, international human rights law was traditionally understood to impose requirements on states. National states are expected to respect, protect and fulfil the human rights of those within their jurisdiction. This is clearly established in international human rights law, which itself reflects legal assumptions that underpin the principle of state and national sovereignty.<sup>16</sup>

Recently, more thought has been given to the responsibilities of private actors. Businesses, directly and indirectly, may have duties, including legal duties, in relation to human rights. Individuals too have a duty to respect human rights and can be held responsible for the most serious human rights crimes. (At the end of the Second World War, for example, individuals were charged with crimes under international law even if their acts were not criminal in their own countries.) The International Criminal Court was recently

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<sup>14</sup> Kate Raworth, “Measuring Human Rights”, *Ethics and International Affairs* 15, 1, 2001, p. 115.

<sup>15</sup> *Ibid.*, p. 116.

<sup>16</sup> For a longer discussion of sovereignty, please refer to Chapter V below.

established to try individuals for such crimes against humanity. This being said, governments remain the primary duty-holders in relation to human rights.<sup>17</sup>

It is worth noting here that the idea of a human rights regime assumes active social consent. This is reflected in the language of the Universal Declaration of Human Rights and other international and regional human rights standards.<sup>18</sup> Laws are effective when the majority of people respect them and see to their observance. They are less effective, and less legitimate, in the absence of such consent. In consequence, human rights law does not assume that one actor must be exclusively responsible for fulfilling a given duty, or that a specific duty-bearer must be assigned specific duties. Respecting, protecting and fulfilling human rights are often best understood as requiring collective action, within a social system that guarantees rights. As one author explains,

a person can have a right not to be assaulted only if all others have an obligation not to assault and all others have a *collective obligation* to provide the protections necessary for ensuring that those individuals who are inclined to overlook their obligation not to assault are deterred from failing to act upon that obligation.<sup>19</sup>

The next chapter looks in more detail at duty-bearers and the attribution of responsibility in relation to poverty and ESC rights.

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<sup>17</sup> For business responsibilities, see International Council on Human Rights Policy, *Beyond Voluntarism – Human Rights and the Developing International Obligations of Companies*, Geneva: ICHRP, 2002. For individual responsibilities, see International Council on Human Rights Policy, *Taking Duties Seriously: Individual Duties in International Human Rights Law*, Geneva: ICHRP, 1999. For the responsibilities of armed groups, see International Council on Human Rights Policy, *Ends and Means – Human Rights Approaches to Armed Groups*, Geneva: ICHRP, 2000. For the International Criminal Court, see Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium*, forthcoming.

<sup>18</sup> International Council on Human Rights Policy, *Taking Duties Seriously*.

<sup>19</sup> Jones, *Global Justice*, p. 93, emphasis in original.

## II. POVERTY, ATTRIBUTING RESPONSIBILITY

### Poverty and human rights

Poverty is not a simple concept. It is not straightforward to define poverty, or to compare poverty in societies that are at different levels of economic development. Economists still find it difficult (and intellectually contentious) to determine whether levels of poverty, world-wide, are falling or rising. Nor should poverty be conflated in too simple a fashion with economic and social rights. Poverty names a relative state or condition, whereas economic and social rights affirm a set of claims and obligations that are limited and attached to specific actors.

In addition, poverty only partially and imperfectly covers the range and content of economic, social and cultural rights, which have diverse and separate headings. Lack of access to a particular economic or social right does not necessarily imply lack of access to other rights. A person may be illiterate and have food; may be homeless and well-educated; may be sick due to a lack of medicines but fully involved in the cultural life of her community. This said, lack of access to essential material resources tends to be the factor that is most commonly shared by those who do not enjoy economic and social rights. The vast majority of those who are homeless, or illiterate, or without employment, or who lack access to health care, clean water, land or food, are also poor.<sup>20</sup>

Use of the term 'poverty' can also be confusing if, as a result, attention is focused exclusively on material want and deprivation. The rights framework, and human rights standards that describe economic, social and cultural rights, refer very properly to *non-material* dimensions of poverty. Illiteracy is a cause and effect of material poverty; but the value of literacy cannot be expressed adequately in terms of enhanced income. The same is true of access to health care: health is a value in its own terms, irrespective of its effects on income (real though these are). Poverty is a condition, and it is experienced in numerous dimensions. We diminish the concept, and the human problem that poverty represents, to characterise it only in terms of income.

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20 But if we recognise this, we must not lose sight of the fact that, for example, professional men in New York may lose their jobs and become homeless, and that people without education may become materially successful.

This broader understanding of poverty is gaining ground. The UN Committee on Economic and Social Rights, in its Statement on Poverty, provided the following definition:

In the light of the International Bill of Human Rights, poverty may be defined as a human condition characterised by the sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights.<sup>21</sup>

While poverty occurs across the globe, its incidence is highly concentrated in certain regions. This has important implications. Very poor people are certainly found in developed industrial economies; but they are in a minority in those countries, and the number of people who are truly materially destitute is usually quite small. In many other societies, by contrast, the majority of citizens are poor and very large numbers of people are extremely poor.

This raises several issues. One is the difficulty of comparison. In practice, it is extremely hard to compare levels of poverty and levels of income across different societies with precision. Some economies are largely monetarised, whereas others are mainly subsistence-based. Measuring income from unofficial (unrecorded) economic activity is a further challenge. Complex and technical arguments are required to calculate relative and absolute poverty, and distinguish their characteristics, to permit comparison between countries of different income levels and cultures. No definition of a minimum wage has been agreed by experts and sharp disputes still surround attempts to define and measure incomes and levels of poverty objectively.

A related issue is that wants and needs are differently perceived and experienced in different economic and social environments. Poverty on a dollar a day would not be experienced in Switzerland in the same way as it would in Lesotho. Non-possession of a television would not be recognised as an official indicator of poverty in most countries, but in parts of Europe it may be. One society may allocate expenditures on important social rituals very differently from another. Do such differences mean the experience of poverty in one place is any less acute than in another?

For our purposes, however, one key difference between richer and poorer countries has important implications for any discussion of transnational

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<sup>21</sup> The United Nations Development Programme (UNDP) defines poverty as "being deprived of those opportunities and choices that are essential to human development: for a long, healthy, creative life; for a reasonable standard of living; for freedom, dignity, self-respect and respect from others". See Bjorn Phillipp, *Poverty – World Bank and UNDP Concepts*, Berlin: Deutsche Gesellschaft für Technische Zusammenarbeit, 1999.

responsibility. Rich countries clearly have the capacity to remove poverty (and to achieve economic and social rights). They have the material and organisational resources to do so, and the number of people who are seriously deprived materially is small. Rich countries can justly be criticised when they fail to protect the economic and social rights of their poorest citizens. This is much less true of poorer countries. Their governments have fewer material and organisational resources and the number (and proportion) of people who are in want (that is, who cannot achieve their economic and social rights) is vastly greater. In practice, governments of poorer countries clearly cannot be expected to meet the unmet needs of their citizens in the same manner as governments of rich countries, and criticism of their failure to do so, and to protect social and economic rights, must take account of this.

### **Attaching responsibility for violations**

Poverty can be analysed in two dimensions: in terms of material deprivation and need; and in terms of powerlessness and injustice. Both forms of analysis have value and relevance. It is important to compute levels of deprivation and need, and to do so objectively, in relation to non-material as well as material deprivation. However, such analyses, which describe a state or condition, are morally neutral and do not need to take account of cause or responsibility. By contrast, when poverty is assessed from the perspective of powerlessness and injustice, analysis necessarily focuses on the relationships between people who are poor, on one hand, and people or circumstances which cause them to be so, on the other. The human rights framework applies this form of analysis. Human rights organisations and human rights activists are increasingly willing to argue that the presence of illiteracy, homelessness or poor health care is a "violation of human rights". At first sight this is an odd statement. Do they mean that poverty itself is a denial of human rights? And, if rights are unfulfilled or violated, do they mean that someone is necessarily responsible? In relation to such language we need to establish an important further distinction.

When a person is mugged, she is mugged by someone. When an individual is tortured, she is usually tortured by a military or civilian official. When a journalist is imprisoned for criticising the policies of his government, he is arrested by a police officer, on the orders of an official, sentenced by a judge, and incarcerated by guards. When crimes against humanity were committed in the former Yugoslavia, the former president of that country was eventually tried for ordering those crimes. In very many cases, there are perpetrators (violators), as well as victims and duty-bearers, and the first responsibility of duty-bearers is often to identify them and bring them to book. Since officials of the state, and state policies, are frequently the cause of rights violations,

states are very often both duty-bearer and perpetrator in relation to human rights abuses. As a result, much human rights campaigning has always called upon states to reform themselves.

While it is true, however, that a perpetrator can often be identified, in many other cases there is either no perpetrator (no person has caused the problem in question), or the existence of perpetrators can be disputed. While such cases come up in relation to many human rights, they are particularly relevant when we discuss poverty and the failure to achieve particular ESC rights.

It is certainly true that a person may go hungry, for example, because a powerful landowner or state agency has unjustly deprived him of access to land to which he is entitled. A child may similarly be deprived of schooling because her local government has corruptly diverted the money set aside for education and no money remains to pay her teacher. In such cases, it is both possible and reasonable to identify victim, violator (landowner and local officials) and duty-bearer (no doubt the government). In such cases, the same methods may be applied to political and civil rights violations and to economic and social rights violations.

Sometimes, however, there is no violator, or the responsibility of people alleged to be violators can be challenged or is unclear. It is difficult, for example, to argue that all poverty in the world is imputable to acts of extortion, discrimination or oppression – even if many individual cases of exploitation and abuse can be identified. The same arguments may be made in relation to access to clean water, access to health facilities, even access to adequate schooling. Rights may be violated, but no one may be guilty in the way that the thief, the torturer, the corrupt official or the abusive landowner are directly guilty.

At this point the usefulness of the idea of duty-bearer becomes re-apparent, because it separates the responsibility to act to end violations of rights from the responsibility for causing the violations in question. The distinction is particularly helpful in relation to economic and social rights, where it is frequently the case that no consensus exists as to the presence of a perpetrator. We have noted that, in relation to many (civil and political) violations, the state is often enjoined to prevent violations which it itself causes. In the case of economic and social rights, this is less often the case. The duty to act exists, but not because the state concerned is necessarily in the position of having violated the rights concerned. In many areas, indeed, it can clearly be said that no one has violated those rights: no one is directly to blame – but the duty to act remains.

This distinction explains why human rights experts often speak of fulfilment of ESC rights (or unfulfilled rights) in contrast to violations of ESC rights.

Whereas a violation implies the presence of a perpetrator, a state of non-fulfilment does not.

Once again, it must be emphasised that this does not exonerate authorities or other individuals from responsibility for their actions. Quite clearly, poor people are particularly subject to exploitation, and they are usually less well-protected than others by the police, courts and other government institutions that should enforce their rights. Discrimination plays a key role in deepening violations of economic, social and cultural rights, and when, as is so often the case, the poor are treated differently on account of their race, gender, religion, caste or social status, this is quite properly a human rights issue. Nevertheless, to a greater degree than in relation to civil and political rights, violations of economic rights may not imply a perpetrator. The responsibility of governments and other actors to intervene is then solely in order to protect the victim (and not to sanction a perpetrator). Of course, where governments and other actors fail to act, they then become complicit in a violation – and, in the face of persistent evidence that economic and social violations are occurring, responsible for the continuation of that violation. The violation itself may still, nevertheless, have no identifiable perpetrator.

It is in this sense that human rights organisations now widely accept that poverty and deprivation are human rights concerns and that, when basic needs (food, shelter, health care, etc.) are not met, this may violate fundamental human rights. They increasingly accept the notion that failure to overcome poverty implies failure to implement human rights.

### **National responsibility**

The question then arises: who is responsible for making sure that economic and social rights are fulfilled? Our starting point and the starting point of international human rights law is that, by comparison with other governments, national governments are primarily responsible for ensuring that human rights, including economic and social rights, are met. They therefore have a duty to mend their own behaviour if their behaviour is responsible for causing or aggravating violations of rights. In addition, they have a duty to do all that they can to create conditions in which rights are fulfilled and violations (even those for which they are not responsible) cease.

This is clear. However, if the primary responsibility rests with the government of the country concerned, what is to be done when that government is honestly unable to perform the task? The question is not an abstract one. It is evident that the governments of very poor countries cannot in practice protect the rights of their people effectively, for lack of resources. For example, it can be shown objectively that many of the poorest countries cannot, by their own means, achieve all the United Nations Millennium Goals by the agreed deadline of 2015. What should be said about local

responsibility, when national governments or other national actors claim that they do not have the resources to achieve the economic and social rights of their populations?

Alternatively, what is to be done when national governments are manifestly unwilling or incompetent? If children in a poor country do not attend school because there are no schools in the villages where they live, and no resources to build them, who determines that resources are not available? It is evident that governments must make choices when they apportion resources between different priorities. Is it acceptable if their choices mean that insufficient resources are available to ensure primary education for all? If so, according to what criteria? Who is in a position to decide that resources are misused or wasted?

These are essential issues. A sound case for transnational obligations cannot be made, intellectually or politically, without eventually defining the scope and limits of national obligations. Though that is beyond the scope of this report, some initial comments may be useful.

In relation to shortages of resources, firstly, national governments and other national actors should show that, in allocating the resources they do have, they have made an honest attempt to meet the needs, and protect the rights, of their own population. It follows that national governments may be able to justify the choice of building a road in preference to financing a health centre or a school. It is unlikely, however, that they can justify spending a large proportion of the national budget on building a palace or an airport close to the president's home town, or on purchasing sophisticated and expensive military equipment. If national governments call for international co-operation to help them meet human rights objectives, they should be able to demonstrate a reciprocal and proportionate level of commitment to the same objectives.

With respect to outsiders, however, the question presents itself somewhat differently. If outside governments and other outside actors are entitled to expect national governments to make a commensurate effort to protect the economic and social rights of their people, the failure of national governments to make that effort (or their criminal involvement in violations) does not necessarily remove the obligation of outsiders to assist. When looked at from a human rights perspective, the primary duty of outside governments and outside actors is not to national governments, but to the populations whose rights are unmet.

In the next chapter we consider "cross border" or transnational obligations in more detail and discuss what international human rights law says about them.

### III. HUMAN RIGHTS LAW, ESC RIGHTS AND TRANSNATIONAL OBLIGATIONS<sup>22</sup>

When does a government have a duty to act abroad to respect, protect or fulfil rights in another country? In this chapter, we discuss what international human rights law says on this subject, focusing on economic and social rights. To start with, however, some contextual, and political issues are noted. The issue of sovereignty is dealt with in Part Two.

#### **Political issues and context**

In Chapter II we noted that economic, social and cultural rights, like other human rights, give rise to duties on different actors. We noted that the primary duty falls on the state in which a person lives. To different degrees and according to circumstances, obligations may also fall on other actors – such as companies, communities, organisations, or parents.

In certain circumstances, duties also fall on foreign states and international institutions. Those whose economic and social rights are unfulfilled are entitled, in such cases, to look beyond their own borders for redress.<sup>23</sup>

A number of practical and political issues arise in relation to such “cross border” or transnational duties on states. First of all, intellectually as well as politically, one cannot make the case that states have obligations abroad without defining the scope of *national* obligations. If governments in richer countries have legal and moral obligations to people in poorer countries whose economic and social rights are unmet, then clearly the national governments of those same people have more direct and prior obligations. This indeed is the starting point of international human rights law, which

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<sup>22</sup> In this chapter we discuss true transnational legal obligations rather than obligations states incur abroad as extensions of normal territorial obligations. International law states that no state may violate the human rights of its citizens or the rights of others residing within its territory. Less clearly, it accepts that states can be held responsible for abuses that occur outside their territory but fall within their legal jurisdiction. This principle particularly applies when a state’s agents, or its policies, are directly responsible for violations of human rights in other states. Thus, a state that routinely discriminates against certain ethnic or religious groups in granting visas at its consulates abroad might be in breach of its human rights obligations. Similarly, state officials operating abroad (such as police or other security or intelligence operatives) may be subject to the international human rights obligations of the state that employs them. This understanding also applies to military forces, though the relevant obligations might be set out in the law of war. Since such obligations are essentially extensions of normal territorial responsibilities, they are not discussed here at length.

<sup>23</sup> It should be emphasised that the notion of transnational obligations applies to all types of human rights. Serious abuse of civil and political rights also gives rise to claims on outside states to act to the extent possible to prevent or punish them.

emphasises the central role and responsibility of national governments in achieving economic and social rights. Obligations on other governments are only triggered when they are complicit in violations or abuse or where the national government on its own is unable to fulfil its obligations.

Secondly, many institutions and individuals play a necessary role in reducing poverty and achieving economic and social rights. They include families, communities, businesses, religious and other civil society organisations, and individuals themselves. Clearly, states – let alone foreign states – are not the only parties responsible. This said, states have responsibilities that cannot be substituted. Only they have the capacity and authority to organise and concentrate social and economic resources where they are most needed.

This is true at international as well as national levels. No other institutions (including businesses) can focus the resources that are required over time to develop and sustain the services that underpin a society's social and economic development and well-being: education, health, infrastructure, social security, governance, protection of the environment etc. In this sense, it is not by chance that international human rights standards are approved by states and apply to states, or that states have particular and specific national and also international obligations in relation to ESC rights.

At the same time, their transnational obligations cannot be limitless. The governments of richer countries also have obligations to their own people. Decisions to help people abroad are not cost-free. They sometimes may imply doing less to help people at home. Rich democracies find it difficult to implement their international obligations when they are faced with competing domestic demands. Many current policies that are known to harm human rights in poorer countries continue to be applied by richer countries because they are strongly supported by voters or interest groups in those countries. Altering direction and introducing new policies that require some national sacrifice to achieve international benefits is therefore politically contentious. While this report does not discuss the sensitivity of such political reforms in detail, the practical relevance of this issue should be recognised.

Defining need is an additional challenge. As we have already mentioned, it is extremely difficult to compare need, or income, across societies that have widely different standards of living or levels of economic development. It is a virtue of the human rights approach that it is not relative. Rights may be claimed by all people in the same terms, by virtue of their humanity. In practice, however, governments of poor countries cannot define their responsibilities if levels of need cannot be defined objectively. Nor can rich countries evaluate their international obligations, in relation to national ones, if they cannot compare one with the other. These questions require and deserve more detailed analysis than can be offered in this report.

Finally, there is the thorny problem of abuse. Much of the misery of the world is attributable to the abuses of government. This report alludes to some of the policies of Northern governments that worsen the situation of the world's poor. Many governments of the developing world, however, are guilty of neglecting their responsibilities or violating the rights of their people. Billions of dollars donated to provide public services or strengthen economic development have been lost to corruption. In some countries, political élites live in comfort and make little effort to reduce the suffering of the majority of those they govern. In others, political ambition and intolerance have blighted the lives of millions and paralysed economic development. In the face of this hard experience, many will protest that it is irresponsible to focus on international responsibilities, thereby diverting attention from the failings of national governments. The point is worth making: it is true that foreign organisations can often do rather little to tackle poverty and injustice in the absence of a genuine commitment from national governments.

In the North, on the other hand, some influential voices will argue that, when Southern governments abuse their position, Northern ones have no duty to stand in for them. This argument is far more suspect because (as we have already argued) the responsibility of outside actors is not to help the governments of poor countries irrespective of their behaviour, but to help poor people whose economic and social rights are unmet, even when this is due to the misbehaviour of their governments. The last point is absolutely central to the direction of global policy.

### **Relevance of the human rights framework**

The human rights framework does not necessarily provide neat or precise solutions to questions of the sort listed above. This should not be surprising – even though many of these questions are certainly important. If we attempt to define the limits of transnational obligations, nevertheless, the human rights framework is useful in several respects.

First of all, it focuses attention on the rights of individuals rather than states. This makes it possible to scrutinise fairly the performance of both rich and poor countries against a universal standard of human dignity and freedom.

Secondly, it focuses attention on institutions and legal processes that are needed to give effect to rights. The most important institutions for giving effect to rights are national ones. The human rights framework focuses properly on the primary responsibility of national governments.

Thirdly, it assumes that international co-ordination and international institutions must play an important contributing role in action that is taken to end extreme poverty and achieve economic and social rights. This implies that international capacity and international institutions need to be competent

and effective – and that they may need to be strengthened or reformed.

With respect to international action, disputes will inevitably arise, because resources are finite, between the claims of the poor and the capacities of the rich. Credible ways must be found to resolve such differences.

Legitimate ways must also be found to determine when failure at national level gives rise to obligations on states abroad; and when a state's policies make it complicit in a pattern of abuse of ESC rights in other countries.

In relation to these and other issues of this sort, it is a virtue of the rights-based approach that it demands a system of rules, and ways to adjudicate between competing rights claims.

What then does international human rights law say on such questions? Relevant legal principles can be found in the UN Charter, the International Covenant on Economic, Social and Cultural Rights (and other human rights treaties), and customary international law including the Universal Declaration of Human Rights. There is also growing support for such obligations in various 'soft law' standards.

### **The United Nations Charter**

The promotion of human rights is a chief concern of the UN Charter, which was adopted in 1945. Article 1(3) includes among the purposes of the United Nations:

To achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.

Article 55 specifically affirms that the UN shall promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion". Article 56 contains the commitment that

All Members pledge themselves to take joint and separate action, in co-operation with the Organisation for the achievement of the purposes set forth in Article 55.

While this language seems strong, its power to trigger obligations is somewhat limited, because Article 55 describes purposes but not substantive requirements. Questions of interpretation have addressed whether "joint and separate action" refers to the actions of international organisations or individual member states as well, and whether the obligations are substantive or procedural. The established interpretation, as seen in later development of human rights treaties and customary law, is that

states are required to take joint action to promote human rights internationally and are also required to promote such rights domestically.

Article 2(7) of the Charter is also particularly relevant. It states that:

Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter.

However, while national sovereignty is respected throughout the UN system, it has also come to be recognised that human rights do not fall within the exclusive domain of domestic jurisdiction. States and organisations readily criticise human rights violations in other states, particularly if those violations are massive and systematic; this is no longer considered internationally as interference in internal affairs. There has been debate as to whether human rights are *obligations erga omnes*, or obligations which a state owes toward the international community as a whole.<sup>24</sup>

Thus the UN Charter affirms both that human rights in any state are a legitimate concern of every state, and that their promotion correctly entails both joint and separate action.

### **International Covenant on Economic, Social and Cultural Rights**

The International Covenant on Economic, Social and Cultural Rights (ICESCR) explicitly asserts that states' duties extend beyond borders. This treaty was adopted by the General Assembly in 1966 and entered into force in 1976. Article 2(1) says:

Each State party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the right recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

As discussed above, a separate treaty on economic and social rights was developed partly because it was understood that poorer countries needed

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<sup>24</sup> In a 1970 ruling, the International Court of Justice determined that "By their very nature ...[human rights] are the concern of all States. In view of the importance of the right involved, all States can be held to have a legal interest in their protection; these are *obligations erga omnes*". *Barcelona Traction, Light and Power Company Limited*, Second Phase, Judgment, I.C.J. Reports, 1970, p. 32, para 33. This was later confirmed in the 1993 declaration of the World Conference on Human Rights, which stated that the "promotion and protection of all human rights is a legitimate concern of the international community". Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, 12 July 1993, A/CONF.157/24, para 4.

help to fulfil these rights. Debates during the drafting of the Covenant, and its subsequent interpretation, indicate that the drafters assumed that the resources of poor countries alone, even if used to their maximum extent, would not be sufficient to reach the Covenant's goals. International co-operation – including technical, financial, legislative, social and cultural – was therefore necessary.

This assumption has since been further explored by the UN Committee on Economic, Social and Cultural Rights. In a General Comment (an authoritative interpretation of the provision), the Committee noted that the "maximum resources" that should be used for the realisation of economic, social and cultural rights include both those "existing within a State and those available from the international community through international co-operation and assistance". Furthermore:

It is particularly incumbent upon those States which are in a position to assist others in this regard. ...[The Committee] emphasises that, in the absence of an active programme of international assistance and co-operation on the part of all those States that are in a position to undertake one, the full realisation of economic, social and cultural rights will remain an unfulfilled aspiration in many countries.<sup>25</sup>

It is interesting to note that the civil and political rights covenant contains clear territorial clauses, limiting the duties of states to those "within its territory and subject to its jurisdiction". Yet, in practice, states have accepted certain transnational obligations with respect to these rights. The ESC Rights Covenant, in contrast, contains no territorial limitation, and indeed points to transnational obligations, but states have been less ready to accept this.

Such duties are specified further in the Committee's General Comment regarding Article 11 of the ICESCR. Article 11 (2) provides that "State Parties to the present Covenant, recognising the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed..." The Committee indicated the type of measures this will entail:

State parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required. States parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention and consider the development of further international legal instruments to that end. States parties should refrain at all times from food embargoes or similar measures which

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<sup>25</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No. 3 (State Obligations) 1990, paras 13 and 14.

endanger conditions for food production and access to food in other countries. Food should never be used as an instrument of political and economic pressure.<sup>26</sup>

General comments issued by the Committee in relation to the rights to health and education have similarly emphasised that states' legal obligations in respect of these rights extend beyond their own borders. In relation to health, for example, the Committee noted:

...that the existing gross inequality in the health status of people, particularly between developed and developing countries, as well as within countries, is politically, socially and economically unacceptable and is, therefore, of common concern to all countries.

The Committee went on to demand that states "comply with their commitment to take joint and separate action to achieve the full realisation of the right to health". Among other points, the Committee stressed that states must take due account of the right to health when they participate in international organisations or grant international loans and credits. The Committee explicitly called on states to "prevent third parties from violating the right [to health] in other countries, if they are able to influence these third parties by way of legal or political means".<sup>27</sup>

### **Convention on the Rights of the Child**

Further legal support for saying that states have transnational obligations in relation to ESC rights can be found in the UN Convention on the Rights of the Child. Article 4 says explicitly that, with regard to ESC rights in the treaty:

States Parties shall undertake such measures to the maximum of their available resources and, where needed, within the framework of international cooperation.

Specific guarantees in the treaty concerning rights to education and health also mention the needs of developing countries.

The Committee charged with overseeing the Convention's implementation has regularly questioned states about these transnational obligations. The Committee's former Chair, Thomas Hammarberg, has noted:

Donor governments never questioned the appropriateness of [the Committee] raising these aspects. It was generally accepted that there

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<sup>26</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No. 12, On the Right to Adequate Food, paras 36 and 37.

<sup>27</sup> The right to the highest attainable standard of health: General Comment No. 14, E/C.12/2000/4.

was an *international* dimension of the duties of the government to implement the convention.<sup>28</sup>

### **Customary international law**

Article 28 of the Universal Declaration of Human Rights states that:

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully utilised.

Article 22 of the Declaration guarantees respect for economic, social and cultural rights “indispensable for [human] dignity” and proclaims they should be realised “through national effort and international co-operation”.

The Universal Declaration of Human Rights, adopted in 1948, did not impose legally binding obligations. Its legal standing, however, has changed. Over time, much of its content has come to be recognised as part of customary international law, and as such it can impose legal obligations on all states and other subjects of international law.

Several components determine that the Universal Declaration has achieved the status of customary international law. These include, for example, human rights provisions that are now a standard part of many national constitutions and laws; references in UN resolutions regarding the “duty” of all states to observe the Universal Declaration; UN resolutions condemning specific human rights violations as violations of international law; statements by national officials criticising other states for serious human rights violations; a comment of the International Court of Justice that *obligations erga omnes* in international law include those derived “from principles and rules concerning the basic rights of the human person”;<sup>29</sup> and decisions in various national courts that refer to the Universal Declaration as a source for judicial decision.<sup>30</sup> By its nature, customary international law is more difficult to specify than formal treaties; nonetheless these are among the elements that help to identify it.

While the Universal Declaration may generally be considered to have entered into international customary law, some parts of it are clearly more established there than others. Freedom from torture or arbitrary killing or systematic racial discrimination, for example, is better established than the rights to work, education and adequate health care. These continue to evolve. Health care, for example, particularly access to patented medicines, is an area currently receiving great attention. The nature of the duties obligated by customary

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<sup>28</sup> Correspondence to ICHRP.

<sup>29</sup> Barcelona Traction Judgment, 1970.

<sup>30</sup> See Oscar Schachter, “International Human Rights”, *Hague Academy of International Law, Recueils des Cours*, 1982, pp. 334-335.

international law will continue to develop, particularly in response to the challenges of globalisation where the actions of some states and also non-state actors may have immense impacts on the human rights of populations residing in other states.

As a sign of this evolution, one might point to several political declarations where richer states have formally committed themselves to shouldering some of the responsibility for tackling global poverty. In the Millennium Declaration, for example, adopted unanimously by the UN General Assembly, UN Member States:

...recognise that, in addition to our separate responsibilities to our individual societies, we have a collective responsibility to uphold the principles of human dignity, equality and equity at the global level. As leaders, we have a duty to all the world's people, especially the most vulnerable....<sup>31</sup>

Further clauses of the Millennium Declaration recognise that "Global challenges must be managed in a way that distributes costs and burdens fairly in accordance with basic principles of equity and social justice". Development targets in the Declaration are introduced with an explicit commitment on the part of all governments "...to spare no effort to free our fellow men, women and children from the abject and dehumanizing conditions of extreme poverty...". The Declaration makes a number of explicit demands on richer and developed countries (for example, to open their markets to duty-free exports from the poorest countries).

The International Conference on Financing for Development, held in Mexico in March 2002, produced the "Monterrey Consensus", a text agreed by the fifty heads of state or government who participated. The statement recognises that primary responsibility for tackling poverty lies with national governments but notes: "At the same time, domestic economies are now interwoven with the global economic system and, inter alia, the effective use of trade and investment opportunities can help countries to fight poverty". In relation to Official Development Assistance (ODA) the states "recognise that a substantial increase in ODA and other resources will be required" to meet the development targets in the Millennium Declaration, and call for "concrete efforts" by developed countries to increase levels of ODA.<sup>32</sup>

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<sup>31</sup> United Nations Millennium Declaration, adopted by the UN General Assembly, 18 September 2000, A/RES/55/2.

<sup>32</sup> Monterrey Consensus, Outcome of the International Conference on Financing for Development, 21-22 March 2002, A/CONF.198/3.

## UN Commission on Human Rights

The UN Commission on Human Rights, a political body composed of some 50 governments, regularly appoints Rapporteurs to cover specific human rights issues, including economic and social rights issues. While the Rapporteurs' mandates vary, they are generally empowered to visit countries, receive allegations of violations, and report on efforts to strengthen respect for the right they monitor.

Several UN Rapporteurs have drawn attention to transnational obligations in relation to specific rights. In his report to the Commission in 2002, for example, the Special Rapporteur on the Right to Food noted that trade liberalisation can damage food security, for example when markets in developing countries are flooded with cheap imported food drawn from surplus stocks in the developed world.<sup>33</sup>

In her report to the Commission in the same year, the Special Rapporteur on Extreme Poverty emphasised that both the IMF and the World Bank are required to ensure that, when they advise a state, they do not recommend policies that will conflict with its human rights obligations.<sup>34</sup>

The Special Rapporteur on the Right to Education has argued that, if universal primary education is to be achieved, donor (and creditor) governments as well as international financial institutions must support the right. She argued "...the universality of the right to education is premised on international co-operation – so as to equalize opportunities for the enjoyment of the right to education by supplementing the insufficient resources of poor countries".<sup>35</sup>

The UN High Commissioner for Human Rights has also referred formally to transnational obligations in relation to ESC rights. In a report on Globalisation and Human Rights, the High Commissioner drew attention to the potential negative effects of trade liberalisation, reminding states "...of the general responsibility to respect human rights in other countries and [encouraged] World Trade Organisation (WTO) Members to negotiate in ways that would enable acceding countries to respect, protect and fulfil the human rights of their own people".<sup>36</sup>

In a resolution on the same subject the Commission on Human Rights reaffirmed "... States' collective responsibility to uphold the principles of

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<sup>33</sup> E/CN.4/2002/58.

<sup>34</sup> E/CN.4/2002/55.

<sup>35</sup> E/CN.4/2002/60.

<sup>36</sup> Mary Robinson, 2002, E/CN.4/2002/54 at para 53.

human dignity, equality and equity at the global level".<sup>37</sup> A further resolution called on all states to alleviate "the unsustainable external debt burden of countries that meet the criteria of the HIPC initiative".<sup>38</sup> Other resolutions were voted on and passed that condemned the effects on the rights to life and health of the illicit cross-border transfer and dumping of toxic waste, and the effects on ESC rights of structural adjustment policies and foreign debt.<sup>39</sup>

### **Conclusions on international law**

As early as 1971, the International Court of Justice concluded that the provisions in the UN Charter concerning human rights placed specific legal obligations on states in relation to their own citizens, and that when such obligations were breached there might be legal implications for other states. This opinion was given in relation to South Africa, its illegal occupation of Namibia, and the extension there of *apartheid* policies.<sup>40</sup> Clearly the strength of obligations on outsiders will depend to a great degree on the nature and scale of abuses. States recognise that they might be required to act to prevent genocide or war crimes in other countries (hence their general reluctance to apply either term in specific situations). In relation to many human rights concerns, states do accept obligations to do what they can to prevent or punish violations that are occurring in other countries.

If such obligations exist for civil and political rights then it is reasonable to apply them also to economic and social rights. Indeed, as seen above, explicit language in international treaties makes clear that the obligation to respect, protect and fulfil these rights falls also on outside states. Authoritative interpretations of these treaty provisions confirm this. Experts appointed by the United Nations Commission on Human Rights increasingly refer to such obligations. If they do not clearly recognise a legal obligation of richer states, recent declarations by large numbers of governments on development issues demonstrate a growing acceptance that responsibility for tackling poverty, disease and under-development must be shared.

What might "shared responsibility" imply in practice? We look next at how the responsibility of foreign governments (and other actors) in relation to ESC rights might be assessed.

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<sup>37</sup> Resolution 2002/28.

<sup>38</sup> Resolution 2002/24, the HIPC initiative is the World Bank's Heavily Indebted Poor Countries initiative.

<sup>39</sup> Resolution 2002/29.

<sup>40</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) I.C.J. Reports, 1971.



## IV. ASSESSING TRANSNATIONAL OBLIGATIONS: A PRELIMINARY FRAMEWORK

Previous chapters reviewed the nature of ESC rights and the types of obligations they give rise to, and confirmed that, in international law, obligations can extend beyond borders. This chapter sketches out a preliminary framework for assessing when such transnational obligations might arise.

Chapter II noted that duties in relation to human rights might arise in cases where ESC (or civil and political) rights are unfulfilled, including in cases where there is no clear perpetrator, and where the duty-bearer had no role in causing or perpetuating the violation in question. It is important to bear these points in mind as we sketch out this framework.

Through their actions or policies, outside governments may directly or indirectly cause or aggravate violations of ESC rights in other countries. In other cases, they cannot sensibly be considered to be responsible. Their obligations in the two cases are somewhat different, and we therefore examine them separately.

### **When outside states or actors are implicated in violations of ESC rights in other countries**

The argument that governments contribute to, or are somehow complicit in human rights abuses in other countries, arises in relation to any number of issues, covering all categories of rights.

It is alleged that foreign states (or other outside actors) have been responsible for violations in this way, for example, when they have:

- exported military or police equipment to a country knowing that it might be used to commit human rights abuses;
- permitted the export of hazardous waste to countries that lack the resources to dispose of it in ways that are not harmful to human health;
- maintained sanctions despite clear evidence that they are causing malnutrition, infant mortality and worsening health standards;
- allowed perpetrators of human rights violations to escape prosecution for their crimes at home by permitting them to enter or remain in the country;
- facilitated the financing of development projects that lead to forced and arbitrary displacement or without adequate compensation;

- established or maintained investment in a country, to the material benefit of its government, thereby enabling that government to oppress its citizens or pursue a repressive war;
- pursued trade policies that result in loss of food security, for example by knowingly subsidising food exports to poor countries although the effect is to undercut local farm prices and thereby endanger local livelihoods;
- authorised the sale to a repressive government of computer software that allows that government to interfere with private correspondence;
- enforced patent laws in the knowledge that doing so will prevent poorer countries from supplying low-cost medicines;
- required repayment of debt by poor countries in the knowledge that doing so will depress expenditure on health, education, and other social budgets.

In cases of this sort, it may be straightforward or difficult to establish a direct link between the policies and actions of an outside state and specific violations of rights. We can illustrate this by reference to some of the issues listed above.

Consider, for example, the export of equipment that might be used to commit torture. International law prohibits definitively the practice of torture. It can be argued that the importing state alone is to blame, because it chose to import the equipment and used it for torture. On the other hand, a strong argument can be made that the exporting state will be an accomplice, and should bear part of the responsibility, if it licenses the equipment for export *in the knowledge* that it will be so used. A number of countries have laws that restrict the sale of military and police equipment on precisely such grounds. Where it is clear that the equipment will be misused due to its nature, knowledge can be assumed. Where such equipment can also be used for legitimate purposes, however, such knowledge, or intention to torture, can be difficult to prove.

Establishing a link between debt repayment and violations of economic and social rights is even less straightforward. When outside states enforce repayment of debts, this reduces the debtor government's funds. As a result, teachers may be unpaid and hospitals may remain unbuilt – and the rights of patients and schoolchildren may suffer in consequence. However, it may not be simple to show that debt enforcement led to cuts in these budgets (rather than, for instance, the defence budget). Moreover, some argue that it is responsible to enforce payment of debts because this encourages debtor states to achieve fiscal discipline and balanced budgets, both of which are necessary for economic growth, which alone in the long-term can raise living

standards in the country and eventually enable rights to be protected in a sustainable manner. In the case of debt, therefore, the *reasoning* behind the human rights claim against outside states can be questioned, as well as the directness and strength of the link between the outside state's policies and the violation.

In the case of the export of torture equipment, disputes on the second state's complicity will turn on the facts. (Were they aware that the equipment would be used inappropriately?) In the case of enforcing debt repayments, disputes might be factual, but even where facts are agreed there is likely to be a dispute on causality. The fact that the debtor government can choose to cut spending in different areas puts the creditor government at one remove from the closing of schools or hospitals. However, where a creditor government is aware *over time* that debt repayment is leading to a deterioration in the enjoyment of ESC rights its responsibility for that result will grow. Outside actors have a more obvious duty to change policies and actions when they know that these policies cause or aggravate violations of human rights.<sup>41</sup>

This is certainly true in relation to civil and political rights, where the principle is clearly established that states must not knowingly contribute to violations of rights in other countries. Laws prohibiting the export of torture equipment were mentioned, but there are other examples: laws that prohibit import of goods made by prison or child labour, or export of arms to countries where evidence shows they will be used to violate rights, or granting of asylum to alleged war criminals (thereby allowing them to evade justice at home).

That states have an obligation to ensure that their policies and practices do not lead to ESC rights violations in other countries is less clearly recognised. This said, the idea that such an obligation *might* exist is increasingly apparent in debates concerning access to medicines, debt relief and the response to the AIDS pandemic.

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<sup>41</sup> An emerging discussion about historical violations of rights raises particularly difficult questions with respect to attribution of responsibility. Such claims require those who make them to prove the directness of links over time as well as in space. Examples include claims for reparations made by people who are descendants of slaves against states or companies that were formerly associated with the slave trade; and claims for reparations against European States or the United States made by representatives of countries that were formerly colonised. Whereas the nature of the violations against those who were enslaved is evident, it is difficult to show that damage due to those violations was inherited by their descendants – or indeed to track who those descendants are, in practice – and equally difficult to show that those who exercise authority today, in countries or companies that were formerly involved in slavery, inherit a responsibility for violations that were committed by their predecessors. Acts of reparation have been made, of course. In New Zealand, the injustices suffered by Maoris have been officially recognised; though this was essentially on political grounds. Jews who were victimised under Nazism have also been compensated, following legal claims. In the latter case, the proximity of the events in question to our own time certainly strengthened the legal force of the claims made.

## **When outside actors have no obvious responsibility for ESC violations**

In many instances, outside actors have no responsibility for violations that occur in other countries (or no responsibility that can sensibly or legally be imputed to them). It is, nevertheless, accepted that they may nevertheless sometimes have a responsibility to act to assist those whose rights are unfulfilled or violated.

Treatment of the debt question illustrates this point. It is often argued in defence of debt repayment that the countries concerned incurred the debt and have a duty to repay it. Those in favour of moratoriums or relief, on the other hand, often reply that the governments that now have to repay were not responsible for incurring the original debt, and that those who granted the original loan did so in the knowledge that it was made to a corrupt or ineffective government that was likely to default. They conclude that lenders should share responsibility and accept part or all of the loss.

These arguments lie on the fault line we identified earlier. Both assume that the perpetrators can be readily identified. It can be argued, however, that, in circumstances where vulnerable groups of people are made more vulnerable by indebtedness, national governments and other states have a duty to work together to protect and assist those at risk – irrespective of the responsibility of either party or others for causing the problem concerned. To identify the proper action of duty-holders, it is first essential to protect those whose rights are violated; identifying perpetrators may not be relevant or may be a separate matter.

In relation to debt repayment (and some other issues, such as management of the effects of early structural adjustment policies), this distinction indeed guided the reasoning that led to policies adopted by the international community. In effect, it was agreed that action was necessary to protect vulnerable groups, whose subsistence rights were violated, even though the argument about who and what were responsible for causing their vulnerability has not been resolved.

Natural disasters provide an even clearer example. Following volcanic eruptions, floods or drought, evidence frequently emerges that state authorities were negligent in protecting their populations from foreseeable risk. This does not cause outside governments to withhold assistance. It is clear to all parties that action should be driven by the needs of those who are at risk. By contrast, assistance may be withheld in circumstances where outside donors believe that local authorities will obstruct those in need from getting access to it – but this confirms that the obligation to which outside donors are responding is to the affected people. The presence and responsibility of a violator is considered relevant only in so far as it may impede or prevent outsiders from providing aid effectively.

The essential point to underline is that gravity of need (level of violation) should determine the response of both national governments *and* the international community. The protection of those whose rights are violated should drive state action, and *all* states should accept that they have an obligation (legitimised by international human rights law) to protect people *everywhere*, when their rights are seriously violated.

This argument has been developed by the International Commission on Intervention and State Sovereignty (ICISS), which speaks of an international *responsibility to protect* people at risk of genocide or crimes against humanity.

The Commission considered a specific and limited question, whether armed interventions from abroad are justified to prevent grave abuses of human rights. Interestingly, however, it did not seek to restrict the application of its argument to other kinds of situations, such as cases of famine, natural disaster, or environmental degradation. We examine the ICISS report in more detail in Part Two, when we discuss the principle of state sovereignty.

### **Developing a framework for transnational obligations**

When considering whether states have a duty to take action in other countries to protect or fulfil human rights, including economic, social and cultural rights, or end violations of those rights, we therefore need to consider the following questions:

- What obligations do states have when violations occur in other countries as an indirect or direct result of their own policies or actions?
- What obligations do states have when violations in other countries are grave, and cannot be managed by national duty-bearers, but are not caused or aggravated by the outside state's policies or actions?
- What obligations do outside states have when national duty-bearers make a substantial effort to fulfil their own obligations?
- What obligations do outside states have when national duty-bearers do not make a substantial effort to fulfil their obligations or are themselves responsible for the violations in question?

When this list of questions is considered, alongside the list of examples cited earlier, it is clear that no simple mechanism is likely to describe the obligations of states in relation to human rights violations in other countries. It is also evident that no simple model will describe the range of actions that outside states should consider in order to meet their obligations. Further, in addition to foreign states, other "outsiders" (private companies, for example) may have

some responsibility for violations, or may (like UN agencies) share the responsibility to act. Too many variables are in play, and responsibilities are incurred – to varying degrees – in too many circumstances. Before going in more detail into possible approaches, it may nevertheless be useful to signal a few rules of thumb or criteria (rather than principles) that may be relevant.

To start with, duty-bearers closest to those whose rights are violated have the first responsibility to respond to violations of ESC and other rights. In most cases, this means national governments. National governments alone (and to a lesser extent other national actors) are in a position to put systems of law and regulatory frameworks in place that will effectively protect rights.

Outside states have a duty to assist when a government lacks the resources or capacity to take the necessary actions alone.

Further, outside states have a duty to act when a government is unwilling to prevent violations of rights in their territories or is itself the cause of those violations. The obligation on outside states is limited in practice, in particular by their own capacity to respond. Their duty is to act, within their capacity, to assist and protect those whose rights are being violated.

The fact that ESC rights are qualified (progressive realisation, recognition of resource constraints), and that effects are often indirect, makes it more difficult to identify clearly when outsiders are responsible for violations of ESC rights. Principles of international responsibility are better established in relation to civil and political rights. Where principles in relation to civil and political rights are well established, their applicability to violations of economic and social rights should be tested wherever possible.

When an outsider's policies can be shown to cause or aggravate violations of ESC rights, or prevent their fulfilment, the closeness and directness of the link will be relevant both to the degree of responsibility and to the obligation to act. Where clear evidence exists that a state's acts (or failures to act) cause or aggravate violations of rights in another society, that state will have a rather strong duty to reform its policies so that the violations end. Where the state takes no action to reform, knowing the effects of its behaviour, one can speak of its complicity in the violations concerned.<sup>42</sup>

Where the link between an outside actor's behaviour and violations of rights is less direct or less discernible, its responsibility (and therefore its duty to respond) is weaker. For example, where private institutions (banks, international companies) are responsible for violations, outside states may have limited control over them. In other cases, the chain of effects between an

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<sup>42</sup> For a discussion of complicity, in the context of business responsibility, see International Council on Human Rights Policy, *Beyond Voluntarism*.

outside state's policies and identified violations may be so long or so indirect that the state cannot credibly be held responsible for causing them, and actions that it might be in a position to take would be unlikely to end them.<sup>43</sup>

The obligation to act should be considered separately from the question of responsibility for the abuse. Where a party is responsible for violations, it has a duty to change its policies and behaviour so that the violations cease. However, in many circumstances outsiders have an obligation to help end violations of ESC and other rights abroad even when they have no responsibility for causing them. Indeed, in many cases of unfulfilled ESC rights, there is no clear perpetrator.

### **In summary**

Foreign states have responsibility to the degree:

- that they directly or indirectly contribute to the violations concerned;
- that the national state is unable, for lack of resources or capacity, to end the violations on its own;
- that the national state is unwilling to act to prevent the violations, or is itself responsible for them;
- that the violations are grave and widespread, particularly when they have an international character.

In taking action, outsiders should take the following responsibilities into account:

- their duty to ensure that the first and overriding aim of action is to end the violations in question and protect and promote the rights of those whose rights are unmet or are being violated;
- their duty to reform their own policies and actions where these cause or aggravate violations in other states;
- their duty to support national duty-bearers (notably national governments) in their attempts to take sustained and effective action to end violations of rights that occur on their territory;
- their duty to consider all forms of action that will effectively mitigate or end the violations in cases where national duty-bearers are not willing to take action or are responsible for the violations concerned. Choice of policy should be governed by the overriding objective to protect those whose rights are unfulfilled or being violated.

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<sup>43</sup> As mentioned in footnote 41, this is a major obstacle to successful application of claims of responsibility in relation to abuses that occurred a long time ago – for example, during the slave trade.

This summary takes the argument a certain distance – but not by any means as far as it needs to go. The above ‘conclusions’ remain general and lack means of application. Who, for example, is to decide on the extent of responsibility in a given case? How is the proximity of a state to a given violation to be measured objectively? What institutions might be in a position to monitor or sanction states that are found to be guilty of causing violations of rights or impeding their fulfilment? Initially, when this report was conceived, the Council hoped to test particular policy approaches by examining some specific cases (for example, management of international debt, investment, trade or aid). This turned out to be one bite too many (though it might be the subject of future research). In detail, each of these issues is highly complex and there is no political consensus about how they should be described. In addition, as noted already, it will not be useful or appropriate to apply the arguments in this report in a mechanical fashion.

To become useful, these very general principles and values will need to be adopted and interpreted in specific cases, over time. In that sense, this document marks a path that is essentially indicative.

This said, it is clear, first, that governments (and in certain instances, other actors) do have international obligations; that such obligations are reflected in, and assumed by, international human rights law; and that, though subject to development, the application and extension of such obligations is likely to become more specific and significant over time.

## PART TWO

### THE PRINCIPLE OF STATE SOVEREIGNTY

The principle of state sovereignty has been a central element in the development of international law, including international human rights law. Part Two examines the constraints on transnational action that the principle of state sovereignty has imposed. It discusses the evolution of new thinking in relation to sovereignty, and suggests that the emergence of a parallel principle, the “responsibility to protect”, may offer a way forward.



## V. STATE SOVEREIGNTY

The international order was created by states that, at least in law, are considered equal and sovereign. States co-operate internationally on this basis. We have seen that international law in its various forms includes provisions that support the notion of transnational obligations. These obligations specifically include obligations in relation to economic and social rights. Yet, if states have duties to protect human rights in other states, what are the implications for sovereignty?

Might action to fulfil duties abroad amount to interference with state sovereignty? If so, would this matter? What risks would be incurred if, in the course of promoting economic and other rights, the norm of sovereignty were to be eroded? As some of those who commented on this report noted, could the case for transnational obligations be used by powerful states to further expand their reach and influence over weaker states?

Raising such questions might appear odd to human rights advocates, who have traditionally been deeply sceptical about sovereignty and its use by states to defend themselves against justified criticism. Yet, in relation to economic and social rights, many advocates both defend the right of poor countries to decide their own economic priorities and protest against 'interference' by foreign investors and international economic institutions such as the International Monetary Fund and the World Bank. Though the concept of sovereignty seems outmoded, requiring reform, human rights might indeed be endangered in certain respects should states become unable to assert principles of non-interference.

As we argued at the outset, national states – no matter how poor – are the primary duty-bearers in relation to human rights and protection of people under their authority. The responsibility of other states is triggered only when those states are themselves responsible for violations or when a national state cannot meet its obligations and an outside state is in a position to assist.

For all the talk of decline of the nation state, and the rise of new global actors, international politics remains structured around states. Though their influence may be shrinking in some areas, and they will continue to adapt to changes in the environment, states are not likely to disappear. Indeed, in many areas their influence and authority have continued to increase. We have alluded already to the fact that states alone are in a position to manage the huge long-term social investments that are fundamental to the achievement of economic and social rights. With these assumptions in mind, this section examines the degree to which state sovereignty challenges the notion of

transnational obligations. Doing so involves examining how the idea of sovereignty is changing.

### **The changing norm of sovereignty**

In its classic form (conventionally dated to the Treaty of Westphalia in 1648), a state is sovereign when it has undivided jurisdiction over its territory to the exclusion of rival powers. A sovereign state keeps external forces out, thus protecting its people, and regulates the internal life of the nation so as to ensure order and facilitate prosperity. These two facets of the norm of sovereignty are related. In theory, sovereign states can claim freedom from external interference because they are competent to govern themselves. A third core feature of the norm of sovereignty is the legal equality of sovereign states. Just as states have no internal equal, they have no external superior. This is the basis of the principle of non-intervention.

Thus theory. Practice was never so tidy and has changed over time. Empirical and conceptual challenges to the traditional legal doctrine of sovereignty are now putting the norm under considerable strain. This is evident both in relations between sovereign states and in relations between sovereign states and their populations.

### **Relations between states**

The equality of sovereign states is a legal artifice. Procedural equality mandates every state to vote in the UN General Assembly on equal terms. In the same manner, all have equal standing in the International Court of Justice, regardless of size, wealth or power. In some ways, this is a triumph for inclusion and participation. By granting even poor or less powerful states a voice and a vote in international fora, state sovereignty may be considered a 'weapon of the weak'.

On the other hand, because of the concept of sovereignty, national states can claim (and are assumed to exercise) sole responsibility in law over their affairs, despite the presence of gross unresolved economic and political inequalities and huge disparities in resources to deal with them. Economic activity is increasingly regulated by international law and international institutions (through the World Trade Organisation, the World Intellectual Property Organisation, the International Monetary Fund etc.), while private corporations are increasingly active across the globe, whether or not they are transnational in structure. These trends strongly influence trading patterns, employment, investment and resource extraction – and are often largely outside the direct control of national governments. They may result in inequalities between and within states that markets alone cannot resolve. Under the legal principle of sovereign equality, however, the inequality

between states is unrecognised while inequality within states – though it may be caused or aggravated by external processes and actors – is treated in law as a matter of internal policy alone.

In this way, the legal artifice that sovereign states are equal serves to obstruct effective action to deal with numerous economic and social problems, both nationally and internationally. Governments can exploit the principle of sovereignty to inhibit investigation of their misdemeanours and failures, and at the same time inhibit the development and operation of effective and politically accountable international policies and institutions.

In reality, of course, international fora are stratified in numerous ways. Historically, the principle of sovereign equality has been balanced against the interests of great powers and the need for efficiency. The “Concert of Europe”, the “Allied Powers” at Versailles, the “Permanent Five” of the UN Security Council, the “G-8”, the two-tiered structure of the Nuclear Non-Proliferation Treaty each illustrate this. However, inequalities in influence and power are treated as political rather than legal issues, and thus have no *legal* recognition or redress.

In light of this situation, one author argues that there is

a relationship of mutual containment between sovereignty and inequality. The system of sovereignty at least notionally precludes some forms of inequality, while helping to exclude other forms of inequality from real consideration.

According to this view, the increasing visibility of global inequalities has tended to turn the traditional sovereignty-based system of international law into a “travesty in which priorities of good governance and human welfare were subordinated to a very formal commitment to ineffective structures”.<sup>44</sup>

### **Internal capacity and performance**

As noted above, the claim to sovereignty from external interference was based on a claim to internal competence. Sovereign states were required to be able to govern themselves. Over time, what this meant evolved far beyond the minimal duty to maintain order. It came to be assumed that states should provide political and also economic stability, and ensure citizens a degree of social welfare. At the same time, some states increasingly failed the two original tests of sovereignty: they became increasingly unable to prevent interventions from abroad or increasingly unable to maintain domestic order or protect their people.

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<sup>44</sup> Benedict Kingsbury, “Sovereignty and Inequality”, *European Journal of International Law* 9, 1998, pp. 602, 616.

The latter trend emerged particularly in the second half of the twentieth century, when many new states were formed following the dissolution of European colonial empires. Self-determination became a widely accepted norm. These new states were granted legal sovereignty, including international recognition and legal equality with other states. Most did not have to prove that they could protect themselves from outside interference and manage their internal affairs. Many did not succeed in developing these capacities.

The problems this posed for international and national governance have been exacerbated by the fact that, in an increasingly globalised world, modern states need to be able to pursue their national interests effectively in international fora. The ability of states to participate in, and influence, international negotiations on matters that concern them can affect the well-being of their citizens (and protection, fulfilment and respect of their human rights) as decisively as control over economic, political and military resources.

The classic picture of sovereignty portrayed the state as protector of its people. Gradually, this norm has evolved: rather than having responsibility *for* their people, states are expected to be responsible *to* their people – a shift from rule to representation, from authority derived from power to authority based on democratic accountability and realisation of common interest.

In reality of course, states throughout history have often been predatory. Around the world, people are far more apt to be harmed by their own than by other governments. Harm results from numerous forms of misgovernment – political and military repression, graft, judicial corruption, economic discrimination against minorities and so on. Such behaviour clearly offends against the norm of sovereignty. The norm nevertheless protects abusive governments and corrupt élites, who can appeal to sovereignty and insist on non-interference in their internal affairs whenever they face international pressure to reform. For this reason, some have called sovereignty a “refuge for scoundrels”.<sup>45</sup>

Thomas Pogge goes further and blames the corruption and abuses common in many poorer countries on the international system, and the principles of state sovereignty on which that system is built. He argues that local élites can afford to be oppressive and corrupt because they are armed and financed from abroad and can stay in power even without popular support. Furthermore, they can make more money by catering to the interests of foreign governments and corporations rather than the interests of their citizens.

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<sup>45</sup> Donald Rothchild, “Responding to Africa’s Post-Cold War Conflicts,” in Edmond Keller, and Donald Rothchild, eds., *Africa in the New International Order: Rethinking State Sovereignty and Regional Security*, Boulder, CO: Lynne Rienner Publishers, 1996, p. 231.

Any group controlling a preponderance of the means of coercion within a country is internationally recognised as the legitimate government of this country's territory and people – regardless of how that group came to power, of how it exercises power, and of the extent to which it may be supported or opposed by the population it rules.<sup>46</sup>

When states recognise such an unrepresentative group as the legitimate government, they negotiate with it, consider it in law to be acting for the people of the country concerned, and “confer upon it the privileges freely to borrow in the country's name ...as well as freely to dispose of the country's natural resources....”<sup>47</sup>

In its various forms, state sovereignty may then strengthen the weak, paralyse responsible policy-making, or protect scoundrels. Clearly it is under pressure from different directions. How might the norm of state sovereignty be adjusted – or should it even be abandoned and replaced?

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<sup>46</sup> Thomas Pogge, “Human Rights and Human Responsibilities”, in Ciaran Cronin and Pablo De Greiff, eds., *Transnational Politics and Deliberative Democracy*, Cambridge: MIT Press, 2002.

<sup>47</sup> Ibid.



## VI. RECONCEIVING SOVEREIGNTY

In this chapter, we briefly consider proposals to establish a supra-national form of government that might replace or oversee the exercise of state sovereignty, then examine more realistic claims that the exercise of sovereignty should be made conditional on performance. These introduce the sensitive issue of international intervention to constrain or end the exercise of sovereignty by abusive states.

### Alternative models

It is probably unrealistic to plan for a form of world government. If such an institution were to be established, it would become possible to dispense with the legal artifice of state equality, and peoples and governments could be represented on the basis of size and population. Substantive inequality would not of course be removed by the creation of a global institution. However, a functioning form of global government – perhaps like the European Union on a larger scale – could address violations of economic and social rights more effectively through global schemes of distributive justice.

Dispersing sovereignty downwards and sideways among a variety of institutions might bring practical benefits, at least in some cases. Many forms of devolution and autonomy have been tried, covering policy in relation to language, culture, religion, education, security, and economic policy. Under such arrangements,

central government and the regional or autonomous authorities could each be the lawful bearer of a share of sovereignty, without necessarily leading to the disappearance or dismemberment of the state.<sup>48</sup>

The European Union is an example of movement in the opposite direction, where separate states maintain their independence, yet pool their sovereignty in important ways.

Thomas Pogge takes a radical approach here too, proposing to reallocate political authority and dispense with much centralised power.

Persons should be citizens of, and govern themselves through, a number of political units of various sizes, without any one political unit being dominant and thus occupying the traditional role of state. And their political allegiance and loyalties should be widely dispersed over these units. ... People should be politically at home in all of them, without converging upon any one of them as the lodestar of their political identity.<sup>49</sup>

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<sup>48</sup> Ruth Lapidot, *Autonomy: Flexible Solution to Ethnic Conflicts*, Washington, DC: United States Institute of Peace Press, 1996.

<sup>49</sup> Thomas Pogge, "Cosmopolitanism and Sovereignty", *Ethics* 103, October 1992, p. 58.

The principal objection to dispersal of sovereignty is that it may not work. In the absence of a central authority, no agent is competent to make authoritative decisions; as a result, disputes over interpretation of a constitution or between different branches of a government may become unmanageable. Pogge states that this argument “has been overtaken by the historical facts of the last two hundred years or so, which now conclusively show that what cannot work in theory works quite well in practice”.<sup>50</sup> He is willing to trust in political checks and balances to settle differences and prevent abuse. In the real world, dispersing sovereignty might indeed promote cultural and political participation. By bringing decisions closer to affected people, it might also promote better implementation of policies to promote economic rights.<sup>51</sup> As Amartya Sen has underscored, progress in one area of rights will tend to protect and facilitate progress in all.

However, dispersing sovereignty will not lead to the disappearance of states. For the foreseeable future, states alone will have the political authority and institutional experience to manage the very large social investments, in education, health, social welfare, the environment, infrastructure and government, on which achievement of economic and social rights depends. If we must therefore live with states for a while longer, what steps might be taken to ensure that they fulfil their modern obligations responsibly?

One proposal is to subject states to international evaluation. States that failed to meet required standards of performance, and failed in particular to protect the safety and welfare of their citizens or respect other states, would forfeit the privileges associated with sovereignty. According to Raymond Hopkins, for example:

Intervention in a situation where violations of human rights indicate a lack of the guarantees justifying sovereignty does not violate the basic purposes of sovereignty. Once a government, although putatively having a legitimate monopoly of coercive power over a people and territory, fails to fulfil the basic purposes for its independence, to wit, providing safety and fundamental human rights to its population, then the principles that

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<sup>50</sup> Pogge, “Cosmopolitanism and Sovereignty”, p. 59. Lapidoth also contests this criticism, citing examples of success in the Aland Islands, South Tyrol, Aldo Adige, the Faroe Islands, West Berlin before the reunification of Germany, Greenland/Kalaallit, Nunaat, the Spanish provinces, and Puerto Rico.

<sup>51</sup> Many complex issues arise, nonetheless. See International Council on Human Rights Policy, *Local Rule – Decentralisation and Human Rights*, Geneva: ICHRP, 2002, which examines the role of local governments in protecting human rights. The research suggested that local democratic accountability can be helpful but (no surprise) local governments are also vulnerable to abuse. Redistribution is a challenge too: even with political goodwill, it is difficult to protect the economic rights of people living in poor communities and regions.

guarantee that state's immunity from intervention (under Article 2, paragraph 2 of the UN Charter) are undermined.<sup>52</sup>

However, who is to judge when a state's misbehaviour warrants intervention? Hopkins answers that decisions must be multilateral, reached jointly by many states meeting as equal members of international organisations, principally the United Nations. However, their inclusion as equal members rests precisely on the principle that Hopkins' proposal would weaken: sovereignty. Dispense with that legal fiction and it can more realistically be assumed that powerful states would decide to whom sovereignty shall be permitted and denied. Such a development might directly violate political rights.

Moreover, foreign military interventions, even when they have been taken for good reasons, have often exacerbated some of the problems they sought to resolve.

Finally, the inadequate performance of states may not be due primarily to venality, malice and greed (as in the cases Hopkins considers) but to poverty. Would the result not be that well-to-do states would enjoy sovereignty, while others would become second-class?

### **Responsibility to protect**

A comparable but more carefully argued approach has been put forward by the International Commission on Intervention and State Sovereignty. As the title of its report (*The Responsibility to Protect*) indicates, the Commission sought to draw attention, away from the rights and prerogatives of states, towards those of victims:

Our preferred terminology refocuses the international searchlight back where it should always be: on the duty to protect communities from mass killing, women from systematic rape and children from starvation.<sup>53</sup>

The Commission set high thresholds for military intervention in states that are unable or unwilling to protect their people. Multilateral interventions would be permissible only in cases where large-scale loss of life had occurred or was imminent (notably through genocide and ethnic cleansing). Intervention should be a last resort and should not be undertaken without reasonable prospects of success. The Commission also considered the process by

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<sup>52</sup> Raymond Hopkins, "Anomie, System Reform and Challenges to the UN System", in Milton Esman, and Shibley Telhami, eds., *International Organizations and Ethnic Conflict*, Ithaca, NY: Cornell University Press, 1995, p. 96.

<sup>53</sup> The International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, Ottawa, Ontario: International Development Research Centre, 2001, p. 17. The Commission also encouraged a broad range of action to deal with crises, and underscored the importance of prevention and reconstruction.

which a decision to intervene would be made. It called on the Permanent Five members of the UN Security Council to withhold their veto power in instances where their vital interests were not at stake and suggested that, when the Security Council failed to act promptly, proposals for intervention should be considered by the General Assembly. The Commission also foresaw the risk that a small group of states within the United Nations might have excessive power to determine where interventions occurred, though its recommendation that intervention should only occur when there were “reasonable prospects” of success suggests that no great power would ever face military intervention by the international community, whatever violence it inflicted on its own people.

### **Beyond the ICISS report**

*The Responsibility to Protect* focused exclusively on military interventions by outside governments that are intended to prevent or stop serious loss of life during a conflict, ethnic cleansing or acts of oppression by a national government. It did not consider the application of its argument to other large-scale and serious violations of human rights, including but not limited to those that threaten physical security. For example, it did not consider threats to food security or health care, or to civil and political participation. For this reason, the report does not apply international obligations to the full range of human rights, although its thoughtful language and careful analysis will contribute to further changes in the norm of sovereignty and enhance promotion of human rights.

The Commission’s essential argument is that the international community has an obligation to intervene and to protect people whose rights are seriously violated, when their own governments will not or cannot protect them. They reaffirm the principle of sovereignty, that national governments have the first duty to protect their people. When they fulfil this duty, interference by other governments is illegal and inappropriate. They argue, however, that the claim of sovereignty is conditional. If, above a certain threshold, governments do not protect their people or violate their rights, other governments are justified in intervening. They may even have a legal or quasi-legal obligation to intervene, forcibly if necessary, to protect the rights of those at risk.

Could the argument ICISS advanced be applied legitimately to non-fulfilment or violations of economic and social rights, of the sort that occur following major natural disasters or that are entrenched in very poor countries? Perhaps pointedly, the Commission did not argue in its report that such an extension would be inappropriate.

When considering whether the argument can be extended to cover a responsibility on richer countries to assist poorer countries to respect ESC rights, four questions require attention:

- Does opposition from the national government condition the justification to intervene? (Is forcible intervention justified?)
- Do the scale and gravity of violations condition the justification to intervene?
- Does the responsibility, or partial responsibility of an outsider condition the justification to intervene?
- Do such interventions need to pass arduous decision-making tests (approval by the Security Council or General Assembly etc.)?

In relation to each of these questions, it appears that the tests one might apply to justify intervention on social and economic grounds would be lighter and easier to satisfy than tests to justify military interventions of the sort discussed by the ICISS.

At the same time, some of the disputes about social and economic policy that have most sharply divided the international community are 'caught' by these questions.

#### *Opposition from the national government*

Different principles underpin discussion of the kinds of intervention the ICISS report addresses, on one hand, and interventions to reduce or end violations of ESC rights (as set out in the convention on ESC rights and in other human rights standards [see Chapter IV]), on the other.

Two core principles have governed discussion of military interventions. One is the principle of state sovereignty, discussed in this chapter and centrally affirmed in the UN Charter. The other is the less well-defined principle, to which the ICISS report attempts to add weight, that in certain circumstances states abroad have a duty to protect people in other countries from very grave abuses of their rights when the state responsible fails to do so.

The principles advanced to justify interventions that secure ESC rights, by contrast, emphasise co-operation. All things being equal, it is assumed that national states will welcome and support assistance to meet their ESC obligations.

Real cases are inevitably more complicated. In many instances, outside authorities, such as donor governments or multilateral organisations, recommend the adoption of policies which national governments oppose, or which national governments claim harm the economic and social well-being of the populations they govern. In some cases, outside authorities effectively impose such policies on national governments. The list of issues in Chapter IV provides several examples of such disagreements. Significantly, in relation to many controversies of this kind, both sides – the national government and outside actors – claim to be acting to protect the longer-term welfare of the population in question.

Notwithstanding the bitterness of many of these disputes (over debt relief, structural adjustment, or trade), it should be noted that they are less grave than those that underlie military interventions of the kind addressed by the ICISS report. In most matters of economic and social policy, co-operation is required and the parties involved accept this assumption. It is neither realistic nor desirable that external authorities should 'take over' responsibility from national governments. In practice, the participation of both national and local authorities as well as the populations affected is essential to the effectiveness of social and economic reforms and policies. Very few institutions argue differently, even if very difficult judgements sometimes have to be made about withdrawing co-operation from a few corrupt or criminal governments, despite the social consequences for vulnerable people in the societies concerned.<sup>54</sup>

As argued earlier in Chapter IV, when outsiders are unable to co-operate with the local government or local authorities, they should consider all the options available to them, but their first obligation throughout should be to meet the unmet needs of those whose rights are being violated. Occasionally this may involve radical action, such as bypassing local authorities, but in the majority of cases this objective will be met best when local authorities lead, and outsiders provide appropriate forms of support (direct assistance, institutional support, etc.).

#### *Scale and gravity*

The International Covenant on ESC rights, and other human rights standards that refer to international co-operation, do not indicate that assistance and co-operation should be influenced by the gravity of violations or the extent of non-fulfilment. The primary test is capacity. Where national governments are unable to meet their obligations, other governments should assist them when they can do so effectively.

In practice, scale and gravity *are* relevant. All things being equal, assistance should be made available in proportion to the scale of need. This is clearly not what happens. In the field of aid, some countries (Egypt and Israel, for example, in the case of United States assistance) receive a disproportionate amount of aid compared with much poorer countries, for political reasons. Despite the very large number of deaths caused by tropical diseases, few resources have been devoted to research on tropical diseases – though it is clear that additional research would almost certainly bring dramatic benefits.<sup>55</sup>

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<sup>54</sup> See International Council on Human Rights Policy, *Local Perspectives – Foreign Aid to the Justice Sector*, Geneva: ICHRP, 2000.

<sup>55</sup> World Health Organization, *Report of World Health Organization Commission on Macroeconomics and Health*, Geneva: World Health Organisation, 2002.

While immense diplomatic effort went into negotiating the trade arrangements now managed by the World Trade Organisation, most of that effort was devoted to the needs of major trading powers. Relatively little attention was given to poorer nations, even though a small improvement in their access to trade could significantly benefit large numbers of poor people.<sup>56</sup>

Though many of these criticisms are justified, the key point is that, whereas the ICISS report argued that military intervention should not occur in the absence of very severe violations, no such constraint applies to normal forms of international co-operation to fulfil, or end violations of, economic and social rights.

#### *Outsider involvement*

In cases of military intervention that are described in the ICISS report, considerable attention is given to issues of state interest. Commentators frequently argue that, when states have a direct interest or are partly responsible for the conflict concerned, they should be disbarred from intervention.<sup>57</sup> On these grounds, there was considerable criticism of France's military intervention in Rwanda in 1994, and Nigeria's interventions in Liberia in the 1990s.

In a similar manner it is argued that states that participate in military interventions – even when they are designed to prevent violations of rights – should not simultaneously participate in humanitarian relief operations. It is argued that the conflict of interest involved is prejudicial to the independence and credibility of other humanitarian organisations. On these grounds, NATO was criticised for running a large humanitarian programme for Kosovar refugees while it was bombing Kosovo, and the United States military was criticised for similar reasons during and after its military campaigns in Afghanistan in 2001-2002 and in Iraq in 2003.

The principle advanced is that, in cases of military intervention to prevent abuses of human rights, states should demonstrate that no interest motivates their intervention other than the overt human rights or humanitarian objective that justifies their use of force.

With respect to violations of economic and social rights, the argument is somewhat different. We have made the case that outside states and other actors have a *greater* responsibility to act where their own policies or actions have caused or aggravated violations of ESC rights.

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<sup>56</sup> "Loaded Against the Poor: World Trade Organisation", Oxfam Position Paper, November 1999.

<sup>57</sup> For a discussion of this question, see International Council on Human Rights Policy, *Human Rights Crises – NGO Responses to Military Intervention*, Geneva: ICHRP, 2002.

There is evidence, moreover, that such problems are occurring more widely because we live in a more globalised world and stronger economic powers have a greater influence on economic and social relations around the world. Once again, the list of issues in Chapter IV draws attention to some of the areas where the policies or actions of richer states and other outside actors are alleged to cause or aggravate violations of ESC rights in other countries. In relation to such violations, the argument is not that outside states should declare an interest and stand aside, but rather that they should *change their policies* to ensure that their own behaviour ceases to cause or aggravate violations of ESC rights in the countries concerned; and that when appropriate, they should intervene to *repair harm* that their policies or actions have caused.

Where outside states or other outside actors have no responsibility for violations of ESC rights, they should also intervene when they are in a position to assist effectively. Interventions of this sort, of course, meet the obligation to be disinterested.

#### *Decision-making tests*

Tests present an interesting problem. In relation to military interventions of the sort described by ICISS, difficult tests are required. Consent to intervention is expected, for example, from many states or from the Security Council or the UN General Assembly. There is no assumption that co-operation between states to end violations of ESC rights requires such tests. Most of the interventions in question are regular and institutionalised (through donor consortia, regular meetings of the World Bank, IMF, WTO, etc.). As noted, these meetings do not necessarily produce policies that are satisfactory to poor countries, or distribute resources and effort in proportion to need. But they are regular and institutionalised frameworks.

It may be asked, nevertheless, whether additional precautions might be needed, notably when external policies that ostensibly seek to protect ESC and other rights are contested by national governments or local authorities. How are states to judge whether their behaviour is correct in such cases? Against what criteria are they to be judged by others? This issue raises important questions of accountability and governance.

In conclusion, there is a strong case for saying that outsiders have a "responsibility to protect" people in other countries whose rights are violated, and that the obligation can be extended to a range of situations in which ESC rights are unfulfilled or violated.

Indeed, while there are good reasons to restrict the number of international military interventions to a small range of extreme cases, fewer and weaker constraints need to be placed on outside actors who seek to assist governments abroad to protect the ESC rights of their populations. Their

obligation to act is just as compelling (and is perhaps more compelling), while fewer and less onerous conditions need to be applied to prevent inappropriate or illegal action by outsiders. It is clear that international co-operation – or intervention – to reduce or end violations of ESC rights will sometimes be contested and sensitive, and will sometimes also be inappropriate or self-interested. In general terms, nevertheless, the duty of outsiders to co-operate with others abroad to improve fulfilment of ESC rights, or end their violation, is a positive one.

The most obvious comment to be made, finally, is that the obligation to protect is largely unmet. In most areas of policy, rich and powerful states and other outside actors are doing too few of the things they could do to help – and they are not undoing enough of the harm that they do. Rather than less international action and co-operation, more is needed.



## PART THREE

### THE PLACE OF VALUES

Values lie at the heart of human rights. They also lie at the centre of individual and political motivation. In the end, personal conviction drives individuals to help one another. It also drives the decisions of political leaders to support or oppose programmes designed to relieve poverty or promote social justice. Part Three considers the role of values, which are the foundation of the legal and human rights arguments advanced in Parts One and Two, but also complement those arguments in their own right. A brief discussion of the teachings of major religions is followed by two longer sections. One examines the contribution of ethical thinkers, and looks in turn at communitarian, utilitarian and cosmopolitan ideas. Chapter IX discusses arguments based on self-interest, and the degree to which, in many areas of policy, international action is consistent with rational self-interest.



## VII. VALUES

Values lie at the heart of the formal framework of human rights that we have described in previous chapters. In affirming the inherent dignity of all human beings and treating each human life as of equal worth, human rights promote values of shared responsibility across society and across borders. In addition, wherever they are formulated in law, they have power to bestow these values with formal authority and legitimacy.

Not everyone will be convinced, however, that it is worthwhile to view global poverty or social injustice through the prism of human rights. Most people, including most decision-makers, do not do so. No argument that seeks to bring about changes of thinking and policy in relation to international social issues can be effective if it does not appeal to values with which voters and political leaders can strongly and personally identify.

It is therefore vital, indeed necessary, to complement arguments based on human rights and human rights law with references to the broader foundation of values that most people draw on in their daily lives – and which they draw on particularly and consciously when they are faced by important moral decisions.

These values take numerous forms. They are experienced most directly within families, in the relations between parents and children and in the relations between children. In numerous societies, they are expressed vividly in oral traditions – in song, proverbs, and fairy tales. More formally, they most obviously present themselves in the teachings of religion.

### **Religious values**

We cannot here examine or compare, and certainly cannot adequately reflect upon the values of the world's major faiths. But it is obvious that they are deeply relevant to this discussion. Across the world, very large numbers of people, including many political leaders and decision-makers in all walks of life, seek moral direction from their faith and consider the teachings of their religion when they take important decisions.

It is equally clear that the world's major faiths attach the highest value to charity and to acts that protect those – within and outside the religious community – who are in need or who are at risk.

Of course, the founding texts of most major religions were created when economies were simpler. They were prepared for societies where the social and political relationships that governed people's lives were qualitatively distinct from those dominant in modern secular societies. The majority of

people still live today in such older forms of community; these co-exist alongside and within modern forms of society associated with industrialisation, electronic technology and scientific rationalism. While the values of religious teachings remain profoundly relevant to human experience, their references and imagery nevertheless do not address in a specific way many of the demands or challenges faced by the modern world, and do not engage in useful detail with many of the issues raised in earlier chapters. What then does secular ethics contribute? What do modern ethical thinkers say about the obligation to assist others without regard to kin, class, or country? What do they say about self-interest, and priority of obligation towards those who are close or who belong to the same community?

### Baha'i

"Each one of you must have great consideration for the poor and render them assistance. Organise in an effort to help them and prevent increase of poverty. The greatest means for prevention is that whereby the laws of the community will be so framed and enacted that it will not be possible for a few to be millionaires and many destitute."

*Abdu'l-Baha, Foundations of World Unity, p. 36.*

### Islam

"It is righteousness...to spend of your substance, out of love for Him, for your kin, for orphans, for the needy, for the wayfarer, for those who ask, and for the ransom of slaves; to be steadfast in prayer, and give Zakat (regular charity)..."

*Al-Qur'an, 2.177.*

### Jainism

"Charity – to be moved at the sight of the thirsty, the hungry, and the miserable and to offer relief to them out of pity – is the spring of virtue"

*Kundakunda, pancastikaya 137.*

### Hinduism

"Bounteous is he who gives to the beggar who comes to him in want of food and feeble."

*Rig Veda Hymn CXVII.*

### Judaism

"If there is among you a poor man, one of your brethren, in any of your towns within your land which the Lord your God gives you, you shall not harden your heart or shut your hand against your poor brother, but you shall open your hand to him, and lend him sufficient for his need, whatever it may be..."

*Deuteronomy 15.7-11.*

### Buddhism

"All beings should be accommodated and served by me as attentively as I would show filial respect to my parents, due respect to my teachers, to elders... all in equality. I would be a good physician to the sick, a guide to those who have wandered from the path, setting their feet in the right way. I would be a light to those who wander in darkness. I would enable the people in poverty to discover vaults of treasure. A bodhisattva should thus benefit all beings in equal treatment, and bestow his loving care on all beings alike."

*Gandavyuha Sutra,  
Vows of Samantabhadra.*

### Taoism

"Relieve people in distress as speedily as you must release a fish from a dry stream... Deliver people from danger as quickly as you must free a sparrow from a tight noose. Be compassionate to orphans and relieve widows. Respect the old and help the poor."

*Tract of the Quiet Way.*

### Christianity

"Then the King will say to those at his right hand: 'Come, O Blessed of my Father, inherit the kingdom prepared for you from the foundation of the world: for I was hungry and you gave me food, I was naked and you clothed me, I was sick and you visited me, I was in prison and you came to me'. Then the righteous will answer him, 'Lord, when did we see you hungry and feed you, or thirsty and gave you drink? And when did we see you a stranger and welcome you, or naked and clothe you? And when did we see you sick or in prison and visit you?' And the King will answer them, 'Truly, I say to you, as you did it to one of the least of these my brethren, you did it for me'."

*Matthew, 25.31.*



## VIII. SECULAR ETHICS

In this chapter we review three ethical traditions – communitarian, utilitarian and cosmopolitan. Each is a broad school, with many variations. We discuss their arguments only insofar as they address the notion that we have duties beyond borders, and thereby help to ground the framework set out at the conclusion of the last chapter. In the next chapter we look at more pragmatic arguments to support transnational obligations, in particular those grounded in self-interest, which often draw on economic arguments.

### Communitarianism

For communitarians, the community is the ultimate unit of moral concern. Individuals are, above all, *members* of their communities. Morally autonomous individuals (the ‘unencumbered self’ of classical liberalism) do not exist. Each person is formed by webs of relationships and association within the communities to which he or she belongs.

Communities exist at many levels – families, tribes, religious groups, ethnic groups, political associations. Depending on its nature, a community will have a shared belief system, language, territory, history, or a set of myths or goals. At its centre, a community has a common moral framework, and a common concept of justice.

Two features of communitarianism are especially relevant to transnational human rights obligations. One is its moral relativism. For communitarians, moral standards are generated within and shared by a community. They do not derive their legitimacy from external or abstract principles, nor need they be consistent with the standards of other communities. “A given society is just if its substantive life is lived in a certain way – that is, in a way faithful to the shared understandings of the members.”<sup>58</sup>

As a result, cross-cultural ethical comparisons are not possible and appeals to universal principles of justice make little sense. It follows that ideas of distributive justice can develop only within a given community, among its members. Communitarians therefore

...do not necessarily question the importance of intra-communal justice: they accept that the good society is one whose institutions are consistent with a set of principles of distributive justice. But when considering the issue of international justice, communitarians deny that the arguments for ‘justice at home’ apply equally to those elsewhere.<sup>59</sup>

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Secondly, communitarians limit the obligations that given groups of people

<sup>58</sup> Michael Walzer, *Spheres of Justice: A Defence of Pluralism and Equality*, Oxford: Basil Blackwell, 1983, p. 313.

<sup>59</sup> Jones, *Global Justice*, p. 16.

have to others. Priority is accorded to fellow members of the community. While individuals may have intrinsic value as individuals, and may be legitimate subjects of ethical concern, communitarianism “assigns ethical priority to *some* individuals (co-nationals or co-citizens) over other individuals (foreigners)”.<sup>60</sup> Members merit special consideration and loyalty. Logically, this cannot extend beyond borders. As one well-known account argues:

Obligations to other people exist only if they are all part of the same community. We may be interdependent with others but interdependence is a material fact, community is a moral fact.<sup>61</sup>

At first sight, therefore, communitarianism is unsupportive of transnational obligations to realise human rights. Is this true? Perhaps less than at first sight. Many moral principles are widely shared. Though communities may provide ideal conditions for moral standards to take root, the standards that emerge may overlap – and this may be particularly true of very basic values such as fundamental human rights. Commitment to local moral standards need not preclude adherence to commitments and obligations that are widely shared.<sup>62</sup>

Similarly, the assumption that relations with compatriots are privileged does not necessarily imply indifference to outsiders. We all feel special obligations to family members: this does not preclude acceptance of duties to others. Even if our obligations to those closest to us are strongest, we may acknowledge duties beyond the borders of home, village or country. Furthermore, in relation to some claims we might accept a very wide scope of obligation. As one author notes:

That our sense of solidarity is strongest where ‘us’ means something smaller and more local than the human race provides a strong argument against the feasibility of a world-wide system of distributive justice (regulated by law), but of course it doesn’t follow that the range of ‘us’ can’t be extended in the direction of greater human solidarity for more narrow purposes, e.g. making people more sensitive to instances of cruelty in faraway lands.<sup>63</sup>

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<sup>60</sup> Ibid., emphasis in original.

<sup>61</sup> Stanley Hoffman, *Duties Beyond Borders*, New York: Syracuse University Press, 1981, p. 151.

<sup>62</sup> Charles Taylor, “Conditions of an Unforced Consensus on Human Rights,” in Bauer Joanne, and Daniel Bell, eds., *The East Asian Challenge for Human Rights*, p. 136.

<sup>63</sup> Daniel Bell, *Communitarianism and its Critics*, Oxford: Clarendon Press, 1993, pp. 150-151.

While communitarianism would seem to be the least likely to countenance transnational obligations, its approach is highly relevant. First of all, it reminds us that we think – and feel, connect, owe allegiance – locally, even though we can reflect, empathise and act globally. In certain areas of life, and in certain areas of public policy, at least, most people certainly consider that loyalty to those who are close is appropriate and should be a factor in decisions that are made. As a result, secondly, communitarians invite us to give serious attention to motives of self-interest – and by extension to national interest (self-interest at the level of states). Communitarian arguments encourage us to examine decision-making that explicitly privileges the interests of local relative to distant groups; and to do so in non-pejorative terms. Chapter IX examines the extent to which, with respect to transnational obligations, motives of self-interest can be compatible with shared or common interest.

In addition, they focus attention on the idea of “community”. Perhaps surprisingly, references to the idea of community have been virtually absent from the discussion so far, despite its common use and emotional and political resonance. In practice, this may not be so surprising, because the term has various, conflicting references. It sometimes refers to “local”, as the opposite of large or “national” (community hall, community nurse). In modern cities, it is often used nostalgically, to describe the disappearance or atrophy of social relationships and socially-shared values (usually person-to-person and again essentially local). In such uses, “community” is a warm, undefined, politically soft notion, that describes a negative (a sense of loss or absence) rather than having a specific and distinct identity.

By contrast, “community” can simply denote those who are recognised by members of a group to belong to that group. This is a much clearer idea, which does not carry with it a positive or negative, warm or cold charge. In relation to the discussion here, this idea of community is potentially useful and intellectually powerful.

In some instances, for example, the idea of community is built upon exclusion. Communities define themselves in terms of their difference from outgroups (as Romans distinguished themselves from “barbarians”). This idea of community provides approaches to complex issues of exclusion and discrimination which are central matters for human rights and human rights law. Visions of “community” that depend on creating out-groups are antagonistic both to the values of human rights and the arguments developed in this report; but clearly, they exist and are influential in the real world. The example of Nazism is emblematic of the dangers such notions can pose.

In other cases, the idea of community emphasises inclusion. In many societies, the community is the group to whom a person can turn for help, those who are bound to assist by virtue of shared bonds of kinship or

association.<sup>64</sup> In smaller and simpler societies, local ties – with family and neighbours – are closer and more personal than in modern urban environments. In this sense, people feel further apart. At the same time, the thrust of this report is that, on a larger scale, individuals and societies across the world, living in very different economies and social conditions, share far more with one another, and depend far more upon one another, than was true in the past – and that as a result, to an ever increasing degree, it is coming to be in the interests of all human beings to see one another as members of the same “community”.<sup>65</sup> Cosmopolitan thinkers have gone furthest in exploring this view, as we see later in the chapter.

The notion of community, as the circle of people who recognise one another as members of a group, is also useful when it casts light on imperfect or selective inclusion. The emergence of a ‘new’ community often has revolutionary effects in society, especially when it creates bonds of loyalty and equality that cut across existing social and economic boundaries. To give one example, early Christianity spread as a radical movement partly because it defined the community to include all who believed. It denied or disregarded existing racial and social boundaries (such as Roman citizenship, for example). Because of this, and despite its vulnerable and marginal beginnings, in a very short period Christians and Christianity converted huge numbers of people, transformed social institutions in many societies, and toppled or colonised numerous centres of political power, including the Roman Empire. (The experience of Islam is comparable.)

But this new community was cross-cutting and inclusive in certain dimensions only. It recognised the community of Christians and introduced innovative forms of social protection and support for its members; but this community included free men and women and did not include slaves, for example.<sup>66</sup> Most social movements that define new communities are similar – revolutionary and egalitarian in certain respects, exclusive and intolerant in others. This challenges us. Today, what is our community? Who do we recognise as members, and who do we ignore, blindly or by design?

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<sup>64</sup> To illustrate, nomadic peoples in arid regions have often developed explicit social rules about the obligation to help kin or clan members – and travellers – since individuals face unusual risks because of the environment and climate or their way of life. For the same reasons, such societies are equally clear about the status, or lack of status, of outsiders. Many moral injunctions in Islamic and also Christian teachings are framed in language that fits such a context.

<sup>65</sup> Peter Singer, *One World: The Ethics of Globalisation*, New Haven: Yale University Press, 2002.

<sup>66</sup> Peter Brown, *Poverty and Leadership in the Later Roman Empire*, New Hampshire: University Press of New England, 2001 discussed in Brent D. Shaw, “Loving the Poor”, *The New York Review of Books* XLIX, 18, November 21, 2002, p. 45.

Communitarians – and the notion of community – help us to ask such questions more pointedly.

### **Utilitarianism**

Utilitarians resolve such questions in a radical manner. They assert that individuals are the ultimate units of moral concern; communities are not significant. In moral terms, all human beings have equal status, and groups (family, friends, co-religionists) have no moral privileges. Utilitarians evaluate each action in terms of whether it maximises welfare, as summed across all individuals. Consequences – and therefore the actions that caused them – are judged by the degree to which they secure the greatest benefit to all concerned. Benefit is assessed in terms of the satisfaction of individual preferences; all individuals are valued equally and all persons have a common duty to maximise utility.

The foremost modern proponent of utilitarian approaches to transnational human rights obligations is probably Peter Singer. Concerned primarily with how individuals act, Singer introduces his viewpoint with a powerful image. A child is about to drown in a shallow pond as you pass by: what is the right thing to do? Clearly the moral imperative is to save the child; the risks or sacrifices involved in doing so – wet clothing, being late to an appointment – are morally insignificant in comparison. Singer compares the child's drowning to worldwide suffering and death from lack of food, shelter, and medical care. Once made aware of such evils, he argues, you should do whatever you can to lessen them. National borders are irrelevant to this imperative. Those who are better off should donate to the point of sacrificing "anything morally less significant" until marginal utility is reached, when sacrificing more would reduce that individual's happiness to the level of the starving person whose rescue is sought. Acting on this imperative, in Singer's view, entails ongoing contributions to charity. He suggests giving at least ten per cent of personal income (and provides the telephone numbers of Unicef and Oxfam at this point in his essays.)<sup>67</sup>

Do such charitable contributions make sense, and would they satisfy transnational human rights obligations? Singer's approach is open to criticism on several grounds. First, the analogy with a drowning child is not applicable. The child's case and the case of the starving millions are dissimilar in important ways. While an individual can achieve the desired effect in one instance – yanking the child from the brink of death – she cannot feed millions by herself. This is not solely due to the scale of the task, but because size

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<sup>67</sup> Peter Singer, "Famine, Affluence and Morality" and "The Singer Solution to World Poverty", reprinted in *Writings on an Ethical Life*, New York: Ecco Press, 2000.

and scale change the task's *nature*. Joint action and co-ordination are required. Charles Jones terms this "strategic interaction" and notes its absence from Singer's approach.<sup>68</sup>

Andrew Kuper argues similarly that Singer takes no account of "the direct and indirect, cumulative and complex effects of multiple human interactions". Due to the scale of global society, he writes,

We co-operate and succeed (or fail) not merely through direct interaction but through social rules and institutions. Effective poverty relief will thus require above all extensive co-operation with other agents.

Singer's prescription for individual charity misses this dimension entirely. Kuper argues that accurate diagnoses of global poverty and effective programs to end it will require analysis of social and political institutions and the complex political and economic relations through which our individual actions and inaction have an impact on distant others.<sup>69</sup>

Utilitarianism is therefore insufficiently dynamic in relation to social processes, and ignores the role of political and social institutions in achieving change. Too mechanical and atomic in its logic, it nevertheless reminds us of the central value of individuals. In this respect Singer's example of the drowning child is absolutely appropriate. The child is a person, drowning in a specific pond at a specific time: she experiences drowning or the fear of it. Hunger, illness, the effects of illiteracy, are similarly experienced by individual people, in specific communities at specific times. These experiences cannot be summed.

In exactly the same way, the bystander's decision to rescue is also personal and involves choice and sacrifice. This reminds us that decisions which institutions take (to assist or not, abroad or at home) are always in the end taken by individuals – by an official, a banker, a politician, a doctor or an activist. Choices are experienced as taken or set aside, as comfortable or excruciating, as a personal responsibility. This is the essence of moral dilemma – and moral theories or theories of action that evacuate individual choice and personal experience from their logic are likely to be fatally

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<sup>68</sup> Jones, *Global Justice*, p. 36.

<sup>69</sup> Andrew Kuper, "More Than Charity: Cosmopolitan Alternatives to the 'Singer Solution'", in *Ethics and International Affairs* 16, 1, 2002, p. 112. He also argues that Singer's approach is too demanding. "There is, ironically, a quasi-Calvinist strand to the individualist approach to development: an insistence that one can never do enough, never be as moral as one ought to be; and an emphasis on individual conscience rather than effective collective moral norms and political institutions" (p. 113). He considers such approaches to be narcissistic in their pre-occupation with conscience and sacrifice, and "couched in terms of an unhelpful binary of 'self-ish' against 'self-less'".

impoverished. In this respect, it is significant that the human rights approach places the individual, and eventually individual responsibility, at the centre of its framework.

### **Institutional cosmopolitanism**

Institutional cosmopolitanism shares many features with utilitarianism.<sup>70</sup> But whereas utilitarians regard institutions as a means by which individuals fulfil their obligations, institutional cosmopolitans insist on the moral relevance of social institutions themselves. The shared practice that social systems and institutions contain becomes the focus of moral evaluation. As summarized by Thomas Pogge, institutional cosmopolitanism is the view that “all persons stand in certain moral relations to one another: we are required to respect one another’s status as ultimate units of moral concern – a requirement that imposes limits upon our conduct and, in particular, upon our efforts to construct institutional schemes”.<sup>71</sup> Pogge offers a helpful distinction: in relation to slavery, the moral demand of an interactional approach is not to be a slaveholder, while that of an institutional approach is to abolish slaveholding.

According to this view, as individuals we become responsible for the human rights of others at the point when we construct, maintain and participate in institutions that affect those rights. “We are asked to be concerned about human rights violations not simply insofar as they exist at all, but only insofar as they are produced by social institutions in which we are significant participants”.<sup>72</sup>

In consequence, the development of institutions and relations on an international scale alters our moral relationship to the rest of humanity. Making this point, Pogge argues that

...the global moral force of human rights is activated only through the emergence of a global scheme of social institutions, which triggers obligations to promote any feasible reforms of this scheme that would enhance the fulfilment of human rights. So long as there is a plurality of self-contained cultures, the responsibility for such violations does not extend beyond their boundaries. It is only because all human beings are now participants in a single, global institutional scheme – involving such institutions as the territorial state and a system of international law and

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<sup>70</sup> It derives its name from *kosmopolitai*, or citizens of the world, in contrast to an earlier Greek concern for the polis or city. Its modern roots are deep. Only one strand is examined here, because it is relevant to extra-national human rights obligations.

<sup>71</sup> Pogge, “Cosmopolitanism and Sovereignty”, p. 49.

<sup>72</sup> Pogge, “Cosmopolitanism and Sovereignty”, p. 52.

diplomacy as well as a world market for capital, goods and services – that all human rights violations have to be, at least potentially, everyone's concern.<sup>73</sup>

What is required of us, then, is a moral response that reflects the complexity of our social and political awareness and makes full use of our institutional and social capacity.

### **Towards institutional change**

This insight is of profound importance to discussion of transnational obligations, because it permits us to understand moral obligation in progressive terms. Our obligations evolve and change as our capacity to know and our capacity to act increase. For example, 19<sup>th</sup> century social reform programmes could not have been introduced in the absence of new administrative and technical systems for implementing and managing large-scale government interventions. Similarly, Sen's argument, that famines do not occur in democracies because citizens and governments are made aware of the dangers they represent, is predicated on the existence of the print media, radio and telecommunications, which make it possible to spread information efficiently through huge populations and large bureaucracies. The moral and policy choices that governments and citizens face in rich countries today do not present themselves in the same terms as moral and policy choices appeared to senior officials serving in Pharaonic Egypt, or at the Mughal Court or during the Xing dynasty.

Three factors are of particular importance in enlarging moral obligation. The first is communications. As Pogge and Sen both make clear, we cannot be expected to feel moral obligation or responsibility for problems of which we are unaware. In this regard, the development of modern media has triggered a huge but uneven leap in consciousness. Whereas William Gladstone or Abraham Lincoln generated moral outrage and political energy in the latter half of the 19<sup>th</sup> century by three month speaking tours, stumping the country, today television and radio make it possible to bring information in 24 hours to the attention of a vast public and a wide array of decision-makers. The quality of that information significantly determines the quality of our moral responses.<sup>74</sup> Nevertheless, ignorance of events across the globe is no longer a sustainable defence for inaction. Certainly in rich countries, growing awareness of suffering abroad undoubtedly spurs citizens' groups and NGOs to call for international action by their governments. And this has some influence – even

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<sup>73</sup> Ibid., p. 51.

<sup>74</sup> See International Council on Human Rights Policy, *Journalism, Media and the Challenge of Human Rights Reporting*, Geneva: ICHRP, 2002.

if the mechanisms are still less immediately effective than those described by Sen which operate in relation to famine *within* democratic societies.

The second major factor is operational or applied knowledge. Effective action can scarcely be taken against many of the ills of poverty in the absence of scientific knowledge and technological advances. Evolution in this area has been more rapid than in any other. Many 19<sup>th</sup> century social reform programmes that were vital preconditions to social improvement emerged from scientific breakthroughs in the study of disease and in the understanding of sanitation, or engineering and technical innovation. Today our power to combat disease, solve engineering problems, organise complex social research, and control environmental pollution, is vastly greater and is perpetually advancing. Cosmopolitans remind us that the presence of knowledge creates wider obligations to apply that knowledge. Before Jenner, societies could not control smallpox: knowledge created an obligation to protect those who had that disease. Today, access to the benefits of scientific knowledge is largely confined to richer societies. The vociferous campaigns in favour of broadening access to key medicines, that will control the spread of HIV-AIDS or improve treatment of malaria or tuberculosis in tropical countries, draws its power from the fact that knowledge – the ability to control disease, or grow food more abundantly, or reduce environmental pollution – creates moral obligation. The application of knowledge we already possess to remove violations of economic and social rights could bring rapid benefits to enormous numbers of people: better health, better education, better housing, better employment, more productive agriculture, a cleaner environment etc.

The third major factor is political and administrative capacity. We may be fully aware that economic and social rights are being violated; we may possess the resources and the knowledge that, if applied, could deal with the problem. Nevertheless, our political institutions and administrative systems may not permit us to act effectively. This is indeed frequently the case, whether one considers the ineffectiveness of national governments, inter-state associations like the EU, or multilateral bodies like the United Nations. To the fury of citizens and the frustration of officials, nothing is done, or it is done too late.

Arguably, it is in this area that the greatest weaknesses are to be found. Though institutional and administrative capacity has increased enormously, and is still increasing, the point at which transnational obligation breaks down is still, very often, at the point of decision-making. And very often (though not, of course, always) this is not due primarily to the malevolence or ill-will or

sloth of politicians or bureaucrats, but to the incapacity of decision-making and administrative systems to cope with the additional complexity of working outside the traditional national frameworks of governance and decision-making that manage most societies and which underpin the international frameworks of governance that have evolved.<sup>75</sup>

Overall, therefore, the cosmopolitan approach gives weight in important ways to the principles advanced at the end of Chapter III, that richer states have a particular obligation to act in relation to violations of economic and social rights abroad, when they are themselves responsible for those violations, and when the national state concerned cannot end the violations on its own and the richer state is in a position to assist. The enormous increase in scientific and organisational capacity of richer states, combined with globalisation and access to information, mean that rich states are increasingly *informed* of violations, increasingly have some direct or indirect *responsibility* for their continuation or their occurrence (as a result of globalisation), and have greater *capacity* to help remove or mitigate them.

For exactly the same reasons, they are also in a far better position than in the past to judge whether local authorities are taking responsible action, as far as their means allow, to tackle the violations themselves.

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<sup>75</sup> For more discussion of the international framework, see Chapters III, V and VI.

## IX. SELF-INTEREST AND NATIONAL INTEREST

Many will say: talk of ethics and values and international law is by the way. In the end, states act from national interest, and individuals, families and communities act from self-interest – and who is to say they should not?

We touched on the relevance of communitarian arguments earlier. However, the specific claim that states act from national interest needs to be examined on its own terms. Many government officials and many political scientists do indeed believe that states have an *obligation* to act in their national interest and have no right (let alone a duty) to act disinterestedly on behalf of others, if it is not in the national interest to do so.

This issue is prominent in discussion of international interventions. When attempts are made to identify criteria to distinguish justifiable from unjustifiable military interventions to stop violations of human rights, it is often argued that the states involved must show that they are not motivated by self-interest. Many officials would reply that such a test is unrealistic, because the foreign policy decisions of all governments take into account their strategic, political and economic interests and are bound to do so. On the same grounds, democratic politicians and governments are bound to take into account the opinions of their citizens and for this reason find it difficult to support policies that are contested by a large proportion of their voters. Communitarian arguments help us to appreciate that recognition of local loyalties may be legitimate and appropriate, rather than unprincipled.

Action that is not motivated by self-interest, almost by definition, involves loss or sacrifice by the person who takes it. This will certainly be true of most initiatives that outside governments or actors take to increase fulfilment or reduce violations of ESC rights abroad. Two lines of reasoning may be persuasive in relation to such actions. The first argues that the action should be taken simply because it is right. What this means is that it is justified by an independent, objective, usually moral value. When the moral standard in question can clearly be shown or seen (injured children in a natural disaster) and has wide public support, such arguments are very powerful, especially in democratic societies. The opposite holds too: moral appeals are much less successful, especially in democratic societies, when the underlying moral standard cannot be clearly shown or seen, or is contested.

The second line of reasoning argues that taking an action is justified, even though it may require sacrifice and initially fail the test of self-interest, because in the long-term all will benefit, including those who took the action. On this deeper level, the action does meet a self-interest test – but the motive is larger and more generous than self-interest alone, and the effect benefits a

wider circle: it might be called *deferred self-interest*. Many examples of this sort of argument can be identified. Action to prevent global warming is an obvious one. Many states, particularly those that are rich and those that are most responsible for global warming, will be required to make sacrifices in order to reduce global warming; but the effects will benefit everyone, including those who make the largest sacrifices.

Food subsidies and agricultural protection in Europe and the United States provide another. In Europe and North America, agriculture is highly subsidised and access to European and North American markets is restricted. The effect of agricultural protection and subsidies is to raise the price of food for European and American consumers, distort the world market in foods, depress the export of food products from many poorer countries, and in some instances damage local markets abroad (for example when surplus European or American food is dumped at prices which are below local levels). Changing the European and American agricultural systems would be expensive financially and politically painful; however, the benefits of doing so could be considerable – for European and American consumers, for producers and consumers in many poorer countries, and (if reforms were well designed) for the environment shared by all.

Another example is education. Millions of children around the world are unschooled or scarcely schooled. It will be expensive to provide reasonable education to all those who do not currently receive it. But if action were taken, enormous improvements in childcare, nutrition and health, governance and economic productivity could be expected. Over a period of time, these changes would benefit everyone – especially the peoples in poorer countries, of course, but in clear ways the people in developed economies too. The latter would face fewer risks from diseases, fewer costs for humanitarian relief and aid, and would benefit from more (and more equal) trade.

Arguments from deferred self-interest can take sophisticated forms. For example, governments may elect to apply highly ethical policies in their international relations – such as policies that promote and support respect for human rights and democracy, which may involve significant costs. The governments concerned may not be able to claim obvious direct or material benefits. Yet it is quite coherent for them to argue that they are acting in the national interest, if they believe that their societies and their peoples (and not least their descendants) will enjoy a higher quality of life and more security in a world that is more democratic, peaceful and respectful of human rights.

Deferred self-interest arguments are of great relevance for the issues discussed in this report. Many of the policy responses that outside states and other actors will be required to make if they are to help to fulfil ESC rights and reduce large-scale violations of those rights take this form. In this context, the notion of global public goods is especially useful.

## Global public goods

The idea of “public goods” emerged from within economics. A private good (a house, an apple, a fortune) is possessed by someone, and consumed by someone: when used or consumed, no others can use or consume the same good. Public goods, by contrast, can be consumed by many and yet not be depleted. In economic jargon, they are nonrivalrous and nonexcludable.<sup>76</sup>

Knowledge is a public good. If I learn the principles of nutrition, my knowledge does not exclude others from the same knowledge. It can be obtained by anyone and its qualities are unaffected by the number of people who possess it. Indeed, in the case of nutrition, everyone is safer and better fed to the extent that more and more people have that knowledge. Other public goods might include well-run judicial systems or safe air traffic control systems. All benefit when these work well; no individual or group derives benefit if they work badly. In this sense they are non-rivalrous. They are also non-excludable: lighthouses shine their light on all passing boats; everyone breathes air kept clean by pollution standards.

Many goods cannot be characterised tidily as private or public. A square meal is a private good, but a well-nourished person is no doubt more productive and less of a drain on the public health system. Some public goods are partially rivalrous: if too many people use the internet or road systems (both public goods) congestion can reduce their value to users. Others are partially excludable. So-called “club goods”, such as common markets or regional irrigation systems, can only be enjoyed by members. Further, the qualities of non-rivalry and excludability do not necessarily attach to the goods themselves. They may be subject to changes in policy or technology. For example, the genome is a common heritage and a potential public good, but patent law may turn it into a private good. Radio waves were non-excludable until technology for scrambling and jamming was developed.

Because such goods are not owned and cannot be possessed, market mechanisms often fail to produce or trade them efficiently. For similar reasons, governments may not protect them adequately or give them sufficient attention. Managing public goods certainly involves costs. It is frequently expensive, for example, to agree with all interested parties about how public goods are to be shared and used, and to police such agreements. Actors are frequently unwilling to co-operate with one another, because they feel the costs of the agreement are shared unfairly, or that others will benefit

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<sup>76</sup> This discussion of public goods and the examples are drawn from Inge Kaul, Isabelle Grunberg and Marc Stein, eds., *Global Public Goods: International Cooperation in the 21<sup>st</sup> Century*, Oxford: Oxford University Press, 1999.

more, or that others will renege on the agreements made. (All these motives were evident in relation to the Kyoto negotiations on action to reduce global warming.)

“Global” public goods extend the idea of public goods beyond national boundaries. They are goods of benefit to humanity which need international protection and dissemination. Obtaining or protecting the benefits such goods offer requires co-ordination among many nations. In many cases, global goods imply positive action; provision of good quality education for all is an obvious example. However, action to protect global goods may often present itself in terms of action to prevent global harm.

Examples include action:

- to prevent the spread of infectious diseases (to protect health),
- to prevent the spread of atmospheric pollution (to protect health),
- to curb overeating and consumption of drugs like tobacco and alcohol (to protect health),
- to forestall global financial crises (to protect livelihoods),
- to curb international crime (to protect livelihoods, personal security, women’s rights etc.),
- to curtail global warming (to protect health, livelihoods, personal security, the environment), etc.

As global integration proceeds, the achievement of national policy objectives – including public health, economic growth and environmental protection – is increasingly subject to international influence. National governments cannot achieve their goals working alone. They need to work with other governments and other actors if they are to provide security and protect the rights of their peoples. Many of the key policy areas where this is the case touch upon or involve global goods. These include: protection of the environment (including water resources, clean air, agricultural land, etc.); education; health; peace; economic progress and stability; justice; communications; scientific research. Collective action and co-operation are required to protect such global public goods, and make sure that people everywhere have fair access to them.

### **Forms of action and effect**

Action to protect global or national public goods can take different forms, and this has consequences. Three in particular may be distinguished – cumulative action, action that depends on the weakest link, and action based on maximum efficiency.

In the first case, all contributions have equal importance and are functionally

identical. It does not matter who provides the good, and positive effect and protection are cumulative. An example might be lowering ozone emission. Effective action by Indonesians is as helpful as effective action by Germans: each society makes a contribution and overall progress results from multiplying the number of positive contributions. Reduction in crime due to effective policing could be described similarly – but crime would not fit the cumulative model so well wherever criminality was international in character and organised internationally. Action to stop money laundering, in Lichtenstein for example, will not bring global improvements in financial transparency if no action is taken in the Cayman Islands and the criminals concerned move their operations there. Cumulative action of this sort can emerge gradually, and consensually; it can equally create political tensions wherever states can free-ride. In regard to ozone, for example, states might gain economic advantage by taking no action to reduce their emissions, but benefit environmentally from the effort made by others.

Some action to protect global or national public goods is reliant on the weakest link. In such cases, overall progress requires all participants to reach a certain standard. Action to control money laundering is an example. Others are action to eradicate infectious diseases; action to prevent acts of international terrorism; and action to control illegal trade in small arms. ‘Weakest link’ forms of action can often only be taken when a large majority of those involved agree to act together. Effectiveness can be blocked by the withdrawal, or refusal to participate, of one or two key actors. The Kyoto agreement to reduce global warming is an example of this problem. Though its arrangements are not ideal, most governments support its introduction, but its positive effects will be sharply reduced while several key polluters – notably the United States – do not participate.

A third kind of action depends for its effectiveness on concentrating resources in the most efficient way. Actions of this sort are often required when the interventions concerned are technological or highly professional. In such cases, it makes little sense to distribute resources widely and thinly. To monitor and control highly infectious diseases, for example, it may be more efficient to concentrate global resources on one highly professional facility, like the United States Center for Disease Control, rather than maintain numerous poorly-equipped laboratories around the world. At national level, similarly, it can be argued that a single office to set examination standards for schools will be more efficient (and fairer) than several regional offices.

This form of action raises other issues, however, including bias. A single centre of excellence may not operate in a wholly representative or inclusive manner. In medicine and in agriculture, for example, it is often claimed that the diseases and crops of richer, temperate countries are given far more attention and resources than the diseases and crops of poorer, tropical

countries. In such cases, the argument from efficiency is evidently compromised.

This underlines the great importance of accountability and governance. Ravi Kanbur argues that a central question is whether global arrangements are

beneficial to poor countries or whether they are agreements between the rich countries which are then imposed upon poorer countries, to their detriment. ...A key indicator of the extent to which these arrangements are likely to be beneficial to poor countries, and hence a key indicator in deciding whether resources expended in these arrangement could count as "aid" is the extent to which poor countries have a voice in decision making and management.<sup>77</sup>

An equally key indicator is the quality of national governance. As we have seen, the human rights framework presumes that in the end national governments must be responsible for ensuring that human rights are respected and that services essential to the protection of economic and social rights are properly provided.

The quality of international institutions and international co-operation is no less necessary. Clear shortages of national capacity and resources need to be filled. As noted, governments also need effective ways to identify and manage national and cross-border policies and actions that cause or aggravate violations of economic and social rights. The weaknesses of international institutions continue to be evident in many areas, and action to deal with global poverty and social injustice is unlikely to be effective while this remains true.

### **Self-interest, common interest and sacrifice – lessons from experience**

How much therefore should we expect to achieve with arguments in favour of global public goods, and other arguments based on deferred self-interest? The answer seems to be unsurprising: they are likely to be influential when the benefits are obvious, when the risks and costs are low, and when such arguments complement other reasons to act.

A comparison of the (successful) Montreal Protocol on ozone emission and the (unsuccessful) Kyoto Protocol on climate change illustrates this.<sup>78</sup> Many factors influenced the outcome of these two negotiations, but a core

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<sup>77</sup> Ravi Kanbur, a note on Cross-Border Externalities, International Public Goods and their Implications for Aid Agencies, first draft, March 2001.

<sup>78</sup> Scott Barret, "Montreal Versus Kyoto: International Cooperation and the Global Environment" in Inge Kaul, Isabelle Grunberg and Marc Stein, eds., *Global Public Goods*, 1999.

difference was the cost, especially for richer countries. The investments required to reduce ozone-depleting substances were small relative to the benefits, while the costs of reducing greenhouse gas emissions by a substantial amount matched or exceeded benefits. When economic (self-interest) arguments weigh heavily against a particular course of action (even though it may have deferred self-interest benefits), effective action is much less likely.

What are the implications for action to protect human rights, and the role that richer countries can play in helping to fulfil ESC rights and reduce their violation, in poorer countries? A few general remarks may be helpful.

The first is to note that access to certain resources is crucial to survival. Examples would certainly include access to water and food (land). In relation to such resources, co-operative behaviour may be seen to be necessary and encouraged, precisely because they are so vital. Advanced regional arrangements have been made for sharing the water of certain rivers, for example (including the Nile, the Danube and the Ganges), and many societies have complex arrangements for distributing water and land to ensure that minimum needs are met. When co-operation fails, however, competition for such essential goods can become explosive. Scarce water is clearly a factor in some conflicts, and threats to close access to water can be used as a military or political weapon (in the Palestine-Israel conflict, in the Pakistan-India conflict and elsewhere). Equally, where land shortage reaches a critical point (as in Rwanda and Burundi, for example), or access to land is highly restricted (as in parts of India and parts of Brazil), it can be the source of extreme tension.

Secondly, as noted, when governments or other actors are required to make considerable sacrifices in the short-term, and when the long-term benefits of actions are limited or unclear, appeals to global goods arguments or deferred self-interest arguments are less likely to succeed (the Kyoto Protocol case). Where short-term sacrifice is limited and long-term advantages are evident, and where outcomes and risks are seen to be shared fairly, such arguments can be persuasive (the Montreal Protocol for example).

Fairness and clarity are both important elements. Sacrifices should be proportionate, and benefits should be fairly spread. This raises – as ever – issues of power and accountability.

For richer and more powerful nations, it will often be more difficult (politically) to apply arguments based on deferred self-interest. To the degree that they are powerful and prosperous, they can afford to disregard the interests of other actors. The consequence of this is that political leaders in more powerful countries are more resistant to global goods arguments, and find it more difficult to oppose the claims of straightforward self-interest. Having the

power to enforce their short-term interests, and being in addition subject to local lobbies, the most powerful states have much less reason to subordinate their short-term interests (myopic though these might be) in favour of explaining to their electorates the advantages of policies based on ethical self-interest which might bring longer-term but less immediate benefits.

The question is not an abstract one. At the present time, when levels of mistrust and perceptions of insecurity are high, many governments appear to take policy decisions that are considered by others to be selfishly short-term, with damaging long-term consequences for everyone – including the state(s) concerned. Failure to address the conflict between Israel and Palestine is a case in point. The unilateral refusal of the United States to trim its short-term interests to take account of the long-term environmental needs of the planet is another; as is that country's refusal to allow a number of multilateral initiatives in the field of human rights to proceed, because it takes a different view from the great majority of states. The continued unwillingness of European countries to reform the agricultural policies of the European Union provides a fourth example.

In conclusion, arguments based on ethical self-interest or deferred self-interest – such as arguments in favour of protection of global public goods – are not likely to be decisive; but they are relevant. Such arguments support claims that there are international obligations in relation to ESC rights. They may even tilt the balance in favour of positive action. But they are not likely to be sufficient.

They are valuable for a second reason. They remind us that, as communitarians have pointed out, motives based on self-interest are not inherently improper or immoral. The argument made in this report is that national self-interest has a legitimate place in discussion of international obligations; but should be considered from all sides rather than defined very narrowly as selfishness. It is rational and sensible to acknowledge certain loyalties, to close kin and members of the same society. Self-interest is not incompatible with ethical conduct. Policies based on national interest are not inherently antagonistic to ethical or responsible international behaviour.

The strongest case for long-term international co-operation to reduce ESC violations can probably be made, in fact, when the moral obligation to act is supported by a commitment that draws on human rights law, and arguments that are based on ethical or deferred self-interest. Activists and officials who seek to persuade richer countries to act abroad in more effective ways to end violations of human rights across the world should no doubt aim to accumulate positive arguments of all three kinds.

## X. CONCLUSION

Discussion of duties and obligations, whether to close kin or distant human beings, begins with the recognition that all human societies assume that their members have a duty to others. The duty is not equal in relation to all, it is not infinite, and others must play their part. Nevertheless, there is a common assumption that all human beings benefit from the creation of a social environment where people are nurtured, happy, feel they are treated fairly, and can pass such values to their descendants sustainably.

Secondly, it is legitimate to say that closer kin have a greater claim. This is also reflected in the legal notion of state sovereignty, according to which states have a primary obligation to meet the needs of their own populations. In this respect they have a responsibility to act in the national interest. But national interest cannot and should not be defined as simple selfishness. Just as parents have a duty – but a lesser duty – to take care of the children of others, so governments have a duty – but a lesser duty – to take care of people in other societies. This is reflected in the wording of the UN Charter and in international human rights law.

Moreover, it is in the longer-term interests of countries to secure a safe, stable and just international environment – free of war, famine, environmental insecurity, etc. – just as it is in the interests of parents to create conditions in which other children in their community (not merely their own children) can grow up safely, in good health, and with access to a good education. Self-interest, and national interest, cannot intelligently be understood merely in terms of direct and selfish advantage. Locally, nationally and internationally, we live increasingly in a world in which security, prosperity and happiness can only be obtained in a sustainable manner if we act in ways that take account of the needs, rights and interests of others.

The duty towards others is limited. Parents have a secondary duty to take proper care of their children's friends; but in cases where those friends are not properly cared for by their own parents, their duty to assist increases. Similarly, governments have the primary obligation to protect the rights of their own populations; but where they violate rights, or are unable to protect them, other states and other actors have an increased duty to assist and if necessary intervene to ensure protection.

Parents should not abuse their own children; they also have a clear duty not to abuse the children of others. States, and other external actors, also have a duty to ensure that, by their policies and actions (or inaction) they do not violate the rights of people in other countries. When they do so, they have a duty to change their policies and behaviour to make sure that those violations end; they may have a duty to repair and compensate.

The duty to act is also limited by knowledge, and by the capacity to assist. This report argues that the obligation upon richer states to assist governments of other societies, to protect the ESC rights of their citizens where these are violated or unfulfilled, is significantly greater than in the past. The authorities and public in richer countries are today in a position to know more clearly than in the past whether violations are occurring in other countries. The excuse of ignorance can rarely be advanced. Information is almost always available. Secondly, in a world that is increasingly integrated, governments and other actors of richer societies have many more links and responsibilities in countries where ESC violations are occurring. Their policies and actions not only have positive or negative effects, but they are in a position to understand what those effects are. This influence and knowledge together confer on richer states, and on other outside actors, a much higher duty to respond, to help fulfil rights, to avoid doing harm, and to act appropriately to end violations where they can.

In addition, the enormous and continuing increases in capacity of richer states, and other actors in richer societies, mean that very often they can provide assistance effectively. This is true, first of all, in terms of their wealth: rich societies have far more resources than they did in the past. Just as important, however, is their logistical and organisational capacity, and their scientific and technical expertise. With manageable investment of resources and skill, the international community could make large differences, notably in the health of many societies. Their capacity also confers added responsibility.

This responsibility is set out in international human rights law, which states that richer societies have an obligation to assist poorer states, through international co-operation, and within their means, to achieve protection of ESC rights. In the modern context, this obligation is far greater – for the reasons described above – than it was when those words were adopted in 1966.

In most circumstances and in most societies, the provision of support and assistance should pass through national governments and national actors – who, in general, will welcome international support and co-operation. It is clear in international law, and accepted in international practice, that national governments and other national actors have the primary responsibility to protect and promote the rights of their people. In reality, nevertheless, national governments and national actors disagree with one another and with external states and actors about the quality and direction of domestic policies to reduce ESC violations of rights, and the behaviour of foreign institutions that have an influence on violations of ESC rights. This raises important issues of accountability and governance. In this regard, external states and actors should clearly recognise that policies to end violations of ESC rights

will not be sustainable or effective if they do not have the consent of, and are not owned by, national states and other national actors.

This said, in certain societies, the national authorities are themselves responsible for violating rights or are not willing to stop violations. Where this is so, and in particular where the violations are severe, outside states and actors have a responsibility to protect those whose rights are violated. They are entitled, and may have a duty, to overrule national sovereignty in order to provide that protection.

Many claims about world poverty, illiteracy, ill-health and the effects of globalisation are challenged. The ground is contested and politicised. It is not in question, however, that many people in many societies – rich as well as poor – suffer from poverty, and that across the globe the ESC rights of numerous people are unfulfilled or violated. It is not questioned either, by anyone, that poverty and ESC violations are concentrated in certain regions, and that very poor states cannot, by their own efforts alone, end the poverty or fulfil the ESC rights of the people they govern. Nowhere on the political spectrum is it claimed that international action to help protect people who suffer violations of their rights is not required.

It is further evident that not enough is being done. This is not just, or mainly, due to declines in international assistance – though levels of international aid continue to fall well below the amounts considered necessary by development experts and industrial country governments themselves. The latter have consistently committed themselves to giving 0.7 per cent of their GDP in foreign aid, and for over two decades the majority of rich countries have, shamefully, given less than half that amount.

Just as important, however, is the fact that richer states are not acting to remedy the effects of their policies when these damage the ESC rights of people in other countries. They are failing to undo harm for which they are directly or indirectly responsible.

Like people in other walks of life, most officials and politicians desire to do good. However, duties to take action abroad must very often be offset against other obligations (to their electorates, to vulnerable groups at home, to local industries, to other political interests). If the analysis here provides decision-makers, and activists who seek to influence their decisions, with fresh arguments that might strengthen their moral convictions and encourage them to take more effective action internationally to reduce the scale of economic and social injustice and suffering across the world, it will fulfil its purpose.

- i UNDP. *Human Development Report 2002*. New York: Oxford University Press, 2002, p. 165.
- ii [www.worldbank.org](http://www.worldbank.org)
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- vii Ibid.   viii Ibid.
- ix [www.unfpa.org/swp/2002/presskit/pressreleases/112602\\_1.htm](http://www.unfpa.org/swp/2002/presskit/pressreleases/112602_1.htm)
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- xi "Earth", *The Guardian*, August 2002, p. 11.
- xii <http://w3.whosea.org/healthnews/ob7ap.htm>
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- xiv [www.ei-ie.org/camp/english/eedoxfampr.html](http://www.ei-ie.org/camp/english/eedoxfampr.html)
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- xviii [www.bread.org/hungerbasics/index.html](http://www.bread.org/hungerbasics/index.html)
- xix Ibid.

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The Council's Mission Statement reads:

The International Council on Human Rights Policy will provide a forum for applied research, reflection and forward thinking on matters of international human rights policy. In a complex world in which interests and priorities compete across the globe, the Council will identify issues that impede efforts to protect and promote human rights and propose approaches and strategies that will advance that purpose.

The Council will stimulate co-operation and exchange across the non-governmental, governmental and intergovernmental sectors, and strive to mediate between competing perspectives. It will bring together human rights practitioners, scholars and policy-makers, along with those from related disciplines and fields whose knowledge and analysis can inform discussion of human rights policy.

It will produce research reports and briefing papers with policy recommendations. These will be brought to the attention of policy-makers, within international and regional organisations, in governments and intergovernmental agencies and in voluntary organisations of all kinds.

In all its efforts, the Council will be global in perspective, inclusive and participatory in agenda-setting and collaborative in method.

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