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THE MULTI-STATE RESPONSIBILITY FOR EXTRATERRITORIAL VIOLATIONS OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS*

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"At some point in the development of every legal system, the original strict and formal application of rules is supplemented by a freer approach which aims to go beyond the positivist strictures."[1]

I. INTRODUCTION

This article argues for a change of perspective in the enterprise of promoting and protecting human rights. Long the province of the relationship of individual citizens to their state, this article goes beyond the present trends related to human rights obligations of non-state actors and its extraterritorial application. This article posits that multiple states can and do hold legal responsibility to protect and promote the human rights of the same individual.

The idea that multiple states have human rights obligations to the same individual is derived, in part, from the author's own experience working in "failed states" and as part of multilateral efforts to bring peace, respect for human rights, and stability to war-torn and dysfunctional countries. Often the resources (e.g., power and financial capacity) at the disposal of the "host state" were extremely limited, while the United Nations Member States choosing to intervene in that country, either bilaterally and/or multilaterally, had extensive resources and at times more political power than the host country.

Oddly, considering legal developments in other fields and the nature of human rights, there is a continuing practice of placing all legal obligations for violations of human rights on the country where such violations occur. Those

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1. Martin Josef Schermaier, *Bona fides in Roman Contract Law*, *in* GOOD FAITH IN EUROPEAN CONTRACT LAW 63 (Reinhard Zimmermann and Simon Whittaker eds., 2000) at 63.

states that have voluntarily joined in efforts to rehabilitate failed states have enjoyed total impunity. This impunity is enjoyed regardless of the relative power and financial capacity brought to bear in what these states would call a collective endeavor to bring peace, the respect for human rights and stability to war torn and dysfunctional countries.[2]

Most relevant to development of the theory presented in this article is the author's recent work related to Haiti. Thus, the article begins with contextual information about Haiti. It continues with a discussion of theoretical considerations regarding the multi-state responsibility for extraterritorial violations of economic and social rights. This discussion first addresses historic humanitarian purposes, intervention industry reality,[3] the essence of human rights law, the legal concept that sovereignty is not jurisdiction, the criminal and civil nature of human rights law, and voluntarily assumed legal obligations. These theoretical considerations will then ground a discussion of specific hurdles to achieving multi-state responsibility for extraterritorial violations of economic and social rights, including marginalization of economic and social rights, exterritorial application of human rights law and multi-state responsibility. The article will conclude with a policy suggestion.

II. HOW RECENT EXPERIENCE IN HAITI INFORMS THE ARGUMENT

Every year, the Robert F. Kennedy Memorial bestows its Human Rights Award on a creative and courageous activist.[4] During the period when the author directed the Memorial's Center for Human Rights, the Center committed to working for many years with the recipient to help her or him achieve specific

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2. In fact, the United Nations was founded for this reason. *See, e.g.*, U.N. Charter pmbl. *We the Peoples of the United Nations Determined* to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom, *And for these Ends* to practice tolerance and live together in peace with one another as good neighbors, and to unite our strength to maintain international peace and security, and to ensure by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples, *Have Resolved to Combine our Efforts to Accomplish these Aims* Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.

3. Considering the cost and frequency of military, peacekeeping, humanitarian and development interventions, they have become an industry.

4. Robert F. Kennedy Memorial, http://www.rfkmemorial.org/legacyinaction/humanrightsawardadvocacy/ (last visited April 20, 2007).

human rights changes. In 2002, Loune Viaud, a right to health activist from Haiti, won the award.

After the ouster of President Aristide in February 2004[5] Viaud was skeptical about the new transitional government,[6] although she was hopeful that this international intervention, the 5th UN peacekeeping operation to Haiti,[7] would become more engaged in and supportive of development in Haiti than past missions. She was skeptical about the change because her organization had developed a number of projects implemented with the Aristide government that were measurably improving access to health care and had a positive impact on the AIDS crisis in the country. In fact, this was one of the reasons why she won the award. After Aristide's ouster, however, programs such as these, run jointly with the new government, were negatively impacted.

Haiti was considered a "failed state" and had a temporary or interim administration that was established extra-constitutionally with a good deal of support, cajoling, arm-twisting, and imposition by important states such as the United States. Much against the council of experience and of experts, the US militarily intervened to facilitate Aristide's removal and the "restoration" of order when regional actors were against the idea and most favored preventive measures.[8] The US obtained UN Security Council support for the US led "multinational interim force" intervention and quickly turned the intervention over to the UN.[9] The Member States voluntarily intervening in Haiti, acting bilaterally and collectively, were better resourced and arguably may have exerted more influence over the country's direction than those nominally running the transitional government. But what is key here is that power and resources were brought to bear by various Member States to achieve a common objective: to bring peace, respect for human rights and stability. They brought resources that were much greater than those of the Government of Haiti.[10]

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5. President Aristide had been deposed once before. In fact, Haiti never had a democratic transition until 1994, when President Aristide handed power over to Rene Preval, who won the Presidential vote. Aristide was barred from running for a second consecutive term, but was elected again in 2001 in the context of growing instability. *See, e.g.,* Paul Farmer, *Haiti's Wretched of the Earth*, TIKKUN MAGAZINE, May–June 2004; Walt Bogdanich & Jenny Nordberg, *Democracy Undone – Mixed U.S. Signals Help Tilt Haiti to Chaos*, N.Y. TIMES, Jan. 29, 2006, at A1.

6. The Transitional Government was a disappointment from a traditional human rights perspective as well. *See, e.g.,* Amnesty Int'l, *Amnesty International Report 2005:The State of the World's Human Rights, Haiti section*, AI index POL 10/001/2005, May 25, 2005, *available at* http://web.amnesty.org/report2005/hti-summary-eng.

7. *See* S.C. Res. 1542, U.N. Doc. S/RES/1542 (April 30, 2004); *See generally,* United Nations Stabilization Mission in Haiti, http://www.un.org/depts/dpko/missions/minustah/index.html (last visited April 23, 2007).

8. US interventions in failed states have basically been failures and should be used rarely as opposed to as a tool invoked without trying many alternatives. *See, e.g.,* Anatol Lieven, *Failing States and US Policy*, Sept. 2006, Stanley Found. Pol'y Brief. *available at* http://www.stanleyfoundation.org/publications/pab/pab06failingstates.pdf.

9. S.C. Res. 1529, U.N. Doc. S/RES/1529 (Feb. 29, 2004).

10. Todd Howland, *Peacekeeping and Conformity with Human Rights Law – How MINUSTAH Falls Short in Haiti*, 13 INT'L PEACEKEEPING 462, 470 (2006).

Haiti is not the exception. The author has seen the problem first hand while working with the UN in post-genocide Rwanda, where those participating in the international intervention were much better resourced than the post-genocide government. When the author arrived in Rwanda, the Ministry of Justice, tasked with responding to the genocide, had almost no resources. Most of the infrastructure of the Ministry had been destroyed. The only vehicle the Ministry had was the Minister's old worn out private car, which on most days needed to be push started. Situations vary in terms of relative resource capacity and political power, but every country in crisis with an international intervention shares some of the same characteristics. In the absence of a war, a ceasefire, a peace process, or a peace accord, the UN Stabilization Mission to Haiti (MINUSTAH)[11] was an especially clear example of a relatively well-resourced peacekeeping mission sent to a country with extreme poverty and a long history of bad governance.

A few months after the UN established a peacekeeping operation in Haiti, Loune Viaud would call the author and complain that "the UN was in Haiti on vacation" or that the donors say they have pledged over a billion dollars, but that she saw no visible impact from this money and questioned if any had actually been disbursed.[12] Given she runs one of the largest NGOs in Haiti, if she and her staff are unaware of the positive impact there probably was none. Viaud became more and more outraged at the fact that the UN had taken over Haiti's only medical school for its troops. The UN troops had electricity, running water and transport, but Haitian communities did not. She would call and complain that kids were lining up outside the UN compound to read because it was one of the few places in town with good light at night. Research done at that time by the RFK Memorial Center for Human Rights demonstrated an enormous gap between significant

11. On April 30, 2004, the UN Security Council decided to establish the United Nations Stabilization Mission in Haiti (MINUSTAH) and requested that authority be transferred from the Multinational Interim Force (MIF), authorized by the Security Council on February 29, 2004, to MINUSTAH on June 1, 2004. *See* S.C. Res. 1542, *supra* note 7; S.C. Res. 1529, *supra* note 9.

12. Ms. Viaud's concern about lack of disbursement of promised funds was confirmed by research conducted by the RFK Memorial Center for Human Rights in 2005 and early 2006. Much of the money promised in the donor conferences had not been operationalized. *See* Interim Cooperation Framework, Summary (April 2006) (unpublished study, on file with the Denver Journal of International Law and Policy). The UN, through a recent high-level panel, has recognized that "the UN and its specialized agencies have much to offer in the way of expertise, knowledge, resources and practical experience . . . [b]ut the system is failing widely." They pointed to a lack of institutional effectiveness, cost efficiency and focus. Poor governance, unpredictable funding, and outdated practices, as well as an often fragmented and weak UN presence on the ground were also cited. The Panel blamed "policy incoherence, program duplication, and vested interests in the status quo," with attempts by UN staff to remedy the situation "thwarted by inappropriate administrative procedures, mediocre management and ill-conceived loyalties." Shaukat Aziz, Luisa Dias Diogo & Jens Stoltenberg, *Unifying the UN*, INT'L HERALD TRIB., Nov. 8, 2006, *available at* http://www.iht.com/articles/2006/11/08/opinion/edaziz.php; *See also* The Secretary-General's High-Level Panel, *Report of the Secretary-General's High-Level Panel on UN System-wide Coherence in the Areas of Development, Humanitarian Assistance, and the Environment: Delivering as One, delivered to the Secretary-General*, U.N. Doc A/61/583 (Nov. 9, 2006).

pledges, their disbursement, and their operationalization. This research supports Viaud's anecdotal account.[13]

There was no hot war in Haiti, so it was unclear why the main response of the UN Security Council was to send troops. Making change on the ground is no easy task,[14] but sending the wrong tool does not make it any easier.

MINUSTAH's annual budget was larger than that of the Government of Haiti. Larger. This is without considering other multilateral and bilateral support not already part of the annual governmental revenue or loan stream, or the amounts that come into Haiti which are not part of Government revenue. For example, the US in 2004 and 2005 disbursed $352 million in assistance for Haiti; most of it through US based NGOs.[15]

The Haitian government had annual revenues of about US$400 million and expenditures of about US$600 million in 2005,[16] whereas the approved 2005 MINUSTAH budget was US$518.30 million.[17]

Remarkably, an ally of former President Aristide, his former Prime Minister, was elected President a little more than two years following Aristide's ouster.[18] His election brought about a reduction in political violence, which could indicate that international intervention may have contributed to, as opposed to minimizing, the political violence.

Viaud's complaint can be boiled down to the following:

Has the international intervention, with all its expenditures, actually measurably improved the human rights situation in Haiti?

Her complaint begs the question: do those participating in the international intervention collectively (e.g., as the UN or World Bank) and/or as individual States actually have an obligation to spend monies allocated or design programs in a way to consciously maximize their positive impact on the human rights situation? This article sets out to demonstrate that the answer to this question is yes. At present there is a gulf between those scholars who convincingly assert that such

13. Interim Cooperation Framework, Summary (April 2006) (unpublished study, on file with the Denver Journal of International Law and Policy).

14. *See* DR. JAMAL BENOMAR, RULE OF LAW TECHNICAL ASSISTANCE IN HAITI: LESSONS LEARNED, A World Bank Conference: "Empowerment, Security and Opportunity through Law and Justice," St. Petersburg, Russia (July 8-12, 2001) *available at* http://haiticci.undg.org/uploads/Lessons%20Learned%20Justice_2001.pdf (discussing how to advance reform in a political environment not conducive to change and characterized by protracted political crisis and paralysis).

15. U.S. Dep't of State, *Background Note: Haiti*, Jan. 2007, http://www.state.gov/r/pa/ei/bgn/1982.htm (last visited May 14, 2007).

16. The CIA World Factbook, *Haiti*, https://www.cia.gov/cia/publications/factbook/geos/ha.html (last visited April 23, 2007).

17. The Secretary-General, *Report of the Secretary-General on the Revised Budget for the United Nations Stabilization Mission in Haiti for the Period from 1 July 2005 to 30 June 2006*, U.N. Doc. A/60/176 (Aug. 1, 2005).

18. Louis Aucoin, *Haiti's Constitutional Crisis*, 17 B.U. INT'L L.J. 115, 118 (1999).

human rights obligations exist[19] and operational entities that seem to even begrudge being bound by humanitarian law after a directive from the UN Secretary General.[20]

III. THEORETICAL CONSIDERATIONS

As odd as it may sound, political and bureaucratic concerns trump human rights obligations in the organization of international missions, mainly because Member States and multilateral and bi-lateral bureaucrats do not consider themselves bound by human rights law in the organization and operation of an intervention.

How human rights obligations can more effectively organize mission resources and hold accountable those involved in international interventions needs to be better defined. For a variety of reasons, the questions "Who holds human rights?" and "Who has the obligation to respect human rights?" are increasingly complex.

A. Humanitarian Purpose v. The Intervention Industry

Historically, linked to the work of the International Red Cross and the content of humanitarian law or the rules of war, interventions with a humanitarian purpose have developed a certain mystique. They enjoy international protection: not just limited scrutiny, but affirmative privileges.

The problem is that interventions with an ostensible humanitarian purpose now regularly include a full range of operations, from aid programs to sending troops (known informally as "blue helmets").[21] This complicates any effort to hold individual states responsible, since a state may easily avoid scrutiny by claiming a humanitarian purpose.[22]

In the International Court of Justice's consideration of the complaint by the Nicaraguan government regarding the covert war the US was waging against it, the ICJ even entertained the United States' argument that its activities in Nicaragua should be considered of humanitarian nature and, therefore, legitimate. The ICJ stated: "the provision of humanitarian aid cannot be regarded as an unlawful intervention or in any way contrary to international law... if [implemented] to avoid violations of sovereignty and limited to the purpose 'to prevent and alleviate

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19. MARGOT SALOMON & ARJUN SENGUPTA, *The Human Rights Obligations of Multilateral Institutions and of States as Members of the MLI, in* THE RIGHT TO DEVELOPMENT: OBLIGATIONS OF STATES AND THE RIGHTS OF MINORITIES AND INDIGENOUS PEOPLES 39-40 (2003), *available at* http://www.minorityrights.org/admin/Download/pdf/IP_RTD_SalomonSengupta.pdf (last visited Apr. 17, 2007).

20. The Secretary-General, *Observance by United Nations Forces of International Humanitarian Law*, UN Doc. ST/SGB/1999/13 (Aug. 6, 1999); *See, e.g.*, Ray Murphy, *An Assessment of UN Efforts to Address Sexual Misconduct by Peacekeeping Personnel*, 13 INT'L PEACEKEEPING 531, 532 (2006).

21. DAVID RIEFF, A BED FOR THE NIGHT: HUMANITARIANISM IN CRISIS 308, 328 (2002).

22. Adding to the complexity is that more and more state functions, such as delivering foreign aid, are being contracted to private entities (both for profit and non-profit). *See* Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability under International Law*, 47 WM & MARY L. REV. 135, 146-60 (2005).

human suffering' and 'to protect life and health' and to ensure respect for human beings and given without discrimination."[23]

Although the ICJ did not find the US intervention in Nicaragua to have a humanitarian purpose, its tautological statement that humanitarian aid cannot be regarded as contrary to international law is consistent with the mystique that has developed around humanitarian purpose. Humanitarian intention is now used instrumentally by governments and NGOs as a means to avoid seriously evaluating whether their intervention actually contributes to measurably improving the human rights situation. If the intervention can be classified as having a humanitarian purpose, intervening states can avoid scrutiny. The question should be not whether there is a humanitarian purpose, but whether interventions have a measurable impact on human rights.

Within many international NGOs, there has been a reaction and soul-searching whether good intentions are good enough.[24] There has not been a similar process for states and international organizations. Scholars of humanitarianism have discussed the need for human rights to be respected and promoted by NGOs.[25]

The reality that international interventions have become a major industry needs to be considered. The fact that public monies fuel this industry is not a reason to avoid scrutiny, but rather a reason for it. If one was to sum all the entities which contribute to work that may fall into the vaguely worded humanitarian purpose, the amount would be significant.[26]

The international intervention industry offers goods and services and should be treated like any other industry. Having good intentions should not free the industry from human rights obligations. The public policy behind holding those who manufacture goods or provide services responsible for their quality applies to all actors, including those with the ostensible intention to do good.

The fact that governments have long history of making laws and not applying those laws domestically simply highlights the historical challenge, but it does not negate the importance of forcing governments to accept their legal obligations.

B. The Essence of Human Rights Law

The preamble of the American Declaration of the Rights and Duties of Man asserts that "the essential rights of man are not derived from him being a national of a particular state, but are based upon attributes of his human personality."[27]

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23. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 242-243 (June 27).

24. *See generally* MARY B. ANDERSON, DO NO HARM: HOW AID CAN SUPPORT PEACE OR WAR (1999); Hugo Slim, *Doing the Right Thing: Relief Agencies, Moral Dilemmas and Moral Responsibility in Political Emergencies and War*, 21 DISASTERS 244, 244 (1997).

25. Hugo Slim, *Not Philanthropy But Rights: The Proper Politicisation of Humanitarian Philosophy in War*, 6 INT'L. J. HUM. RTS. 1, 8 (2002).

26. For example, all the foreign aid budgets, the budgets of international organizations (e.g. UN, WB), even some parts of defense budgets designated for this purpose, as well as NGOs and private foundations for this purpose.

27. O.A.S. Res. XXX, reprinted in Basic Documents Pertaining to Human Rights in the Inter-

States during the Vienna Conference declared, "Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments."[28] What is noteworthy in this language is that it reiterates attachment of rights to the individual and the use of the plural form of government, inferring that more than one government can be concerned with the rights of a particular individual.

But for years there has been theoretical debate and practical confusion about human rights. To some degree, growing out of the state-centric reality of international law, it is understandable how many attempted to limit human rights to being a matter between a citizen and his or her state of citizenship. Being about the individual without a link to a particular state seems fanciful, but if the objective of law is the protection of the individual and creation of a just world, that is the logical outcome.[29]

If entities with the capacity to effect positive changes in human rights are not bound by human rights principles, this reinforces the idea that human rights law has no restraining normative content and may be manipulated simply for political ends.[30] The more often human rights law is applied to those with the power to comply with those obligations, the closer we are to a place where the individual person, not states, forms the essence of the law.[31]

It has been a time-honored practice to ridicule the fact that human rights law and international law in general are violated and to question their validity based on this fact. For example, in *Candide* Voltaire mocks:

> He passed over heaps of dead and dying, and first reached a neighboring village; it was in cinders, it was an Abare village which the Bulgarians had burnt according to the laws of war.[32]

The fact that all laws are broken, however, does not mean there is no law—but it does affect the law's acceptance and effective enforcement. What is most problematic, however, is the relative difficulty of getting the most powerful entities actually to accept and comply with their human rights obligations. While lack of mechanisms, effective forums and third party oversight do not negate the existence of rights, it certainly makes our job as human rights advocates challenging.

American System, OAS/Ser.L/V/I.4 Rev. 9 (2003); 43 AJIL Supp. 133 (1949).

28. World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, I(1), U.N. Doc A/CONF.157/23 (July 12, 1993).

29. In many ways this is already a well established principle, for example, "Aliens shall enjoy, in accordance with domestic law and subject to the relevant international obligation of the State in which they are present . . . ." Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, G.A. Res. 40/144, Art.5, Annex, U.N. GAOR, Supp. No. 53, U.N. Doc. A/40/53 (Dec. 13 1985).

30. MARTTI KOSKENNIEMI, APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 251-54 (2005)

31. JANNE ELISABETH NIJMAN, THE CONCEPT OF INTERNATIONAL LEGAL PERSONALITY: AN INQUIRY INTO THE HISTORY AND THEORY OF INTERNATIONAL LAW 457-73 (2004).

32. VOLTAIRE, CANDIDE (Boni & Liveright, Inc. 1918) (1759).

Western tradition related to rights seems grounded in a tight knit community or nation, where a contract between governed and governors defines these rights. This idea, in times of little movement between one nation and another, worked adequately enough to ground human rights law. But today, human rights law is about protecting individuals from those who have the capacity to respect or violate their rights.[33] The "community" is heterogeneous and international, and therefore laws ought to apply globally. Indeed, in 1993, the Vienna Conference affirmed the idea that human rights are universal, indivisible, interdependent and interrelated, yet we have not achieved full acceptance of human rights as a constant limitation of power.

> [T]he contracting states do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d'etre of the convention... The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.[34]

Historically, human rights law has been viewed too narrowly and has been portrayed as a dichotomy based on intentions, good or evil. In fact, because human rights apply to everyone, not only people with evil intentions can violate them. Often organizations created to do good, such as the UN, NGOs and even human rights groups, can violate an individual's human rights. The idea that violators must be evil limits the understanding and application of human rights.[35]

C. Human Rights Law has Both Criminal and Civil Aspects

It is important to be reminded of the criminal and civil aspects of human rights law in order to highlight that it is very common in both these areas of law to have multiple actors held responsible for actions that took place in another country.

A human rights violation can constitute a violation of both criminal and civil law. In many legal systems cases based on one set of circumstances will include both civil (e.g. monetary damages against individuals, corporate or government entities) and criminal aspects (e.g. jail time for individuals, usually working in some official capacity). For example, in the United States, the same violation may trigger two different actions, one using the criminal justice system and the other civil. On the international level, the same violation may also be treated in two ways. Actions to regional bodies are similar to civil actions, given monetary damages and orders to change practice will be the frequent remedy. For certain

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33. *See, e.g.,* Alon Harel, *How (and Whether) to Rethink Human Rights*, 9 INT'L LEGAL THEORY 87, 88 (2003).

34. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 3, 23 (May 28).

35. David Kennedy, *The International Human Rights Movement: Part of the Problem?* 15 HARV. HUM. RTS. J. 101, 109, 111 (2002). One should question the effectiveness of international interventions and of the overriding usefulness of the dominant paradigm, given the world should be better off then we are. Review Essay Symposium: *Phillip Allott's Eunomia and Health of Nations - Thinking Another World: 'This Cannot Be How the World Was Meant to Be'* Discussion, 16 EUR. J. INT'L. L. 255, 256, 260 (2005).

enumerated human rights violations, an action can be brought to the International Criminal Court.

Jurisdiction in criminal law can be asserted where the crime occurred, based on nationality (of defendant or victim), universal jurisdiction (certain enumerated crimes, for example crimes against humanity) or by treaty.[36] In civil law, jurisdiction has been easier to obtain and is often asserted through minimum contacts that do not offend notions of fair play.[37]

Many theories regarding accountability of multiple actors have been developed and are in use throughout the world. Most of these theories allow for degrees of responsibility or fault, distinguishing the actions of one wrongdoer from another involved in the same action. Theories and practice, ranging from simple to very sophisticated, have developed to allocate or apportion fault, responsibility and liability, which include: co-defendant and co-conspirator liability, agency, contract, vicarious liability, respondeat superior, market share liability, joint and several liability, enterprise liability and comparative fault.[38]

D. Jurisdiction in Human Rights Law

Unfortunately, human rights and humanitarian law are often lumped together within the public international law field. Practitioners often practice both, and human rights lawyers are far from immune from the phobia that human rights law may be more fantasy than fact. Because humanitarian law is the more developed discipline, practitioners often wrongly borrow its obsession with a threshold jurisdictional hurdle, when no such hurdle need be crossed in human rights law. This desire to first determine if human rights law applies has created a problem for its extraterritorial application; such a hurdle should not have been created in the first place.

Human rights is distinct from most international law or law between nations. For example, whether refugee law is a distinct discipline within international law, or rather a part of human rights law, makes a difference as to how these laws are interpreted. Laws relating to refugee rights use language about such laws applying in the territory of the Contracting State.[39] The territorial limits included in the Convention Relating to the Status of Refugees have been interpreted narrowly by Contracting States. For example, the U.S. Supreme Court, in a narrow

36. *See, e.g.*, Tarik Abdel-Monem, *How Far do the Lawless Areas of Europe Extend? Extraterritorial Applications of the European Convention on Human Rights*, 14 J. TRANSNAT'L L. & POL'Y 159, 173 (2005).

37. This jurisdiction must "not offend traditional notions of fair play and substantial justice." Int'l Shoe Co. v. Wash., 326 U.S. 310, 316 (1945).

38. *See generally* KENNETH ABRAHAM, CONCISE RESTATEMENT OF TORTS (2000); CONTRACT LAW TODAY: ANGLO-FRENCH COMPARISONS (Donald Harris & Denis Tallon eds.,1989); EUROPEAN GROUP ON TORT LAW, PRINCIPLES OF EUROPEAN TORT LAW (Springer-Verlag/Wien 2005); EUROPEAN PRODUCT LIABILITY (Rebecca Attree & Patrick Kelly eds., 1992); FOWLER V. HARPER ET AL.,THE LAW OF TORTS (2005); William M. Sage, *Enterprise Liability and the Emerging Managed Health Care System*, 60 LAW & CONTEMP. PROBS. 159 (1997).

39. Convention relating to the Status of Refugees art. 10, 40, Jul. 28, 1951, 19 U.S.T. 6577, 189 U.N.T.S. 150.

interpretation of refugee law as traditional international law, as opposed to a part of human rights law, found that detention of Haitians in Guantanamo, Cuba, was not covered by the Refugee Convention, since that would be an "uncontemplated" extraterritorial obligation.[40] Viewing the Refugee Convention as protecting the human rights of individuals first, rather than as simply an agreement between states, would have resulted in a different decision that protected the rights of the refuge-seeking Haitians.[41]

Again, human rights law focuses on the rights of individuals and the core protection or essence of the law is to protect people.

Human rights law is not humanitarian law, with all its jurisdictional definitions. Humanitarian lawyers spend countless hours in mental contortions attempting to either show how humanitarian law applies or does not apply to a particular circumstance.[42] Is it an international conflict? Where the participants engaged in combat? Were they wearing uniforms? And recently, is he or she an enemy combatant? Such a practice appears to help these lawyers comfort themselves that humanitarian law is really law.

Human rights apply and belong to humans. Although this may be a stark and sweeping statement, this is the nature of the law, and this is why human rights law now applies to non-state actors,[43] to corporations and in the private sphere (e.g., discrimination).[44] It is out of step with these developments, which represent the essence of human rights law, to limit the extraterritorial application of human rights law and to presume that only one state may be held responsible for violating an individual's rights. To some degree these limits have been based on the desire to avoid the difficult task of evaluating government policy in a war abroad. In addition, the international law state-based approach appears to limit the inquiry to one state at a time. In the main, though, limitations are due to an enculturation from humanitarian law/traditional international law, where we review the actions of one state at time and where some sort of jurisdictional hurdle must be crossed before the law applies. Human rights law is relevant when an individual's rights are violated.

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40. Sale v. Haitian Centers Council, Inc., 113 S. Ct. 2549, 2564 (1993) *cited in* Gerald Neuman, *Extraterritorial Violations of Human Rights by the United States*, 9 AM UNIV. J. INT'L L. & POL'Y 213, 219 (1993).

41. Gerald Neuman, *Extraterritorial Violations of Human Rights by the United States*, 9 AM UNIV. J. INT'L L. & POL'Y 213, 219 (1993).

42. A clear example of this is US government lawyer efforts to show that somehow humanitarian law does not apply to its war on terror. For an effective critique of this mental yoga *see* Human Rights Watch, *Briefing Paper, International Humanitarian Law Issues In A Potential War In Iraq* (Feb. 20, 2003), *available at* http://www.hrw.org/backgrounder/arms/iraq0202003.htm (last visited Jan 30, 2007).

43. Nigel S. Rodley, *Can Armed Opposition Groups Violate Human Rights? in* HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY: A GLOBAL CHALLENGE 297 (Kathleen E. Mahoney et al. eds., 1993).

44. *See, e.g.*, ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE (1996); Mark Gibney & R. David Emerick, *The Extraterritorial Application of United States Law and the Protection of Human Rights: Holding Multinational Corporations Accountable to Domestic and International Standards*, 10 TEMP. INT'L & COMP. L.J. 123 (1996); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001).

E. Duty to Act

General principles of tort, contract and criminal law create a number of situations requiring an affirmative duty to act, including: A duty to act may be based in the relationship of the parties (e.g. parent to child, pilot to passenger) or in contract; a duty based in a voluntary assumption of care; a duty arising from the fact that a person created a risk from which a need for protection arose (e.g., the Good Samaritan principle, where no duty exists to intervene, but once a person intervenes she has a duty to intervene appropriately); a duty arising from a special relationship that makes the non-acting partner criminally responsible for the actor's criminal action (e.g. one person beats the other and leaves the victim lying on the ground injured); a duty can arise from the fact that one owns the real property upon which the victim is injured; the duty to act and the resulting criminal liability for failing to act, based upon statute.[45]

Borrowing and applying these general principles of law to instances of states intervening in another state in any way (from invasion, to peacekeeping, to development work), a duty would often exist.

Perhaps the strongest basis to assert a duty is the Good Samaritan principle, given states would argue that they had no duty in the first place to intervene. Just as in general principles of law, a Good Samaritan has no obligation to intervene, but if he or she does, he or she is held to certain legal obligations.

Another basis for an affirmative duty could be asserted depending on the circumstance. For example, considering Chapter IX of the UN Charter and various human rights agreements,[46] it could be argued that a contractual or statutory duty exists. Or where a state has intervened in another country, for example militarily or economically, and damage has been done, a duty could arise.

The idea is established rhetorically and intellectually that a human rights duty applies to protect the "target beneficiaries" of international actors involved in development projects. This understanding, however, has yet to be accepted and/or operationalized by most states and other international actors. It is notable that on paper the World Bank already recognizes this:

> Human rights foster accountability of all actors involved in development by locating duty for particular development outcomes on duty-bearers (usually States). This advances accountability to the poor and a consequent empowerment of the poor. In short, human rights improve the processes through which development occurs for those it is designed to benefit.[47]

45. *See, e.g.*, David C. Biggs, *The Good Samaritan is Packing: An Overview of the Broadened Duty to Aid your Fellowman, with the Modern Desire to Possess Concealed Weapons*, 1997 U. DAYTON L. REV. 225, 229-230 (1997).

46. U.N. Charter art. 55-60.

47. Robert Danino, Legal Opinion on Human Rights and the Work of the World Bank, para. 2 (Jan. 27, 2006) (on file with the Denver Journal of International Law and Policy).

F. An Agent or Sub-contractor Cannot Avoid Legal Obligations

In general principles of law, it is clear, whether that under contract, agency or tort law, that an individual or entity cannot escape legal responsibility by forming an association with others. In these cases, one is held to be liable for the acts or omissions of the other.

Similarly, international organizations have human rights obligations, and entities that created these organizations do not escape liability by acting through the international organization:

> International organizations are entities created by states delegating power to achieve certain goals and perform specified functions.... It would be surprising if states could perform actions collectively through international organizations that states could not lawfully do individually.[48]

> [I]nternational organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law.[49]

Case law interpreting the European Convention of Human Rights has consistently held states to be responsible for their actions, regardless of the banner or entity through which such actions were carried out.[50] For example, it would be incompatible with the purposes of the European Convention to absolve states from responsibility when acting through international organizations.[51]

IV. SPECIFIC HURDLES

Ending obligations to respect human rights at a nation's borders severely limits human rights law's capacity to effectuate positive change. This interpretation is anachronistic and flows against an actual trend of globalization of commerce as well as conflicts. Our present world is amazingly interconnected. Corporations have obligations to respect human rights wherever they operate; so how, when human rights principles apply in the private sphere across borders, can countries claims that only a host state has human rights obligations, and that human rights obligations that apply domestically do not apply when that country is working in another, either directly or through an agent (e.g., UN, OAS or World Bank)?[52] Some aspects of this issue have received academic attention.[53]

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48. Dinah Shelton, *Protecting Human Rights in a Globalized World*, 25 B.C. INT'L & COMP. L. REV. 273, 309 (2002); *see also* Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174 (Apr. 11).

49. Interpretation of the Agreement of March 25, 1951 Between the WHO and Egypt, 1980 I.C.J. 73, 89 (Dec. 20).

50. Michael Kearney, *Extraterritorial Jurisdiction of the European Convention on Human Rights*, 5 TRINITY C.L. REV. 126, 139 (2002).

51. Waite and Kennedy v. Germany, 30 Eur. Ct. H.R. 261, 262 (1999).

52. For example, both home and host states have an obligation to regulate multinational corporations. *See, e.g.*, Shelton, *supra* note 48. It is a general principle that those with power must be accountable for the way in which they exercise it. International organizations have developed limited and limiting ways to hold themselves to account. *See, e.g.*, Daniel D. Bradlow, *Private Complainants*

There is a growing understanding of the application of human rights law to individuals serving in international operations. For instance, human rights principles proscribe "blue helmets" from torturing or raping those they have been sent to protect.[54] At the same time, mechanisms to create accountability for these violations are underdeveloped.[55]

An understanding of how human rights law should be considered in how Member States organize their interventions in another country and how human rights law provides a vehicle for accountability related to money spent is also underdeveloped and requires further attention.[56] It should be noted that Zanmi Lasante/Partners in Health, the Robert F. Kennedy Memorial Center for Human Rights, and the International Human Rights Clinic at the New York University School of Law requested and received a hearing on the human rights obligations, specifically economic and social rights, members of the OAS have when implementing projects in Haiti.[57] The purpose of the hearing was to remind the Commissioners of the confusion regarding this issue and the ripeness for further clarification.

A. Extraterritorial Application of Human Rights Law

Extraterritorial responsibility has been well established in international law for decades. The seminal case, the Trail Smelter Arbitration, held that: "no state has the right to use or permit the use of *its* territory in such a manner as to cause injury... in or to the territory of another" (emphasis added).[58]

Do these principles also apply to human rights violations arising from decisions taken in one country that result in actions carried out in another? A

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and International Organizations: a Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions, 36 GA. J. INT'L & COMP. L. 403 (2005).

53. Professor Ved Nanda has been sitting on a Committee of the International Law Association that has been grappling with this topic already for a number of years and has already caught the wave in a recently published article. *See* Ved Nanda, *Accountability of International Organizations – Some Observations*, 33 DENV. J. INT'L L. & POL'Y 379 (2005).

54. *See, e.g.,* Murphy, *supra* note 20, at 531-46.

55. Some scholars see a more gradual acceptance by the UN and Member States of their human rights obligations, for example when acting as a quasi-sovereign. *See, e.g.,* Frederic Megret and Florian Hoffmann, *The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities*, 25 HUM. RTS. Q. 314 (2003).

56. Some scholars believe the general principles of state responsibility apply to human rights law and that the host state would be justified in approaching the intervening state for compensation for the violation of the rights of its citizens. The logical extension of this argument is that Haiti could bring a case in the ICJ against various states for violating the economic and social rights of its citizens. *See, e.g.,* Danwood Mzikenge Chirwa, *The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights*, 5 MELB. J. INT'L L. 1, 26-27 (2004).

57. *Statement of Partners in Health/Zanmi Lasante* before the Inter-American Commission on Human Rights (March 3, 2006), *available at* http://www.rfkmemorial.org/human_rights/2002_Loune/PIHStatement.pdf.

58. *The Smelter Arbitral Tribunal Decision*, 35 AM. J. INT'L L. 684, 684 (1941), *quoted in* Rebecca M. Bratspies, *Trail Smelter's (Semi)Precautionary Legacy* (2006), *in* REBECCA M. BRATSPIES, TRANSBOUNDARY HARMS IN INTERNATIONAL LAW: LESSONS FROM THE TRAIL SMELTER ARBITRATION, (Rebecca M. Bratspies & Russell Miller, eds., Cambridge University Press 2006).

number of forums and scholars have argued that this should be the case. Many scholars argue that decisions against the extraterritorial application of human rights law is anathema to the effective protection of individual rights, the very purpose of human rights law.[59]

Notably, states actually take interest in the impact of their corporate actors abroad (e.g., product liability)[60] or acts of individuals (e.g., pedophiles, money launderers, tax dodgers) and international humanitarian law attaches to the actor, not the place.[61] Yet, human rights NGOs and advocacy groups have not spent a lot of time looking at the extraterritorial impact of state actions. One author has said, "[g]reater commitment is needed to the complex and broad-ranging business of transforming the political culture both nationally and internationally in order to create greater transparency and accountability in relation to state actions overseas."[62]

The human rights advocate's position, and one that has significant theoretical support, is that it is unconscionable to interpret human rights treaty obligations in such a way that would permit the violation of human rights by a Contracting Party extraterritorially, but find that same violation condemnable when done in its own territory.[63]

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59. *See, e.g.*, Theodor Meron, *Extraterritoriality of Human Rights Treaties*, AM. J. INT'L L. 78, 82 (1995). *See also* John Creone, *Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo*, EUR. J. INT'L L. 469, 475 (2001).

60. In fact, some have argued that various states, including the US, have gone too far in asserting extraterritorial jurisdiction or application of their laws in other countries. (This is a far cry from the US position on the application of human rights to their actions extraterritorially.) *See, e.g.*, Note, *Extraterritorial Application of the Export Administration Act of 1979 Under International and American Law*, 81 MICH. L. REV. 1308, 1309 (1983); *see also* Jerry W. Cain, Jr., *Extraterritorial Application of the United States' Trade Embargo Against Cuba: The United Nations General Assembly's Call for an End to the U.S. Trade Embargo*, 24 GA. J. INT'L & COMP. L. 379, 380 (1994); *see generally* Note, *Constitutional Law – Extraterritorial Application of the Fourth Amendment to Actions Taken by or at the Direction of United States Agents Against Aliens Residing in Foreign Nations*, 21 WAYNE L. REV. 1473, 1479 (1974-1975) *and* Randall L. Sarosdy, Comment, *Jurisdiction Following Illegal Extraterritorial Seizure: International Human Rights Obligations as an Alternative to Constitutional Stalemate*, 54 TEX. L. REV. 1439, 1468 (1975-1976) (discussing the ebb and flow of the extraterritorial application of the individual rights guaranteed in the U.S. Constitution); *see also* Angela Fisher & Margaret Satterthwaite, *Beyond Guantanamo: Transfers to Torture One Year After Rasul v. Bush*, CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, June 28, 2005, *available at* http://www.nyuhr.org/docs/Beyond%20Guantanamo%20Report%20FINAL.pdf (providing a more recent example of the ebb and flow of the extraterritorial application of the individual rights guaranteed in the U.S. Constitution).

61. *See, e.g.*, Dino Kritsiotis, *The Kosovo Crisis and NATO's Application of Armed Forces Against the Federal Republic of Yugoslavia*, 49 INT'L & COMP. L.Q. 330 (2000).

62. Ralph Wilde, *Legal "Black Hole"? Extraterritorial State Action and International Treaty Law on Civil and Political Rights*, MICH. J. INT'L L. 739, 770 (2005).

63. Michael Kearney, *Extraterritorial Jurisdiction of the European Convention on Human Rights*, 5 TRINITY C. L. REV. 126, 126-129 (2002).

The issue has been litigated often in the European Court on Human Rights. These cases turn mainly on the definition of "jurisdiction" found in article 1 of the European Convention.[64]

There have been many critiques of the European Court's approach to extraterritorial application of the Convention, a number of which show what appears to be somewhat inconsistent judgments that tend to support the idea that the Court has placed the higher interests of the State Parties above examining serious human rights violations.[65] Cases against Turkey and Russia have tended to support the extraterritorial application, while cases against core European states do not.[66]

In the context of the Turkish occupation of Cyprus, the Court stated: "[A] Contracting State to the Convention could not, by way of delegation of powers to a subordinate and unlawful administration, avoid its responsibility for breaches of the Convention, indeed of international law in general."[67]

The term 'jurisdiction' is not limited to the national territory of the High Contracting Parties; their responsibility can be involved because of acts of their authorities producing effects outside their own territory.[68]

One line of cases clearly does not limit jurisdiction to territorial boundaries and uses the "effective control" or "degree of control" test based on power or authority to determine if the European Convention should be applied extraterritorially.[69]

In the *Bankovic* case, plaintiffs attempted to hold states responsible for a bombing in Belgrade by NATO forces, but the Court narrowed the applicability of the Convention extraterritorially to the territories of the Contracting States. By taking this tack, the Court avoided the more interesting question regarding the degree State Parties are responsible for actions carried out within the framework of NATO.[70]

> ...[T]he Convention is a multi-lateral treaty operating, subject to Article 56 of the Convention, in an essentially regional context and notably in

64. "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention." Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Apr. 11, 1950, 213 U.N.T.S. 221.

65. *See, e.g.*, Kearney, *supra* note 63 at 126-157 (providing an analysis of several decisions of the European Court regarding the extraterritorial application of international human rights laws).

66. Some scholars have pointed to the odd development of jurisprudence in this area as related to Europe's colonial past. Louise Moor & A.W. Brian Simpson, *Ghosts of Colonialism in the European Convention on Human Rights*, 76 BRIT. Y.B. INT'L L. 121 (2005).

67. Cyprus v. Turkey, App. No. 25781/94, Eur. Ct. H.R., para. 71 (May 10, 2001).

68. Drozd & Janousek v. France & Spain, 240 Eur. Ct. H.R. (ser. A) at 91 (1992); *See also* Loizidou v. Turkey, 310 Eur. Ct. H.R. (ser. A) at 62 (1995).

69. *See* Cyprus v. Turkey *supra* note 69 at 71; Loizidou v. Turkey *supra* note 68 at 62; Ocalan v. Turkey, App. No. 46221/99, Eur. Ct. H.R. (2003); Issa v. Turkey, App. No. 31821/96, Eur. Ct. H.R. (2004); Ilascu v. Moldova & Russia, App. No. 48787/99, Eur. Ct. H.R (2004).

70. *See, e.g.*, Alexandra Ruth & Mirja Trilsch, *International Decision: Bankovic v. Belgium (Admissibility)*, 97 AM. J. INT'L L. 168, 172 (2003).

> the legal space (*espace juridique*) of the Contracting States. The FRY clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention.[71]

Although this reading of the European Convention moves away from extraterritorial application, the "*espace juridique*" concept would reinforce the notion that regional human rights instruments apply throughout the territories of the Contracting States. Taking this line of thinking a logical step further, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR) were designed to apply throughout the world, so it is not a stretch to define "*espace juridique*" to be global.[72]

In matters related to extraterritorial application of the American Convention on Human Rights, the Inter-American Commission has taken a position that is conceptually consistent with the essence of human rights law. It has held: "[g]iven that individual rights inhere simply by virtue of a person's humanity, each American state is obliged to uphold the protected rights of any person subject to its jurisdiction."[73] This appears to mean that all OAS Members are bound by Inter-American human rights law when intervening in Haiti.

The Inter-American Commission for Human Rights has also specified the non-nationality basis for conceiving human rights.[74] If human rights law cannot support a distinction between nationals and foreigners domestically, should it be able to do so extra-territorially?

Perhaps most important for the purposes of this article, the "jurisdiction" limitation that exists in the European Convention, the ICCRP and the American Convention on Human Rights is conspicuously absent in the International Covenant on Economic, Social and Cultural Rights. Article 2 begins:

> 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

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71. Bankovic v. Belgium, App. No. 52207/99, 2001-XII Eur. Ct. H.R. 333 para 80 (Dec. 12, 2001).

72. It should be noted that the Human Rights Committee has not been so expansive in its view of extraterritorial application. In its General Comment 31 on Article 2 it stated, "that a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party." U.N. Human Rights Comm., *General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, ¶ 10, U.N. Doc CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

73. Coard v. United States, Case 10.951 Inter-Am. C.H.R., Report No. 109/99 OEA/Ser.L/V/II.106, doc. 3 rev. ¶ 37 (1999).

74. Wilde, *supra* note 62, at 791.

> resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.[75]

It should be noted that only article 14 of the ICESCR specifies that each State Party must have a plan for securing free primary education in its territory or under its jurisdiction. Otherwise, the ICESCR requires international cooperation to achieve the rights of the Convention in all State Parties.

The Committee on Economic and Social Rights clarifies this point:

> The Committee wishes to emphasize that in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard.[76]

This certainly can be read as an attempt to create an obligation to provide foreign assistance, but it also supports the idea that if a state or states choose to intervene in another nation, the intervening states continue to be bound by the Covenant. In another General Comment, the Committee mandates that the rights of Covenant be considered by State Parties in their international work. These statements underscore the applicability of the ICESCR extraterritorially:

> The second principle of general relevance is that development cooperation activities do not automatically contribute to the promotion of respect for economic, social and cultural rights. Many activities undertaken in the name of "development" have subsequently been recognized as ill-conceived and even counter-productive in human rights terms. In order to reduce the incidence of such problems, the whole range of issues dealt with in the Covenant should, wherever possible and appropriate, be given specific and careful consideration.[77]

> Every effort should be made, at each phase of a development project, to ensure that the rights contained in the Covenants are duly taken into account. This would apply, for example, in the initial assessment of the priority needs of a particular country, in the identification of particular projects, in project design, in the implementation of the project, and in its final evaluation.[78]

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75. International Covenant on Economic, Social and Cultural Rights art. 2, Dec. 19, 1966, 993 U.N.T.S. 3.

76. U.N. Comm. on Econ., Soc. & Cultural Rights [CESCR], *General Comment 3: The Nature of States Parties Obligations (Art. 2, par.1 of the Covenant)*, ¶ 14, U.N. Doc. 14/12/90 (Dec. 14, 1990).

77. U.N. Comm. on Econ., Soc. & Cultural Rights [CESCR], *General Comment 2: International Technical Assistance Measures (Art. 22 of the Covenant)*, ¶ 7, U.N. Doc. 02/02/90 (Feb. 2, 1990).

78. *Id.* at ¶ 8(d).

The extraterritorial application of Contracting Parties obligations under the Covenant of Economic, Social and Cultural Rights is much clearer than that under the European Convention and the International Covenant of Civil and Political Rights and clearer than the Inter-American Convention on Human Rights.

B. Marginalization of Economic and Social Rights

Economic, social and cultural rights (ESCR) have been marginalized in practice.[79] Many governments and a number of leading NGOs see economic rights more as the equivalent of letters to Santa Claus rather than as justiciable rights.[80] A few states, like the US, still cling to the outdated notion that human rights are limited to civil and political rights.[81] But we in the advocacy community also are part of the problem.[82] Our focus on civil and political rights has helped to marginalize ESCR. Importantly, violations of ESCR affect women disproportionately since women tend to be marginalized in terms of political power, there may be a correlation.[83]

Up to now, most discussions (both academic and in the European Court of Human Rights (ECHR) and Inter-American Commission on Human Rights (IACHR)) of the extraterritorial application of human rights law have related to civil and political rights. The marginalization of ESCR can be seen from this fact, especially considering the distinct wording between the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which favors the extraterritorial application of ESCR rights.

Many countries, like Canada and Brazil, have developed very sophisticated ways of measuring positive change in the level of respect for ESCR.[84] When intervening abroad, these countries should bring this experience with them in order

79. Human rights as implemented today can mask power relations. While economic and social rights have been marginalized, market attributes have been formalized through the WTO. *See* Tony Evans, *International Human Rights Law as Power/Knowledge*, 27 HUM RTS. Q. 1046 (2005).

80. "Right to Health," 6 *Human Rights Features* 1 (31 March – 1 April, 2003). For an alternative view of the justiciable nature of economic, social and cultural rights, *see* Trinidad Antonio Cancado, "A Justicabilidade dos Direitos Economicos, Socias e Culturias no Plano Internacional," in Volio Jimenez Collection 171 (2002) (on file with author).

81. Rhoda Howard, *The Full-Belly Thesis: Should Economic Rights Take Priority Over Civil and Political Rights? Evidence from Sub-Saharan Africa*, 5 HUM. RTS. Q. 467, 468 (1983).

82. *See* Kenneth Roth, *Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization*, 26 HUM. RTS. Q. 63 (2004); Leonard S. Rubenstein, *How International Human Rights Organizations Can Advance Economic, Social and Cultural Rights: A Response to Kenneth Roth*, 26 HUM. RTS. Q. 4 (2004).

83. *See* Joe Oloka-Onyango, *Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for People's Rights in Africa*, 18 AM. U. INT'L L. REV. 851, 876-79 (2002-2003).

84. *See, e.g.*, Todd Landman, *Measuring Human Rights: Principle, Practice and Policy*, 26 HUM. RTS. Q. 906 (Nov. 4, 2004); Katarina Tomasevski, *Measuring Compliance with Human Rights Obligations*, *in* HUMAN RIGHTS IN DOMESTIC LAW AND DEVELOPMENT ASSISTANCE POLICIES OF THE NORDIC COUNTRIES, 109 (1989); Robert E. Robertson, *Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources" to Realizing Economic, Social, and Cultural Rights*, 16 HUM. RTS. Q. 693 (1994).

to demonstrate whether money being spent is actually improving the human rights situation.[85]

There is a growing understanding of the many ways of viewing and working internationally. But too often when viewing human rights problems, we borrow only from the criminal aspect of the law and forget about its social justice component, and thereby fail to include a focus on the obligations to improve the economic, social and cultural reality of the people in the country where the international entities are intervening. Often, for example, in the field of transitional justice, economic, social and cultural rights are marginalized.[86]

Peacekeeping and peacebuilding efforts are lagging well behind in terms of measuring their impact on ESCR. Whereas human rights are normally included in the report of the Secretary General to the Security Council related to a specific peacekeeping operation, these reports almost always focus on civil and political rights and contain minimal if any discussion of ESCR.

C. Multi-State Responsibility

Roman law offers one of the first examples of how a legal system is renovated under the influence of equitable ideas.[87] It is time for our thinking about multi-state responsibility for violations of economic and social human rights to be renovated.

In general principles of law, for example, we find co-defendants and co-conspirators in criminal law, and joint enterprises and joint enterprise liability in civil law.[88] Many actors (e.g., States, multilateral organizations and NGOs) are part of the joint enterprise of bringing sustainable peace and the respect of the full spectrum of human rights to Haiti. There should be shared responsibility and accountability.[89] Not only general principles of law, but general principles of international law support this position.[90]

The Committee on Economic, Social and Cultural Rights has already held that if states fail to abide by their obligations in the Covenant when entering bilateral or multilateral agreements they can violate their obligations under the Covenant.[91] It

85. Tools have been created that are useful in determining if a state is taking steps to the maximum of its available resources. *See, e.g.*, Claudio Schuftan, *Dignity Counts: A Guide to Using Budget Analysis to Advance Human Rights*, 27 HUM. RTS. Q. 134 (2005).

86. Louise Arbour, United Nations High Comm'r for Human Rights, Economic and Social Justice for Societies in Transition (Oct. 25, 2006), *available at* http://www.ictj.org/en/news/features/1025.html.

87. Schermaier, *supra* note 1 at 65.

88. *See, e.g.*, Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 MICH. L. REV. 1266, 1266-1380 (1996-97).

89. More has been written on obligations of UN and multilateral entities than holding multiple states responsible for the same violation; however, more work is needed to flush out how states must abide by their human rights obligations while acting collectively. *See, e.g.*, Cerone, *supra* note 59; Kritsiotis, *supra* note 61.

90. *See* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 15 (Jan. 29). *See, e.g.*, Salomon and Sengupta, *supra* note 19.

91. Comm. on Econ., Soc. and Cultural Rights [CESCR], General Comment 14, *The Right to the*

is a logical step to consider states bound by the Covenant in the implementation of these agreements. States are individually and collectively bound by human rights law. The question remains as to how to achieve acceptance of this principle. In the case of "decisions... made collectively, one cannot disaggregate such actions and attribute them to individual member States. Member States are then obliged to discharge their obligations undertaken *qua* members pursuant to those collective decisions, and will be held... responsible under international law for the breach thereof."[92]

Despite some developments, human rights law and accountability for violations still have not evolved to hold multiple actors liable. We are very much still in the state-citizen mode in terms of the application of human rights law. This is true despite the fact that the reality on the ground is complex, multidimensional and involves many actors. In places like Haiti, where the government was not trusted or had a limited capacity to absorb funds from international donors, a different way of looking at human rights obligations needs to be developed. Importantly, in Haiti, most money flows from a donor directly to NGOs or corporations (implementing projects approved by the donor), but yet the government of Haiti is held responsible for improving the human rights situation and is accountable for whether these projects – which the Government has very little influence over – actually benefit the people. Something is wrong with this picture: the UN peacekeeping mission to Haiti, the OAS mission, the Inter-American Development Bank, World Bank and all the Member States' missions and projects to Haiti, NGOs and corporations, are all exponentially better resourced than the Government.

Numerous entities exercise some power and impact the lives of Haitians. In multiple ways, the relative power of each entity should be examined when determining levels of responsibility to respect and promote the human rights of the Haitians. Interestingly, all of those entities, except corporations, would accept that one of their missions is to improve the human rights situation in Haiti. The problem is that the expectation and measurement of each entity's contribution to improving the human rights situation remains undeveloped. All accountability still flows to the entity considered by many to be corrupt and ineffective – the Haitian government—while the Member States and their agents enjoy moral high ground and no accountability. Even "do gooders" need to examine carefully to see if their work is actually producing a human rights benefit, including the human rights components of UN mission.[93]

Highest Attainable Standard of Health, ¶ 50, U.N. DOC. E/C.12/2000/4 (2000); Comm. on Econ., Soc. and Cultural Rights [CESCR], General Comment 12, *Right to Adequate Food*, ¶ 19, U.N. DOC. E/C.12/1999/5 (1999).

92. U.N. ECON. & SOC. COUNCIL [ECOSOC], Sub-Comm. on the Promotion and Prot. of Human Rights, *Progress Report: Globalization and Its Impact on the Full Enjoyment of Human Rights*, ¶ 58, U.N. DOC. E/CN.4/Sub.2/2001/10 (Aug. 2, 2001) (*prepared by* Joseph Oloka-Onyango and Deepika Udagama).

93. Kennedy, *supra* note 35, at 108.

Even if huge projects could not be completed within the next few years, many projects could be implemented that would help transform lives and give the Haitian people some control and influence over the resources being spent in their name. This, in and of itself, is mandated by human rights law. Political participation in the decisions affecting the Haitian people is fundamental in human rights law. Why it can be ignored at a time of crisis is far from clear, especially when it is the people's participation and empowerment that can help to build the basis for a sustainable peace through laying the foundation for good governance.

It is not simply the international intervenors' responsibility; obviously the host Member State has significant obligations, but it is past due to begin a process to define that each intervenor has human rights obligations and those obligations need to be considered in the way interventions are structured and their impact measured.

Rights also have addressees who are assigned duties or responsibilities. A person's human rights are not primarily rights against the United Nations or other international bodies; they primarily impose obligations on the government of the country in which the person resides or is located. The human rights of citizens of Belgium are mainly addressed to the Belgian government. International agencies, and the governments of countries other than one's own, are secondary or "backup" addressees. International human rights organizations provide encouragement, assistance, and sometimes criticism to states in order to assist them in fulfilling their duties.[94]

A growing acceptance of the responsibility to protect highlights the significance of "backup" responsibility: the principle makes it an obligation of UN Member States to intervene to end massive human rights violations.[95]

Contemporary practice makes it hard to see how states other than the primary state have duties in a Hohfeldian sense, but such practice is out of step with other areas of law that clearly contemplate multiple duty holders. There is nothing in human rights law that prevents us from using a similar analysis. In fact, the call for state cooperation to achieve full respect for human rights seems to highlight the duty. "Starting with a human act, we must next find a causal relation between the act and the harmful result; for in our law – and it is believed in any civilized law – liability cannot be imputed to a man unless it is in some degree a result of his act."[96]

The main hurdle is the means for moving from a lack of an obligation to intervene in another country, for example, when the responsibility to protect does not exist and the recognition of a duty on states that voluntarily intervene in another country. In this case, we can simply borrow from the general principles of

94. James Nickel, *Human Rights,* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY, Fall 2006, http://plato.stanford.edu/entries/rights-human/ (emphasis excluded).

95. *See, e.g.,* Mukesh Kapila, United Nations Humanitarian Coordinator in Sudan, The Responsibility to Protect: Moving from Words to Action (Jan. 25, 2006), *available at* http://www.aegistrust.org/index.php ?option=comcontent&task=view&id=318&Itemid=147.

96. Joseph Beale, *The Proximate Consequences of An Act*, 33 HARV. L. REV. 633, 637 (1920).

law. Just as in the case of the Good Samaritan, there may be no duty to intervene, but the act of an intervention, or voluntary operation in another state, creates legal duties to respect human rights law.

Once we get over the duty hurdle, it is also not clear what standard should be applied. Until now, states could point to their good intentions as a reason why they should not be held responsible. However, given that *mens rea* or bad intention is only required in some cases of criminal law, other standards need to be looked at, such as recklessness, negligence and strict liability. In many ways a violation of human rights law is a *malum prohibitum* or a prohibited wrong. When such a wrong happens the parties involved are liable. This should be the case in human rights law.

Once a violation of human rights can be demonstrated, liability and responsibility should be divided based on relative power and ability to have ended the violation.

V. RECOMMENDATION/CONCLUSION

Recently, member states of the UN, including most notably the United States, have been preoccupied with the concept of the UN's accountability. But what is needed is accountability to the UN's guiding principles rather than to the agenda of particular Member States.

Further defining the extent of states' human rights obligations when intervening in other states will help to improve transparency, accountability and effectiveness of these interventions. It is hoped this article will create more interest in this area.

The IACHR examination of multi-state responsibility for extraterritorial violations of economic, social and cultural rights of Organization of American States Member States is an important step in the direction of formalizing a new understanding of what human rights duties are held by states voluntarily intervening in other state. Hopefully, the IACHR will help clarify the legal obligations that do in fact exist.

Once there is a growing understanding of this responsibility, the heavy lifting will be the operationalization of this obligation when Member States and their agents (e.g., UN and World Bank) operate in another country.