Towards a Division of Labour for Sustainable Development: Extraterritorial Human Rights Obligations

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Abstract The Sustainable Development Goals (SDGs) adopted in 2015 are the new and ambitious global development agenda for the 2015–2030 period. That global agenda can only be realized through a global effort. What does that mean for the division of labour? Traditionally, fostering development has been seen as the primary responsibility of the territorial State. This chapter reflects from a human rights perspective on the role to be played by external governmental and intergovernmental actors in bringing about sustainable development. It ponders strengths and weaknesses of the right to development and extraterritorial human rights obligations, and identifies five challenges for human rights law: the legal status of the obligations to cooperate internationally; the distributive allocation of extraterritorial obligations; the triggers of extraterritorial human rights obligations; the scope of the extraterritorial obligation to cooperate for development; and the ability of human rights law to engage with strong definitions of development, which take growth agnosticism as their starting point.

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1 Introduction

The Sustainable Development Goals (SDGs) adopted in 2015 are the new and ambitious global development agenda for the 2015–2030 period. That global agenda can only be realized through a global effort. What does that mean for the division of labour? Traditionally, fostering development has been seen as the primary responsibility of the territorial State, with a secondary and often more charity-based role for external actors such as the United Nations organisations, donor countries and non-governmental organisations.

This chapter reflects from a human rights perspective on the role to be played by external governmental and intergovernmental actors in bringing about sustainable development in the context of the SDGs.¹ Are States² that are in a position to do so, also legally obliged to provide development assistance (ODA), and to what extent: should they simply seek to meet the 0.7% GNP target, or provide development assistance commensurate to their ability or to global need? Beyond development assistance, do States have more fundamental and encompassing obligations to further sustainable development globally through structural economic and political reforms? When and how are these obligations of external actors triggered: whenever the need arises? Or only when a territorial State is unable and/or unwilling to realize development?

Answers to these questions will be sought primarily in the realm of human rights law. Over the past decades, two main human rights framings have been proposed to analyse the human rights obligations for development of external States: the right to development, and extraterritorial human rights obligations. Both framings are only emerging and major sites of political and legal contestation. Therefore, the legal materials used in this chapter show varying degrees of “legal hardness”.

Section 2 explores how the 2030 Agenda for Sustainable Development and the SDGs themselves envisage the division of labour between the territorial State and external State actors. Section 3 introduces the human rights framings of obligations incumbent on external States, that is the right to development and extraterritorial obligations. Section 4 maps the areas of convergence between the Agenda for Sustainable Development and human rights law in this regard, and examines the potential contribution the latter may make in clarifying the role of external State actors in development. Section 5 highlights some of the outstanding debates in human rights law that currently prevent it from taking full normative leadership in the debate on the division of labour for sustainable development. Section 6 concludes.

¹For reasons of space, this chapter does not engage with the question of obligations and responsibility incumbent on non-state actors, such as businesses.

²“States” refers to States acting individually and/or collectively through intergovernmental organisations.

2 The 2030 Agenda for Sustainable Development

Transforming our World: the 2030 Agenda for Sustainable Development, the outcome document of the United Nations summit for the adoption of the post-2015 development agenda, acknowledges and emphasizes the importance of a “Global Partnership for Sustainable Development”.³ The idea of a global partnership goes back to the Millennium Declaration and the Millennium Development Goals (MDGs), the 2000–2015 development agenda, in which MDG 8 was dedicated to the development of a global partnership for development.⁴ Among the five “Ps” that the Preamble to the 2030 Agenda for Sustainable Development lists, one is referring to “Partnership”. Under that heading, reference is made to “a spirit of strengthened global solidarity” as the foundation for such a partnership. In the Declaration itself, a separate heading is dedicated to the means of implementation, which a revitalized Global Partnership is considered central to.⁵

The starting point for any division of labour for sustainable development nonetheless remains that “each country has primary responsibility for its own economic and social development”. Hence, external State actors have only secondary obligations for development. Another element that sheds some light on the envisaged division of labour is the principle of common but differentiated responsibilities, first established in the Rio Declaration on Environment and Development.⁶ This principle of environmental law acknowledges explicitly that not all States are equal, hence the differentiated responsibilities.

Strong emphasis is put in the Declaration on financial resources, with explicit reference to the outcome document of the third International Conference on Financing for Development (held in 2015 in Addis Ababa) and to the long-standing commitment of developed countries to spend 0.7% of gross national income on official development assistance (ODA).⁷ Elsewhere in the Declaration, some attention is nonetheless also paid to structural challenges in the economic system, where the need for “an enabling international economic environment, including coherent and mutually supporting world trade, monetary and financial systems, and strengthened and enhanced global economic governance” is acknowledged.⁸ In line with this, the targets listed under SDG 17 relate not only to finance, but also to technology transfer, trade and systemic issues of policy and institutional coherence and multi-stakeholder partnerships.

In sum, primary responsibility of the territorial State is complemented with international solidarity, which is put into practice through official development assistance and an enabling international economic environment. The latter reference

³UNGA (2015).

⁴UNGA (2010) and United Nations Secretary-General (2001).

⁵UNGA (2015) at paras. 39–46, and 62.

⁶UNGA (2015), at para 12.

⁷UNGA (2015), at paras. 40 and 43.

⁸UNGA (2015), at para 63.

to macro-economic factors, read in conjunction with the principle of common but differentiated responsibilities, may suggest that structural imbalances of power, and hence different degrees of responsibility for mal- and underdevelopment, are being acknowledged.

3 International Human Rights Law

In human rights law, two main framings of obligations incumbent on external State actors have taken shape over the past decades, that is the right to development and extraterritorial obligations. Both are briefly introduced in what follows.

The Right to Development

The concept of a (human) right to development was coined and legally framed in the late 1960s and early 1970s. A Declaration on the Right to Development was adopted in 1986.⁹ Unanimous political recognition to the right to development *as a human right* was given in 1993, in the Vienna Declaration and Plan of Action.¹⁰

Justification for the right to development was sought in the strategic, economic and political domination of the North over the global South. This domination made the North responsible for development in the South.¹¹

In origin, the right to development was a radical human rights framing of responsibility for development, since it sought to challenge prevailing international economic relations, and to introduce alternative legal principles to guide international relations, such as international solidarity, substantive equality and international justice.¹² These alternative legal principles relate to the external dimension of the right to development, i.e. the claims to international cooperation and assistance a developing State may have towards external States or the international community,¹³ or the right to have removed structural obstacles to development that are inherent to the prevailing international economic relations.¹⁴ The latter aspect shows that there was a close connection between the right to development and NIEO, at least in the early years.¹⁵

⁹GA resolution, UN Doc A/RES/41/128 (4 December 1986).

¹⁰Art. 10 *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23 (12 July 1993).

¹¹M'baye (1972), pp. 514–526; M'baye (1980), pp. 78–88.

¹²M'baye (1980), pp. 85–88; Bedjaoui (1987), pp. 95–101; De Vey Mestdagh (1981), pp. 43–44 and 46; Alston (1980), pp. 104–105.

¹³De Feyter (1992), p. 556; Salomon (2008), pp. 2–8.

¹⁴Marks (1985), p. 509. See Salomon (2008), pp. 8–9.

¹⁵See, e.g. Abi-Saab (1980), pp. 164–168; Israel (1983), p. 29.

The 1986 Declaration tones down the radical edge of the right to development. Article 3(3) stipulates that “States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development . . .”, but does not clarify the objectives of that cooperation. Article 4 adds that States “have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development”. The latter Article also spells out to some extent the division of labour in bringing about development: “As a complement to the efforts of developing countries, effective international co-operation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development.”

Recent attempts to elaborate on the right to development’s meaning in reference to the global partnership for development in MDG 8, do not add much analytical clarity.¹⁶ The High Level Task Force set up to assist the UN open-ended working group on the right to development between 2004 and 2010,¹⁷ elaborated an assessment framework for the extent to which States acting collectively and individually contribute to the creation of an enabling environment for the realization of the right to development.¹⁸ It has not sought, though, to clarify the distributive allocation of obligations to the territorial State and external States, individually or collectively.¹⁹ Even more so, in recent attempts at further standard-setting, the external dimension of the right to development, that is the obligations it imposes on external States acting individually and collectively, has been more and more downplayed.²⁰

In sum, the 1986 Declaration on the Right to Development focuses mainly on international cooperation, not so much on addressing structural impediments to development. It considers the territorial State as the primary duty-bearer, but a complementary role is envisaged for external States through international cooperation, in particular through international development policies. Later attempts to operationalize the right to development under the MDGs have introduced the notion of an enabling international economic environment, but they do not shed any light on the distributive allocation of development obligations. Let us now turn to human rights law as codified in treaties, to see how responsibility for development is attributed, if at all.

¹⁶Vandenbogaerde (2013), pp. 187–209.

¹⁷The open-ended working group was established by the UN Commission on Human Rights in 1998.

¹⁸Report of the high-level task force on the implementation of the right to development on its sixth session (Geneva, 14–22 January 2010), Addendum—Right to development criteria and operational sub-criteria, UN Doc. A/HRC/15/WG.2/TF/2/Add.2 of 8 March 2010.

¹⁹For an explicit rejection of such an approach, see Report of the high-level task force on the implementation of the right to development on its sixth session (Geneva, 14–22 January 2010), Addendum—Right to development criteria and operational sub-criteria, UN Doc. A/HRC/15/WG.2/TF/2/Add.2 of 8 March 2010, para. 18.

²⁰Vandenbogaerde (2013), pp. 199–200.

Extraterritorial Obligations

Typically, human rights obligations are incumbent on the territorial State, i.e. the State that exercises territorial jurisdiction. Nonetheless, there is a longstanding recognition that the realisation of at least some human rights—in particular economic, social and cultural rights (ESC rights), children's rights, and the rights of persons with disabilities—requires international cooperation and assistance.²¹ The precise meaning and scope of these references to international cooperation and assistance remain somewhat open to debate,²² although a strong case has been made for reading extraterritorial obligations into these references.

The position of the UN Committee on Economic, Social and Cultural Rights (CESCR) on extraterritorial obligations under the ICESCR has been consistent over the past two decades,²³ and is well-reflected, for example, in its 2016 general comment on the right to sexual and reproductive health. Territorial States that are not able to comply with their obligations due to a lack of resources must seek international cooperation and assistance. "States that are in a position to do so must respond to such requests in good faith and in accordance with the international commitment of contributing at a minimum 0.7 per cent of their gross national income for international cooperation and assistance." Donor States and international actors have an obligation to comply with human rights standards throughout their international assistance (in other words, it should be rights-based), and as members of international organisations and in bilateral, regional and multilateral treaties.²⁴ Emphasis was put in an earlier general comment on the right to health on the role of international assistance and cooperation in realizing core obligations and obligations of comparable priority.²⁵

Overall, the interpretation of the Committee on the Rights of the Child (CRC Committee) has been very much in line with that of the CESCR,²⁶ as illustrated for example in the former's general comment on public budgeting. States that lack the

²¹See Article 2 International Covenant on Economic, Social and Cultural Rights; Article 4 Convention on the Rights of the Child; Articles 4 and 32 Convention on the Rights of Persons with Disabilities.

²²An overview of the UN human rights bodies' understanding can be found in a working paper published by the Global Initiative for Economic, Social and Cultural Rights, Human Rights Law Sources: UN Pronouncements on Extra-Territorial Obligations, July 2015, see http://www.etoconsortium.org/nc/en/main-navigation/library/documents/?tx_drblob_pi1%5BdownloadUId%5D=163 (last accessed 5 January 2018).

²³For a systematic overview, see Coomans (2011), pp. 1–35.

²⁴CESCR, GC No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc E/C.12/GC/22, 2 May 2016, paras. 50–52.

²⁵Social and Cultural Rights Committee on Economic, 'General Comment No. 14 (2000) on the Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)', (11 August 2000) at para. 45.

²⁶For a comprehensive and systematic analysis, see Vandenhoe (2009), pp. 23–63.

resources to fully realize the CRC must seek international cooperation; States with resources “have an obligation to provide such cooperation with the aim of facilitating the implementation of children’s rights in the recipient State.”²⁷ Beyond bilateral development assistance, States “should collaborate with other States’ efforts to mobilize the maximum available resources for children’s rights.”²⁸ Development cooperation strategies should be rights-based: they should not negatively impact on children, and should contribute to the realisation of children’s rights.²⁹ State must observe their children’s obligations “when engaging in development cooperation as members of international organizations, [footnote omitted] and when signing international agreements.”³⁰

The Committee on the Rights of Persons with Disabilities (CRPD Committee) has mainly emphasized that all cooperation must be rights-based. With regard to the right to inclusive education, this means that “all bilateral and multilateral cooperation must aim to advance inclusive and equitable quality education and promote lifelong learning opportunities for all [. . .].”³¹

In sum, the importance of international assistance and cooperation for the realisation of human rights has been acknowledged in several human rights treaties. The reference to international assistance and cooperation has been understood by the UN human rights treaty bodies as imposing an obligation for developing countries to seek, and for developed countries to offer development assistance. Development assistance, international agreements and the exercise of membership of international organizations should all be rights-based. Again, there is little if any clarification of the division of labour for sustainable development. In the next two sections, I will spell out in more detail some aspects of the extraterritorial human rights obligations framing, while looking into in the convergence of the SDGs and human rights, and the challenges ahead.

4 Convergence and Added Value of Human Rights

On a number of key points, the 2015 Agenda and the SDGs on the one hand, and human rights law on the other hand, converge and mutually reinforce each other.

First, the need for international cooperation, including international assistance, is acknowledged: development is not exclusively the responsibility of the territorial State. The 2015 Agenda and the SDGs mainly refer to solidarity and a global

²⁷Committee on the Rights of The Child (2016) at para. 35.

²⁸Committee on the Rights of The Child (2016), at para. 37.

²⁹Committee on the Rights of The Child (2016), at para. 38.

³⁰Committee on the Rights of The Child (2016), at para. 39.

³¹CRPD, General comment No. 4 (2016) on the right to inclusive education, UN Doc CRPD/C/GC/4, 25 November 2016, para. 43. Compare CRPD, GC comment No. 2 (2014) Article 9: Accessibility, UN Doc CRPD/C/2, 22 May 2014, para. 47.

partnership, and seem to envisage mainly multilateral cooperation. The same holds true to some extent for the right to development. The extraterritorial human rights obligations frame focuses more on bilateral cooperation, and in particular on development assistance, although it also pays attention to States acting collectively through international organisations or a treaty regime.

Second, the primary responsibility for development (understood respectively as sustainable development or the full realisation of human rights) lies with the territorial State. External State actors have only a secondary role to play. There is also some differentiation of responsibility: the 2015 Agenda speaks about “shared but differentiated responsibilities” in language borrowed from the Rio Declaration; in the human rights context, the obligations of developing and developed states are different: the latter have to step in when the former are unable to fully realize their obligations and ask the latter for assistance.

Third, it is acknowledged, albeit in various degrees, that development is not just a matter of development finance or development assistance. Attention is given also to economic and financial governance, and to the need for an enabling international economic environment.

Beyond these commonalities, human rights law may be able to further refine the emerging picture of the division of labour for sustainable development in three respects. First, it locates international cooperation more explicitly in the realm of obligation than of charity. Second, it contains more detail on the respective obligations of developing and developed States. And finally, the tripartite typology of human rights obligations may help to clarify the obligations incumbent on external actors in realizing sustainable development. That it *may* be able is not to say that it currently *is* already fully up to that task.

Human rights law locates international cooperation and assistance stronger in the realm of (legal) obligation rather than in that of charity. In Fukuda-Parr’s view, the challenge for international development policy (at the time as reflected in MDG 8) as already done in human rights law was to “shift international cooperation from charity to solidarity”.³² Whether that shift has already fully taken place in human rights law, is questionable though. During negotiations on new human rights instruments, this has been a recurrent topic of contestation and politicization.³³ We will return to this point in Sect. 5.

Second, human rights law spells out in somewhat more detail than the 2015 Agenda and the SDGs what the respective obligations of the territorial and external States are. The territorial State has to undertake measures to the maximum of its available resources to (progressively) fully realize the economic, social and cultural rights guaranteed by the treaties concerned. Where needed, it is under an obligation

³²Fukuda-Parr (2006), p. 967.

³³With regard to the negotiations on the Optional Protocol to the ICESCR, see Vandembogaerde and Vandenhoe (2010), pp. 227–230. With regard to the negotiations on the CRPD, see Vandenhoe (2009), pp. 55–60.

to seek international assistance and cooperation.³⁴ In a spirit of fair burden-sharing, the strongest shoulders must bear the heaviest burdens: “economically developed States parties have a special responsibility”.³⁵ Hence, it is “particularly incumbent upon those States which are in a position to assist”³⁶ to respond to any request for assistance. In Sect. 5, we will explore what the precise legal status of this obligation is.

Third, the tripartite typology of obligations (to respect, to protect, and to fulfil), when applied to extraterritorial obligations, takes the debate beyond official development assistance and the transfer of financial resources, to more structural factors that inhibit development or create underdevelopment or mal-development. This may be helpful to deepen the understanding of what it takes to create an enabling international economic environment. As the CESCR nicely explains in its 2017 general comment on State obligations in the context of business activities, the extraterritorial obligation to respect requires States “not to obstruct another State from complying with its obligations [. . .]. This duty is particularly relevant to the negotiation and conclusion of trade and investment agreements or of financial and tax treaties [. . .]”,³⁷ and—one could add—when exercising membership in regional or international organizations. The extraterritorial obligation to protect implies that the home state of companies has to protect individuals in other countries against adverse impacts of these companies, through e.g. regulation and the use of incentives.³⁸ The extraterritorial obligation to fulfil may include an obligation to live up to the longstanding commitment to spend 0.7% of GNI on official development assistance, but goes clearly beyond that. For CESCR, with regard to State obligations in the context of business activities, it seems to coincide with promoting and creating an international enabling environment.³⁹

The account offered here of the reinforcing and clarifying role that human rights law can play with regard to the division of labour for sustainable development may be too optimistic. Much will depend on the way and extent to which human rights law evolves in the coming years. I now turn to the main challenges ahead.

³⁴Article 2 International Covenant on Economic, Social and Cultural Rights; Article 4 Convention on the Rights of the Child; Article 4(2) Convention on the Rights of Persons with Disabilities.

³⁵Committee on Economic, Social and Cultural Rights (2000), para. 40.

³⁶Committee on Economic, Social and Cultural Rights (1990) at para. 14.

³⁷Committee on Economic, Social and Cultural Rights (2017) at para. 34.

³⁸Committee on Economic, Social and Cultural Rights (2017), at para. 36.

³⁹Committee on Economic, Social and Cultural Rights (2017), at para. 40.

5 Challenges Ahead for Human Rights Law

There are at least five challenges or uncertainties to be addressed in order to make human rights law indeed instrumental in carving out a clear division of labour for sustainable development between territorial States and external actors. These are: the legal status of the obligations to cooperate internationally; the distributive allocation of extraterritorial obligations; the triggers of extraterritorial human rights obligations; the scope of the extraterritorial obligation to cooperate for development; and the ability of human rights law to engage with strong definitions of development, which take growth agnosticism as their starting point.

Aspirational or Hard Legal Obligations?

There is a long-standing, very often highly politicised and polarised discussion whether or not there is a hard legal obligation to provide international assistance and cooperation, and in particular development aid. In doctrine, two schools have been identified by Karimova: a maximalist and a minimalist one. The maximalist school submits, on the basis of the references to international assistance and cooperation that can be found in treaties, that hard legal extraterritorial obligations exist (for some only negative obligations, for others also positive obligations). In the minimalist approach, international cooperation is not seen as a self-standing and autonomous obligation, but rather as a means or a measure by which obligations can be fulfilled.⁴⁰

Whereas this doctrinal disagreement has not struck much of a chord with the UN treaty bodies, it does correspond to a political disagreement that exists very much along North-South lines. Inevitably, as long as this legal and political disagreement persists, the role of human rights law in carving out a division of labour for sustainable development will be somewhat constrained. In my own reading, informed by more recent treaty negotiations, there is currently no *general and undifferentiated* hard legal obligation to cooperate internationally for development. On the other hand, an extraterritorial obligation to *respect* human rights is fairly well accepted.⁴¹

⁴⁰Karimova (2014), pp. 169–171.

⁴¹See also Vandenhoe (2009).

The Distributive Allocation of Obligations Remains Unsettled

The distributive allocation of obligations plays at two levels: first of all, what the obligations are of the territorial State, and of external States. And secondly, how obligations are allocated *among* external States.

There is a clear divergence of views on the first question, i.e. the distributive allocation of human rights obligations to the territorial State and external States. For some, the starting point is that all States have global obligations. In their view, human rights are universal: “all people have human rights and [...] all States have the responsibility to protect those rights – for all people”.⁴² Hence, the key question is whether the human rights of individuals are respected⁴³ or, from a violations perspective, whether “the global order in its entirety” may be to blame for structural impediments to the realisation of human rights.⁴⁴ Whereas this is an interesting theoretical position that deserves further theorisation, it can hardly be grounded in current human rights law.

Another strand of thought considers the territorial State as the primary duty-bearer, and external States as secondary or subsidiary duty-bearers.⁴⁵ This position accords well with the fact that the territorial State holds sovereign power over its territory. However, I submit that the obligations of external States are not merely secondary or subsidiary. Rather, they are *complementary*: these obligations accompany but never replace a territorial State’s obligation. The term “secondary” suggests a hierarchy or sequence of obligations, as if extraterritorial human rights obligations arise only in the event that the territorial State failed to observe its obligations. “Complementary” recognises that a State’s extraterritorial obligations co-exist simultaneously with the territorial State’s obligations, whereas it accepts that the latter’s obligations remain primary.⁴⁶

Taking the analysis one step further, it is suggested to differentiate the distributive allocation of obligations between the territorial State and external States with the type of obligation. Since profound resource implications, including financial, become more likely as we move on the obligations continuum from respect and protect to fulfil, I consider the extraterritorial obligations to respect and to protect as complementary and simultaneous, and the extraterritorial obligation to fulfil as subsidiary.⁴⁷ Simultaneous obligations are immediate obligations, lack of observance of which cannot be justified by invoking non-abidance with the primary

⁴²Gibney (Reference) at 47.

⁴³Skogly (2006), p. 48.

⁴⁴See also Salomon (2006), pp. 113, 116; Pogge (2002).

⁴⁵See, for example, Craven (1995), p. 144; Coomans (2004), p. 198; Sepúlveda (2003), pp. 370–377 (implicitly).

⁴⁶Compare Vandenhole and Benedek (2013), pp. 332–366.

⁴⁷Compare Alston’s notion of a correlative obligation in case a developing country has demonstrated its best efforts to meet the Millennium Development Goals (MDGs) but is unable to do so because of a lack of financial resources, Alston (2005), pp. 755–829, at 778.

obligation by the territorial State. The extraterritorial obligation to fulfil (like the territorial State's obligation to fulfil) fundamentally requires the mobilisation of resources, and is therefore in principle not an immediate obligation, but one that is subject to progressive realisation in light of the (maximum use of) available resources.⁴⁸

If, in a specific case, the resource implications assumption with regard to the extraterritorial obligations to fulfil, or the relatively resource-free implications assumption underlying the extraterritorial obligations to respect and to protect, can be rebutted, the assessment of the subsidiary or simultaneous nature of the extraterritorial obligations may have to be adjusted.

The division of responsibility *between* external States, in particular in the field of international development co-operation, is very much a *de lege ferenda* exercise. No particular problems arise with regard to the obligation to respect, which is a negative obligation that is simultaneously incumbent on (each territorial State and) all external States. The obligation to protect is also of simultaneous application, but may have more far-reaching implications for some States commensurate to their capacity. The obligation to protect may sometimes amount to a *joint* obligation, that is when individual extraterritorial obligations would not be sufficient.⁴⁹ This may be the case when policies of international financial institutions or of the European Union are considered to be an unjustifiable interference with ESC rights. With regard to the division of responsibility amongst external States under the extraterritorial obligation to fulfil, it is not sufficient to identify "a generic [obligation] that attaches to the undifferentiated international community".⁵⁰ Duty-bearers are to be identified in more detail. Whether a State is in a position to assist depends *inter alia* on the availability of resources, be they human, natural, financial or other.⁵¹ This is not to say that the extraterritorial obligation to fulfil never requires collective or joint observance in order to be effective. However, as the obligation to fulfil is most likely to have some resource implications, even when considered to be a joint obligation of a number of States, it is necessary to specify which external States are concerned and what the extent of their obligations is. In order to be able to do so, further clarification is needed on how extraterritorial obligations of States are triggered.

⁴⁸Certain exceptions to the principle of progressive realisation may apply, such as non-discrimination and core obligations. For more details, see, for example, Vandenhoe (2003), pp. 437–438 and 441–442.

⁴⁹Künemann (2004), p. 220.

⁵⁰See Alston (2005), p. 777: "The nature of any obligation that could reasonably be argued to have emerged from the various commitments to cooperate internationally is, at best, a generic one that attaches to the undifferentiated international community."

⁵¹Engh (2008).

Triggers of Extraterritorial Fulfil Obligations Need to Be Defined More Clearly

A diversity of triggers can be considered. It may be the mere ability of the external State(s), as proponents of global human rights obligations suggest. Or it may be the request by a territorial State that is unable to realize human rights on its own. Other triggers that have been suggested are causation of human rights harm,⁵² or historical responsibility.

The domestic State's inability, for reasons beyond its control, to abide by its obligation to fulfil the minimum core content of ESC rights would correspond partly to the CESCR's threshold for activating the obligation to fulfil (provide) for a territorial State.⁵³ The extraterritorial obligation to fulfil, like the domestic obligation to fulfil, is subject to progressive realisation in light of the maximum of available resources. It is, in other words, not an immediate obligation, but rather one qualified by time and resources. However, upon the receipt of a legitimate request, there is an immediate obligation for States in a position to assist to take steps to contribute to the progressive realisation in the affected State.

The *applicability* of extraterritorial obligations of fulfilment should not be conditioned by the reasons for noncompliance by the territorial State. Unwillingness or lack of commitment does not necessarily exonerate other States from taking action.⁵⁴ This does not make external States the *de facto* primary duty-bearers. The territorial State remains responsible for noncompliance with its obligation to fulfil ESC rights to the maximum extent of its available resources. The action taken by external States reflects their living up to their part of responsibility: their extraterritorial obligations of fulfilment remain subsidiary, constrained by the availability of resources and arguably limited to the core obligations.⁵⁵ Hence, the *applicability* of extraterritorial obligations of fulfilment should not be conditioned by whether the territorial State fully complies with its own primary obligations, regardless of the reasons for this noncompliance (be it inability or unwillingness). However, their *scope* is not

⁵²Skogly (2013), pp. 233–258.

⁵³See, for example, Committee on Economic, Social and Cultural Rights (1999), para 15: “when-ever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to fulfil (provide) that right directly”. The reference to “beyond their control” was borrowed from Art. 25(1) of the Universal Declaration on Human Rights.

⁵⁴Compare on the external obligations of a supranational organization like the European Union (EU), Hazelzet (2007), p. 401: “It is argued, moreover, that the EU’s external duties, for instance in the area of trade and development, should not be conditional on the fulfilment of obligations by states in the South, because the EU’s international assistance and cooperation, ultimately, are to the people in the South, with the state being the intermediary through which their rights can most often be realised.”

⁵⁵As the CESCR has repeatedly suggested, see Committee on Economic, Social and Cultural Rights (2002) at para. 38; Committee on Economic, Social and Cultural Rights (2006) at para. 40; Committee on Economic, Social and Cultural Rights (2008), para. 61.

extended when a territorial State fails to live up to its part. For example, the fact that a territorial State is reluctant to provide free basic health care to all individuals does not exonerate other States from fulfilling their extraterritorial obligations in this regard, albeit limited to their share. How the scope of the extraterritorial obligation to fulfil-provide can be defined, is discussed in the next sub-section.

Scope of the Obligation to Cooperate for Development

The scope of the extraterritorial obligation to fulfil-provide can be defined by the resources available to a State. Resources include not only financial, but also natural and human resources, as well as, for example, technology, logistics and information.⁵⁶ Nonetheless, financial resources will often play an important role.

Availability of resources is primarily assessed by the State concerned, which enjoys a margin of appreciation in the allocation of its resources. A *prima facie* assessment of *financial* resources an external State has available to cooperate for development may be based primarily on the allocations actually made in the national budget for ODA and for emergency aid. A more comprehensive assessment should go beyond national allocations. For example, political or legal commitments made in internal development policies, domestic legislation or bilateral agreements may all be indicative of the financial resources an external State can be expected to mobilize under its extraterritorial obligation to fulfil-provide. One can think there of the oft-repeated political commitment of spending 0.7% of GNI on development assistance. Other commitments made, for example, in the context of conferences regarding financing for development can equally help to settle the scope of the extraterritorial obligation to fulfil, both as a collective obligation and as one incumbent on particular States.

In its *Statement on Poverty*, CESCR submitted that “core obligations give rise to . . . international responsibilities for developed States, as well as others that are ‘in a position to assist’”.⁵⁷ Core obligations hence seem to have been elevated to the level of global human rights obligations.

Extraterritorial human rights obligations to co-operate internationally for development should not be drawn too narrowly, though. Development assistance is but one feature of the obligation to co-operate internationally for development. Beyond the obligation to fulfil-provide, all types of obligations may be relevant. For example, as part of the extraterritorial obligation to respect, a human rights impact assessment may have to be undertaken of all policies with external effects. As part of the obligation to fulfil-facilitate, structural measures in trade, finance and investment regimes may be needed.

⁵⁶Compare Engh (2008).

⁵⁷Committee on Economic, Social and Cultural Rights (2001), para. 16.

Sustainable Development and Growth Agnosticism

A fifth challenge for human rights law is to take sustainable development, particularly in its strong definitions, seriously.

In the 2030 Agenda, economic growth, social development and ecological sustainability go hand in hand. Commonly, sustainable development is explained in terms of a triple bottom-line (the three Ps of profit, planet and people), suggesting that it is about *balancing* economic growth with environmental and social considerations. In other words, economic growth is still taken for granted.

This approach of *balancing* planet and people with profit may be seen as the weak definition of sustainability. Strong definitions of sustainability deplore that sustainable development means “environmentally friendly economic growth”.⁵⁸ In these strong definitions, the *prevalence* of the environmental dimension over the economic one is argued for.⁵⁹ The prioritization of the environmental (*planet*) over the economic (*profit*) one⁶⁰ has led to a radical departure from assumptions of economic growth, including zero-growth or even de-growth, as argued in post-growth or ecological economics.⁶¹ At the very least, growth agnosticism, as adopted by Raworth in “Doughnut Economics”,⁶² replaces growth as the new normal.

At first sight, growth agnosticism seems to undercut the foundation of social development. If economic growth is no longer the basis of social development, what is? Or does growth agnosticism lead to a major roll-back in socio-economic rights realization? The latter is certainly not the option that is defended. In “Doughnut Economics”, it is between the outer boundary, i.e. the ecological ceiling (composed of Rixtrom et al.’s nine planetary boundaries) and the inner boundary, i.e. the social foundation (twelve social boundaries drawing on “internationally agreed minimum social standards”), that “lies an environmentally safe and socially just space in which humanity can thrive.”⁶³ The basis for that environmentally sustainable and socially just space is to be found in redistribution, domestically and globally.

For sure, the call for global redistribution and fair shares of effort reinforces the earlier analysis in this chapter that if the SDGs are to become a reality, redistribution of some sort through international assistance and cooperation will be needed. But growth agnosticism also challenges human rights law, since the latter is very much based on assumptions of growth that translate into progressive realisation of ESC

⁵⁸Kerschner (2010), p. 549.

⁵⁹Bosselmann (2011), p. 54; compare the argument that the SDGs need to be organized ‘in a normative hierarchy, with a single priority sustainability goal at the apex’, see Kim and Bosselmann (2015), p. 198; on the nine planetary boundaries, see the Stockholm resilience Centre <http://www.stockholmresilience.org/research/planetary-boundaries.html> (accessed July, 3 2017).

⁶⁰Bosselmann (2011); Ross (2009), pp. 32–54.

⁶¹For arguments about the desirability and feasibility of degrowth, see the references in Kallis et al. (2012), pp. 173–175.

⁶²Raworth (2017b), pp. 243–285.

⁶³Raworth (2017a).

rights. This requires a major shift in attention towards redistribution and redistributive equality, concepts that so far have remained un- or under theorised in human rights law. As submitted by Alston, the human rights community has closed its eyes to what has been coined extreme or radical inequality,⁶⁴ and it remains to be seen whether human rights law can do more than offering “a floor of protection against indigence”, that is whether it can provide “a ceiling on inequality”, as Moyne has pleaded for.⁶⁵

6 Conclusions

The ambition of this chapter was to show how human rights law can be of help to the SDGs to operationalise the global partnership for development. That global agenda can only be realized through a global effort. What does that mean for the division of labour? Traditionally, fostering development has been seen as the primary responsibility of the territorial State, with a secondary and often more charity-based role for external actors such as the United Nations organisations, donor countries and non-governmental organisations. That legacy is reflected in the SDG Declaration.

Whereas the concept of the right to development was meant to address structural impediments to development, the 1986 Declaration on the Right to Development focuses mainly on international cooperation. Later attempts to operationalize the right to development under the MDGs have introduced the notion of an enabling international economic environment, but they do not shed any light on the distributive allocation of development obligations.

The reference to international cooperation and assistance in human rights treaties has been interpreted by the UN human rights treaty bodies as imposing an obligation for developing countries to seek, and for developed countries to offer development assistance. Development assistance, international agreements and the exercise of membership of international organizations should all be rights-based. Here too, there is little if any clarification of the division of labour for sustainable development.

So, beyond the areas of convergence in the SDGs and human rights law, at least five challenges or uncertainties must be addressed in order to make human rights law indeed instrumental in carving out a clear division of labour for sustainable development between territorial States and external governmental actors. These are: the legal status of the obligations to cooperate internationally; the distributive allocation of extraterritorial obligations; the triggers of extraterritorial human rights obligations; the scope of the extraterritorial obligation to cooperate for development; and the ability of human rights law to engage with strong definitions of development,

⁶⁴Alston (2017): ‘Extreme inequality should also be seen as a cause for shame on the part of the international human rights movement. Just as global economic institutions have eschewed human rights, so too have the major human rights groups avoided tackling the economics of rights.’

⁶⁵Moyne (2015, 2017).

which take growth agnosticism as their starting point. The jury is out whether human rights law will evolve in these directions.

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