Dilemmas in promoting global economic justice through human rights law

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This piece discusses a recent activist initiative being promoted by leading international NGOs seeking to deploy international human rights law to combat global poverty and economic inequality. In the process it offers some broader reflections on the politics of human rights law activism in the economic sphere. It is based on a longer forthcoming book chapter, to be published in the collected courses of the Academy of European Law at the European University Institute, Florence, itself part of a broader interdisciplinary research project on the extraterritorial application of human rights law generally, 'Human Rights Beyond Borders', funded by the European Research Council.[1]

The Extraterritorial Obligations (ETO) Consortium is a group of 80 NGOs, academics and experts working on international development and campaigning against economic inequality

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[1] Ralph Wilde, 'Dilemmas in promoting global economic justice through human rights law' Chapter in Nehal Bhuta (ed.), *The Frontiers of Human Rights: Extraterritoriality and its Challenges, Collected Courses of the Academy of European Law* (forthcoming, Oxford University Press, 2016) (hereinafter 'Wilde').

and poverty.[2] In 2011, forty individual members adopted the 'Maastricht Principles on the Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights', a treaty-like instrument, backed up by a legal 'Commentary'.[3] These documents claim to codify comprehensively the international human rights law regime on socio-economic rights across borders.

The current campaign for their acceptance and the implementation of their contents is based on the proposition that international human rights law has a primary, perhaps even pre-eminent, positive role in combatting global poverty and economic inequality, and regulating economic globalization. So, for example, the ETO consortium website claims that:

> ETOs [extraterritorial human rights obligations] are a missing link: Without ETOs, human rights could not assume their proper role as the legal bases for regulating globalization. With ETOs, an enabling environment for ESCRs [economic, social and cultural rights] can be generated, the primacy of human rights can be implemented, climate and eco-destruction can be stopped, the dominance of big money broken, TNCs [transnational corporations] regulated, and IGOs [intergovernmental organizations, e.g. the IMF and World Bank] made accountable.[4]

Claims like this are underpinning efforts to place the initiative at the centre of global civil society activism on development.[5] In the chapter, I apply broader theoretical ideas to consider some of the dilemmas involved in initiatives like this, such as between hope and reality, between elitism, orientalism and patriarchy, on the one hand, and representativeness in its various forms, on the other, and between statism, on the one hand, and globalism and

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[2] See http://www.etoconsortium.org/en/about-us/eto-consortium/ (last accessed 15 May 2015). I am an academic member of the Consortium, which I joined after the Maastricht Principles had been adopted (an overview over the academic members is available at http://www.etoconsortium.org/en/about-us/academic-members/ (last accessed 15 May 2015)). I played no role, formal or informal, in the process that led to their adoption.

[3] Various authors, Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, adopted 28 September 2011, available in multiple places online including http://www.maastrichtuniversity.nl/web/Institutes/MaastrichtCentreForHumanRights/MaastrichtETOPrinciples.htm (last accessed 15 May 2015) (hereinafter 'Principles'). The official commentary to the Principles is De Schutter, A. Eide, A. Khalfan, M. Orellana, M. Salomon and I. Seiderman, *'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights'*, 34 *HRQ* (2012) 1084 (hereinafter 'Commentary').

[4] Quote from the ETOs webpage, *supra* note 2, (last accessed 15 May 2015).

[5] See further the discussion in Wilde, *supra* note 1, section 2.

cosmopolitanism, on the other. Bearing these considerations in mind, I then look behind the claims made about the value of the law, to consider how the law's substantive content is understood, what the merits of this are, and what underlying assumptions about global economic change are embedded in it.

The legal regime in the Principles and elaborated in the Commentary articulates two bases for extraterritorial obligations in the sphere of socio-economic rights, what I term 'power' and 'cooperation'. The 'power' basis triggers obligations if and when a particular type of power relationship operates between a state and people outside its territory. The power relationship is either, an unusual situation of direct control over foreign territory, such as an occupation, or, transboundary harm conceived in terms of direct or foreseeable causation. The 'cooperation' basis operates regardless of the existence of any particular power relations. It is the area within which financial, technological and resource transfers from the more to the less economically privileged are situated, via the notion of 'assistance'.

The 'power' basis for extraterritoriality has two alternative components. On the one hand, if the state is present on the ground extraterritorially, exercising 'authority or effective control', then it has a broad obligation to 'respect, protect and fulfil' economic, social and cultural rights there (Principle 9a). This is significant, but limited to unusual situations where states are present in this kind of direct way outside their territories.

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

Clearly discussion and disagreement can be had about, and work in related areas of law such as the law of state responsibility drawn upon in considering, how these key terms can and should be defined legally, from the notion of 'particular' types of harm that are 'foreseeable' not 'remote' to the idea of a 'real risk' with effects that are 'substantial.' But whichever approach is taken in the range of options for the scope of liability here, from narrow to broad,

more fundamentally the range itself only covers a sub-set of the wide linkages that exist globally between national economies, given how they are intertwined in an acute, complex and constant fashion. This is a limited notion of international economic relations in not taking in the full potential for causal relationships that can mediate the condition of economic rights.

The second area of obligations, those relating to 'co-operation,' are not conceived to be triggered by the existence of a particular power relationship between a state and an extraterritorial human rights situation. Rather, they operate generally. As such, they have the potential to be of much wider relevance to international economic relations, and so to be much more important to efforts to combat global poverty and economic inequality, than the first set of obligations.

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

However, according to the Principles and the Commentary, the very existence of an obligation to assist is called into question, and no proper consideration is given to the crucial question of how resources are to be allocated by more economically advantaged states as between welfare at home and welfare internationally.[6] Although not mentioned in the Commentary, some of those involved in the initiative raise in their separate writings on the Principles the resistance of wealthier states to the notion that there is a legal obligation to cooperate in general and an obligation to provide particular levels of assistance in particular.[7] The position taken in the Principles and the Commentary, then, may be a pragmatic decision

[6] See further the discussion and sources cited in Wilde, *supra* note 1, section 7B.
[7] See *id.*

made to accept, not challenge, this resistance, in order, presumably, to ensure that such states come on board on the regime more generally, which, in order for this logic to work, has to be worth the price paid in jettisoning some of the core aspects of the obligation to cooperate. But the merits of this position are not self-evident, requiring, a considered cost-benefit analysis that is reasoned and persuasive. No such analysis is provided.

More fundamentally, the language of 'assistance' and 'cooperation' indicates very limited notions of action. It suggests a pre-existing reality taken as a given and, moreover, which is to be addressed through a conception of responsibility for realizing socio-economic rights located exclusively in the territorial state. Other states then 'assist' that government in this, although not by any clear level in terms of resources. Broader, more fundamental approaches, including of redistribution, that would involve a more radical transformation of the world economy, are not considered.

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

Also, this regime does not encompass responsibilities arising out historical considerations, whether the origins of contemporary global economic inequalities, or the question of redress for historic economic exploitation and abuse across borders.[8] So matters of global economic transformation and redistribution can be understood exclusively in terms of communitarianism and charity—with consequently very modest consequences—not unfair, inherited privilege based on past inequality and exploitation—which might require more profound change.

Bearing the foregoing in mind, I suggest that the grand claims made for international human rights law on these matters do not stand up to scrutiny. This raises the question as to whether

[8] See the discussion and sources cited in Wilde, *supra* note 1, section 7.E.

a campaign to put human rights obligations at the centre of activism here is a valuable use of the limited time and resources of those involved. Also, there is a concern that the modest nature of the legal requirements might serve merely to bolster the continuation of the *status quo*, which can now be further legitimated by states through claims to be 'human rights compliant'.

It needs to be asked, however, whether more modest claims could be made for the law: limited improvements might be effected at the margins; more radical efforts for transformation can be, and indeed perhaps should be, left to broader struggles taking place outside the structures of international human rights law. Such struggles could, as human rights law cannot, involve ideas that offer more fundamental challenges to the structural aspects of global economic life, from the division of the world into sovereign states itself to the substantive models of economics that form the basis for the global economy. Modesty in the expectations made of the law can also be used to limit the law's legitimating power in undergirding the status quo: if activists aren't making grand claims about the value of the law, states would be undermined in efforts to use the law to legitimate business as usual.

But it is important to avoid substituting an overblown account of the law's emancipatory potential with an alternative narrative that obscures how the law enables substantive policies to be furthered. A model of extraterritorial economic obligations limited to narrow conceptions of direct or foreseeable harm, or vague notions of co-operation, of course maps onto a liberal economic model of laissez-faire, with a modicum of light-touch regulation and modest social provision in exceptional areas. International economic inequality is accepted as a given, bar narrow areas where there is more direct transboundary harm (but only in the present), and the possibility of 'assistance' which is unquantified and thereby left in the realm of charity and discretion.

This model not only lacks more substantial socialist or solidarist elements; for its proponents, it would be an alternative to a model with such elements. For an economist, international human rights law would appear to have come down on one side in the hugely contested debate about the operation of the global economy.

It may not be possible, then, simply to assume that the law offers a modest, neutral foundation from which all manner of developments, including progressive, transformatory

ones can spring. The foundation might determine that which is possible. It sets the trajectory that would, therefore, have to be altered, not followed, if different conceptions of international economic relations were to be attempted.

On the particular failure to address responsibilities for historical injustices, there is a huge absence of, and resistance to, a reckoning for historical transnational human rights abuses, especially relating to the colonial era and the actions of victorious belligerents. Some efforts are now challenging this, for example the recent *Mau Mau* litigation about the British in Kenya. The Maastricht initiative, in failing to address the idea of historic inequalities and abuses as a factor in understanding how the normative regime should operate, intervenes by omission in a debate on the side of those who would deny the significance of this factor.

Finally, as a project of international human rights law, this initiative, although coming out of the work of non-state actors, and in its subject-matter of extraterritoriality seeking to disrupt state boundaries, ends up legitimating the state-based international system that post-colonial scholars argue may be best understood as one of the structural causes of international economic inequality. Moreover, on its own terms, it privileges states in the area of norm-generation and transformation. The modest nature of the current regime for extraterritoriality could be built upon not only, as its proponents intend, by those who aspire to progressive development; it could also be captured by states, and for different ends.

Why, then, even bother analysing this area of international human rights law and its limitations in the first place? Scholars in this field have to reckon with the continuing purchase that the language of human rights law has amongst activists, states and international organizations, something which, of course, is being encouraged by those behind the Maastricht initiative. This necessitates engagement by human rights scholars, and engagement of a particular kind: responsible contributions to the body of knowledge in this field to assist those making policy decisions at the front line to better understand what is at stake in the choices they make about how to invoke the law to frame their claims.