Extraterritorial Human Rights Obligations of States in the Event of Disease Outbreaks

Elif Askin[*]

Abstract

Within the scholarly discourse on international health governance, the regulation of global health crises has predominantly been discussed within the international legal regime of the World Health Organization. Beyond that, the present contribution demonstrates that insufficient reflection has been given to the extraterritorial applicability of human rights obligations of states arising from international human rights treaties that aim to protect individuals situated in foreign states when disease outbreaks occur. Against this backdrop, the article focuses on the obligations of states with respect to the right to health and seeks to explore whether, in the context of disease outbreaks, states other than the territorial state of the right-holders bear legal duties towards individuals living in the afflicted state. While a state's human rights obligations under international law primarily apply within its territory, this article fosters the understanding that under contemporary international human rights law, states not only have commitments caused by political virtues or moral considerations towards victims of disease, but also under certain conditions bear legally-binding extraterritorial obligations, including positive obligations, to secure the realization of the right to health of the affected individuals in foreign states, particularly in developing countries.

---

* Research Fellow at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, Germany (askin@mpil.de). Her current research relates to public international law, international human rights law with a particular focus on the extraterritorial applicability of socio-economic rights, the law on state responsibility and global governance. All websites last accessed January 23, 2017.

I Introduction

In the age of globalization, actors and processes that have an impact on the right to health are increasingly internationalized.[1] Governmental action as well as inaction may therefore have detrimental effects anywhere on the globe. In this respect, already at the beginning of the 21st century the outbreak of the Severe Acute Respiratory Syndrome (SARS) disease[2] and its unprecedented worldwide spread in a short period of time prompted attention to *global health crises* that, as explained by the Committee on Economic, Social and Cultural Rights (CESCR), is due to "the formidable structural and other obstacles resulting from international and other factors beyond the control of States that impede the full realization of Article 12 [ICESCR] in many States parties".[3] This might be conceived to be most relevant in economically disadvantaged states where national health policies are considerably impacted by the policies of (affluent) states, for instance, when the latter require unaffordable fees to be imposed for primary health care as a conditionality for development cooperation and international aid programs.[4]

In the most recent example of a global health crisis, West Africa has been confronted with the largest outbreak of the Ebola[5] disease ever seen in history.[6] In August 2014, the World Health Organization (WHO) declared Ebola a Public Health Emergency of International Concern (PHEIC), stressing that a coordinated international response was essential to halt the cross-

---

1 Bueno de Mesquita, J, Hunt, P & Khosla, R, "The Human Rights Responsibility of International Assistance and Cooperation in Health" in Gibney, M & Skogly, S (eds.), *Universal Human Rights and Extraterritorial Obligations*, 2010, 104.

2 WHO, *Severe Acute Respiratory Syndrome (SARS)*, available at http://www.who.int/csr/sars/en/. According to the WHO SARS affected 26 countries.

3 CESCR, General *Comment No. 14, The right to the highest attainable standard of health*, Article 12 of the ICESCR, August 11, 2000 (UN Doc. E/C.12/2000.4), para. 5.

4 Bueno de Mesquita, Hunt & Khosla, "The Human Rights Responsibility of International Assistance and Cooperation in Health", above Fn. 1, 804.

5 See for more information on Ebola the contributions of *Michael Marx*, "Ebola Epidemic 2014-2015: Taking Control or Being Trapped in the Logic of Failure – What Lessons Can Be Learned?" and *Wolfgang Hein*, "The Response to the West African Ebola Outbreak (2014-2016): A Failure of Global Health Governance?" in this volume.

6 WHO, *Ethical considerations for use of unregistered interventions for Ebola viral disease, Report of an advisory panel to WHO*, 2014 (WHO/HIS/KER/GHE/14.1), 3.

border spread of the disease.[7] The disastrous impact of the virus within the affected states and its spread beyond national boundaries have obviously demonstrated the ineffectiveness and insufficiency of national measures taken by the post-conflict countries affected by Ebola – Guinea, Liberia and Sierra Leone – to tackle the disease, in large part due to domestic factors, such as weak health systems and a lack of resources, but also due to rampant fear and mistrust among the affected population.[8]

Concomitantly, the Ebola crisis has also highlighted the reluctance of many non-affected states to respond to the Ebola crisis in the afflicted countries, although, in most instances, these states would have been able to do so.[9] In the first months after the outbreak, only a few states offered assistance to countries where Ebola had occurred.[10] It was mainly neighboring African states, such as Cape Verde, Cote d'Ivoire, Ghana, Mali and Senegal, that offered aid to Guinea, Liberia and Sierra Leone.[11] According to the WHO, by June 2012, only 42 (21 %) of the 193 States Parties met their core capacity requirements imposed by the WHO's International Health Regulations (IHR).[12] Two years later, former US President *Obama*

---

7 Article 1 of the International Health Regulations (IHR) of the WHO defines Public Health Emergency of International Concern (PHEIC) as follows: "an extraordinary event which is determined […] to constitute a public health risk to other States through the international spread of disease and to potentially require a coordinated international response". See also BBC, "Ebola: Mapping the outbreak" (January 14, 2016), available at http://www.bbc.com/news/world-africa-28755033.

8 Largent, E, "EBOLA and FDA: reviewing the response to the 2014 outbreak, to find lessons for the future" (2016), 3 *Journal of Law and the Biosciences*, 489 (490); see on the outbreak of SARS WHO, *SARS: How a Global Epidemic Was Stopped*, 2006; Fidler, D, *SARS, Governance and the Globalization of Diseases*, 2004. See also WHO, *Factsheet No. 103 on Ebola virus disease*, January 2016, available at http://www.who.int/mediacentre/factsheets/fs103/en/.

9 Kian, T & Lateef, F, "Infectious Diseases Law and Severe Acute Respiratory Syndrome – Medical and Legal Responses and Implications: The Singapore Experience" (2004), 7 *APLAR Journal of Rheumatology*, 123 (129).

10 See for an overview of Ebola The Guardian, "Ebola outbreak response: a breakdown of the key funding pledges" (October 9, 2014), available at http://bit.ly/2lunWxy.

11 See United Nations (UN) Security Council Resolution 2177 (December 18, 2014), preambular para. 10.

12 The WHO obliges all States Parties in its IHR to establish and maintain core capacities for surveillance, risk assessment, reporting and response to public health risks and emergencies. These capacities need to be operational at national and

called on states to accelerate the global response to the Ebola crisis in stating that the world "has the responsibility to act, to step up and to do more. The United States intends to do more."[13] The delay of a coordinated and effective international response led to Resolution 2177 (2014) by the United Nations (UN) Security Council,[14] declaring for the very first time a disease outbreak as a threat to international peace and security, and to the establishment of the first UN health emergency mission.[15]

What might be the added value of applying international human rights law to global health crises, as far as the human rights obligations of states outside their territories are concerned? International human rights law is struggling with the phenomenon that states often escape accountability when it comes to actions and omissions beyond their national borders.[16] Traditionally, states bear human rights obligations only within their jurisdiction, based on territorial control.[17] However, the Westphalian territorial

---

international levels, WHO, *Implementation of the International Health Regulations (2005), Report of the Review Committee on the Role of the International Health Regulations in the Ebola Outbreak and Response*, *Report by the Director-General*, May 13, 2016 (A69/21), para. 19-20. See for more information on the core capacity requirements within the framework of the WHO's regulations the contributions of *Michael Marx*, "Ebola Epidemic 2014-2015: Taking Control or Being Trapped in the Logic of Failure – What Lessons Can Be Learned?" and *Wolfgang Hein*, "The Response to the West African Ebola Outbreak (2014-2016): A Failure of Global Health Governance?" in this volume.

13 Cooper, H & Fink, S, "Obama Presses Leaders to Speed Ebola Response" (September 16, 2014), *New York Times*, available at http://nyti.ms/2lJf1Zs.

14 See for further information on UN Security Council Resolution 2177 (2014) the contribution of *Robert Frau*, "Combining the WHO's International Health Regulations (2005) with the UN Security Council's Powers: Does it Make Sense for Health Governance?" in this volume.

15 BBC News, "Ebola global response was 'too slow', say health experts" (November 23, 2015), available at http://www.bbc.com/news/health-34877787. The UN Mission for Ebola Emergency Response (UNMEER) was established on September 19, 2014 and finished by July 31, 2015, available at http://ebolaresponse.un.org/un-mission-ebola-emergency-response-unmeer.

16 See Coomans, F, "Situating the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights" (April 26, 2013), Maastricht University, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2256836.

17 ICJ, *Legal Consequences for States of the Continued Presence of South Africa un Namibia*, Advisory Opinion of 21 June 1921, ICJ Reports 1971, 16, para. 131; see also Skogly, S, "The obligation of international assistance and cooperation in the International Covenant on Economic, Social and Cultural Rights" in Bergsmo, M

framing of human rights, that might be the corrective to the domestic failure of a state, has been at the same time shaped by the rise of (economic) globalization, and has been challenged in situations where, in particular, socio-economic rights are negatively impacted by the policies of foreign states.[18] As has been argued by a growing number of scholars:

> "ETOs [extraterritorial 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 regulated, and IGOs made accountable […]. This reductionism to territorial obligations has led to a vacuum of human rights protection in a number of international political processes and a paucity of regulations for the protection of human rights. The situation is particularly challenging in the field of economic, social and cultural rights […]."[19]

The present contribution examines the following question: Do non-affected states have *legal* obligations, here defined as *extraterritorial obligations*, in cases where the territorial state of the rights-holder fails to guarantee the right to health of its own population?

From a methodological perspective, this article takes a legalistic approach (leaving aside the various political, economic and philosophical intellectual strands and theories that arise when discussing human rights obligations of foreign states), and focuses on *states* in particular. As a rule,

---

(ed.), *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjørn Eide*, 2003, 403 (403).

18 Vandenhole, W, "Extraterritorial Human Rights Obligations: Taking Stock, Looking Forward" (2013), 5 *European Journal of Human Rights*, 804 (808). See also for example Coomans, F & Künnemann, R, *Cases and Concepts on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights*, 2012; Langford, M, Vandenhole, W & Scheinin, M et al. (eds.), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law*, 2013; Vandenhole, W, "Beyond Territoriality: The Maastricht Principles on Extra-Territorial Obligations in the Area of Economic, Social and Cultural Rights" (2011), 29 *Netherlands Quarterly of Human Rights*, 429; Salomon, M & Seiderman, I, "Human Rights Norms for a Globalized World: The Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights" (2012), 3 *Global Policy*, 458.

19 See website of the Extraterritorial Obligations Consortium, a network of experts and Non-Governmental Organizations (NGOs) in the field of human rights, available at http://www.etoconsortium.org/en/main-navigation/our-work/. See also Wilde, R, "Dilemmas in Promoting Global Economic Justice through Human Rights Law" in Bhutal, N, *The Frontiers of Human Rights. Extraterritoriality and its Challenges*, 2016, 127 (134).

international human rights law primarily imposes obligations on states. Therefore, the enquiry of the expansion of the territorial scope of international human rights treaties in the area of socio-economic rights, especially the International Covenant on Economic, Social and Cultural Rights[20] (ICESCR), via states' obligations may help to consider how international human rights obligations of International Organizations and non-state actors can be further developed. Notably, the reference to the obligation of international cooperation in the Charter of the United Nations[21] (UN Charter) and in various international human rights instruments, such as in the Universal Declaration of Human Rights[22] (UDHR) entitling individuals to "a social and international order",[23] reflect, as described by *Simma*, "the maturing of international law into a much more *socially conscious legal order*, […], a rising awareness of the common interests of the international community, a community that comprises not only States, but in the last instance all human beings […]."[24] The debate about extraterritorial obligations of states, including the obligation of international cooperation, therefore plays a crucial role in certain areas of international law, at least as a guideline for the interpretation of human rights treaties and as a source of new obligations.[25] By zooming in on the law as it stands, this article intends

---

20 International Covenant on Economic, Social and Cultural Rights (ICESCR) of December 16, 1966 (993 UNTS 3).

21 Article 55 and 56 of the Charter of the United Nations (UN Charter) of October 24, 1945 (1 UNTS XVI).

22 Universal Declaration of Human Rights (UDHR) of December 10, 1948 (A/RES/3/217 A).

23 Article 28 of the UDHR.

24 Simma, B, "From Bilateralism to Community Interest in International Law" (1994), 250 *Recueil des Cours de l'Académie de Droit International*, 217 (234) (emphasis added).

25 Vandenhole, "Extraterritorial Human Rights Obligations: Taking Stock, Looking Forward", above Fn. 18, 807. See also on that De Schutter, O, "Foreword" in Coomans, F & Künnemann, R (eds.), *Cases and Concepts on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights*, above Fn. 18, at viii: "The Maastricht Principles […] contribute to […] renewal of human rights: they invite us to see human rights as global public goods, a guide for the reshaping of the international legal order. As these norms and procedures develop, human rights gradually can turn into […] a 'global public standard' to assess the normative legitimacy of global governance institutions – i.e., the 'right to rule' of these institutions, which cannot ensure compliance with their decisions unless they are perceived as legitimate by those, including States, whom such decisions are addressed to."

to address some of the complex issues arising within the context of extraterritorial obligations of states; to that end this contribution provides an overview of the topic of extraterritorial obligations rather than an in-depth analysis of specific questions.

The present piece introduces the obligations of the affected states in the event of disease outbreaks that arise from Article 12 of the ICESCR (II). The following section establishes the context for this article and analyzes the legal basis and status of extraterritorial obligations, with a special focus on positive obligations to fulfill of states (III). It then sheds light on the jurisdiction threshold and on potential parameters that might trigger extraterritorial obligations of non-affected states (IV). The concluding section sums up the outcomes of the article (V).

II An Overview of the Affected State's Domestic Obligations

1 Obligations Imposed by the Right to Health

On the analytical plane, it is necessary to briefly revise the obligations of states arising from the right to health. In this vein, as stated above, these obligations are primarily directed towards affected states (in the case of Ebola, Guinea, Liberia and Sierra Leone), on the basis that they are the primary duty-bearers under international human rights law and have the primary duty to respond to the Ebola outbreak.[26] In a next step, the question whether these duties can form the basis for extraterritorial obligations will be analyzed. The core question is a two-pronged one: When (beyond which threshold) does an extraterritorial obligation of a state arise under international human rights law (here under the ICESCR), and how should these obligations be allocated among various obligated states?

At the international level, the right to health is enshrined in Article 12 of the ICESCR, which contains the most complete guarantee of that right.[27] In

---

26 See Toebes, B, "The Ebola crisis: challenges for Global Health Law" (February 4, 2015), available at http://www.sharesproject.nl/the-ebola-crisis-challenges-for-global-health-law/; see also Langford, M, Vandenhole, W & Scheinin, M et al., "Introduction. An Emerging Field" in Langford, Vandenhole & Scheinin et al. (eds.), *Global Justice, State Duties*, above Fn. 18, 3.

27 See for more details on the content of the right to health, see the contribution of *A. Katarina Weilert*, "The Right to Health in International Law – Normative Foundations and Doctrinal Flaws" in this volume.

being an "inclusive"[28] right, the normative content of the right to health encompasses the right to enjoy appropriate health care, including access to medicines,[29] on the one hand, and on the other embraces a range of factors that promote the underlying components of health,[30] such as safe water, food and housing, as well as a healthy environment that guarantees that individuals enjoy the highest attainable level of health.[31] The right to health also includes access to health-related education and information.[32]

Moreover, social determinants of health, such as social, political, economic and cultural factors (such as poverty) are equally significant to the realization of the right to health.[33] In this respect, the underlying social determinants of the right to health illustrate the crucial role that these "global" factors can play in the interlinkage between territorial and extraterritorial obligations of states, including issues of the global institutional structure that are beyond the reach of any single state.[34] This is in line with Article 28 of the Universal Declaration of Human Rights (UDHR), which entitles individuals to *a social and international order* in which human rights can be fully realized.[35]

Turning to the obligations of states, Article 12 (1) of the ICESCR stipulates that States Parties "recognize" the right to health, whereas other rights

---

28 Economic and Social Council, *The right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, Report of the Special Rapporteur, Paul Hunt, Addendum, Mission to the World Trade Organization, 1 March 2004 (UN Doc. E/CN.4/2004/49/Add.1), para. 18.

29 Ibid., para. 19.

30 CESCR, *General Comment No. 14*, above Fn. 3, para. 11.

31 Ibid., para. 8, 11; see also Saul, B, Kinley, D & Mowbray, J, *The International Covenant on Economic, Social and Cultural Rights. Commentary, Cases, and Materials*, 2014, 984.

32 CESCR, *General Comment No. 14*, above Fn. 3, para. 11.

33 UN GA*, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, August 8, 2007 (UN Doc. A/62/214), para. 45. See also WHO, *Social determinants of health*, available at http://www.who.int/social_determinants/en/.

34 See on the issue of the right to health and global institutional reform Tobin, J, *The Right to Health in International Law*, 2012, 344.

35 Article 28 of the UDHR.

in the Covenant need to be "respected"[36], "ensured"[37] or even "guaranteed"[38]:

> "1. The States Parties to the present Covenant *recognize* the right of everyone to the enjoyment of the *highest attainable standard of physical and mental health*.
> 2. The *steps to be taken* by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
> […]
> (c) The *prevention, treatment and control* of epidemic, endemic, occupational and other *diseases*; […]."[39]

It has been argued that the obligations of states arising from the right to health rank lower or are less legally binding ("soft legal obligations").[40] It is important to keep in mind that the provision reflects the reluctance towards socio-economic rights in general, notably with respect to their implementation.[41] As pointed out by *Tobin,* the wording of the provision does not offer a precise meaning of the actual obligations of states under the right to health.[42] However, according to the drafting history of the ICESCR, the term "recognized" gives the provision less operative force in order for states to "construe the meaning more or less liberally",[43] as the realization of the right to health depends on resources and social conditions within a state, which in turn "would assist in securing its general acceptance by the States".[44]

While Article 12 of the ICESCR grants states a wide margin of appreciation for the realization of the right concerned, it must be read in conjunction with Article 2 (1) of the ICESCR, the umbrella clause of the Covenant:

> "Each State Party to the present Covenant undertakes *to take steps*, *individually* and through *international assistance and co-operation*, especially economic and technical, to the *maximum of its available resources*, with a view to achieving *progressively* the full realization of the rights recognized in the present Covenant *by all appropriate means*, including particularly the adoption of legislative measures."[45]

---

36 See for example Article 13 (3) and Article 15 (3) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).
37 See for example Article 3 and Article 8 of the ICESCR.
38 See for example Article 2 (2) and Article 7 (a) (1) of the ICESCR.
39 Article 12 of the ICESCR (emphasis added).
40 Toebes, B, *The Right to Health as a Human Right in International Law*, 1999, 293.
41 See Tobin, *The Right to Health,* above Fn. 34, 176.
42 Ibid., 175.
43 UN, General Assembly, 9th meeting, Third Committee, 566th meeting, October 28, 1954 (UN Doc. A/C.3/SR.566), para. 11.
44 Ibid.
45 Article 2 (1) of the ICESCR.

According to Article 2 (1) of the ICESCR, the realization of the right to health depends on the *resources that are available* to the state.[46] In consequence, "the right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions"[47] that are essential for the realization of that right.[48] In concrete terms, this is not merely directed towards the availability of financial resources, but also includes, for instance, human, technological, organizational, natural and informational resources.[49] It is because of this that states, *inter alia*, have to "increase public spending on health",[50] "train and recruit […] medical staff"[51] and "increase expenditure for health care and to take all appropriate measures to ensure universal access to health care at prices affordable to everyone".[52] States are obliged to ensure that the allocation of resources is adequate and appropriate as well as effective and sustainable.[53] This also includes resources available from the *international community*.[54]

While resource constraints might derive from structural deficits that have built up in a short period of time, making them difficult to correct immediately, Article 2 (1) of the ICESCR allows for the *progressive realization* of the right to health. States have a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realization of the right to health.[55] But, at the same time, they also have *immediate obligations* that include the guarantees of non-discrimination and equal treatment,[56] as well as the *obligation to take steps* towards the full realization of

46 CESCR, General *Comment No. 14*, above Fn. 3, para. 9. See also Tobin, *The Right to Health*, above Fn. 34, 175, 252.
47 CESCR, *General Comment No. 14*, above Fn. 3, para. 9.
48 Ibid., para. 9.
49 CRC Committee, *Report on the Forty-Sixth Session*, April 22, 2008 (UN Doc. CRC/C/46/3), chapter VII, para. 65; see also Tobin, *The Right to Health*, above Fn. 34, 226 et seq.
50 CESCR, *Concluding Observations on Kazakhstan*, June 7, 2010 (UN Doc. E/C.12/KAZ/CO/1), para. 40.
51 Ibid.
52 CESCR, *Concluding Observations on the Republic of Korea*, December 17, 2009 (UN Doc. E/C.12/KOR/CO/3), para. 30.
53 Tobin, *The Right to Health*, above Fn. 34, 228.
54 CESCR, *General Comment No. 3, The Nature of States Parties' Obligations*, Article 2 (1) of the ICESCR, December 14, 1990 (UN Doc. E/1991/23), para. 13.
55 CESCR, *General Comment No. 14*, above Fn. 3, para. 31.
56 Article 2 (2) of the ICESCR: "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised

the right to health that need to be "deliberate, concrete and targeted"[57], such as the introduction of a national public health strategy or a plan of action.[58] *Alston* and *Quinn* explain that these obligations are "hybrids between obligations of conduct and obligations of result".[59] On the one hand, states must match their performance with their objective capabilities, which are obligations of result; on the other hand, they are obliged to take active – but unspecified – steps towards the realization of the relevant right that are obligations of conduct.[60]

Furthermore, the CESCR emphasizes a series of concepts and principles that have to be met by states, notably the *minimum core obligations* and the *principle of non-retrogression,* i.e. that the state should not take steps backwards in its realization of the right concerned.[61] Apart from the essential primary health care that is read into the core of the right and that has to be guaranteed by every state, the CESCR establishes "obligations of comparable priority".[62] These encompass, among others, the *prevention, treatment and control of epidemic and endemic diseases,* as well as education and access to information concerning the main health problems in the community, including methods of prevention and control.[63] In any event, these minimum core obligations must be met by states. In order to justify the failure to meet at least the minimum core obligations due to a lack of available resources, the state is obliged to prove that every effort has been made to use all resources that are at its disposal.[64] The CESCR stressed that "a State claiming that it is unable to carry out its obligation for reasons beyond its control therefore has the burden of proving that this is the case and that it

---

without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

57 CESCR, *General Comment No. 14*, above Fn. 3, para. 30.

58 Economic and Social Council, *The right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, above Fn. 28, para. 22.

59 Alston, P & Quinn, G, "The Nature and Scope of States Parties' Obligations under the Covenant on Economic, Social and Cultural Rights" (1987), 9 *Human Rights Quarterly*, 159 (185).

60 Ibid.

61 CESCR, General *Comment No. 3,* above Fn. 54, para. 9-10.

62 CESCR, *General Comment No. 14*, above Fn. 3, para. 43.

63 Ibid., para. 44 (c) and (d).

64 See also CESCR, *General Comment No. 3*, above Fn. 54, para. 10. See also Forman, L, "Can Core Obligations under the Right to Health Achieve their Ambitions" (2015), 9 *Zeitschrift für Menschenrechte*, 36 (38).

has unsuccessfully sought to obtain *international support*".[65] Concomitantly, the Committee emphasized "that it is particulary incumbent on States parties and other actors in a position to assist, to provide 'international assistance and cooperation, especially economic and technical' which enable developing countries to fulfil their core and other obligations".[66]

Consequently, the territorial state will be in breach of international law if it cannot meet the minimum core obligations arising from the right to health, regardless of whether the state is unwilling or unable to abide by that obligation. Nevertheless, a possible exculpation from the violation in question might exclude wrongfulness at the secondary level of international responsibility.

2 The Obligation to Prevent, Treat and Control Diseases

The fact, however, that a number of non-limitative steps are mentioned in Article 12 (2) of the ICESCR implies that the right to health is more concrete than similar provisions, which do not enumerate concrete steps.[67] As articulated by the CESCR:

> "'The prevention, treatment and control of epidemic, endemic, occupational and other diseases' […] requires […] the promotion of social determinants of good health, such as environmental safety, education, economic development and gender equity. The right to treatment includes the creation of a system of urgent medical care in cases of accidents, epidemics and similar health hazards, and the *provision of disaster relief and humanitarian assistance in emergency situations*. The control of diseases refers to *States' individual and joint efforts* to, inter alia, make available relevant technologies, using and improving epidemiological surveillance and data collection on a disaggregated basis, the implementation or enhancement of immunization programmes and other strategies of infectious disease control."[68]

The right to health imposes on states the tripartite typology of duties: the obligation to respect, protect and fulfill.[69] Accordingly, the obligation to

---

65 CESCR, *General Comment No. 12, The right to adequate food*, Article 11 of the ICESCR, May 12, 1999 (UN Doc. E/C.12/1999/5), para. 17 (emphasis added).

66 CESCR, *General Comment No. 14*, above Fn. 3, para. 45.

67 Article 12 (2) (c) of the ICESCR. Article 24 (2) (c) of the Convention of the Rights of the Child (CRC) of November 20, 1989 (adopted by UN GA Resolution 44/25) also refers to the obligation to combat diseases.

68 CESCR, *General Comment No. 14*, above Fn. 3, para. 16 (emphasis added).

69 Ibid., para. 33; Eide, A, Giacca, G & Golay, C, "Economic, Social and Cultural Rights as Human Rights" in Eide, A, Krause, C & Rosas, A (eds.), *Economic,*

respect, as a negative obligation, requires states to refrain from interfering directly or indirectly with the enjoyment of the right to health.[70] This, among others, entails the obligation to refrain from "denying or limiting equal access for all persons […] to preventive, curative and palliative health services [and] abstaining from enforcing discriminatory practices as a state policy".[71]

On the other hand, the obligation to *protect* refers to the states' positive obligation to take preventive measures to reduce or eliminate human rights violations by non-state actors.[72] The obligation to protect contains a number of elements, some of which are obligations of *due diligence*. For instance, states should have a preventive apparatus to ensure the protection of the right to health, in order to prevent or mitigate the outbreak of a disease.[73] It is a matter of due diligence how these institutions function.[74] Furthermore, the obligation to protect requires states to adopt legislation or other measures ensuring equal access to health care and health-related services provided by third parties, as well as to ensure that privatization of the health sector does not constitute a threat to the availability, accessibility, acceptability and quality of health facilities.[75] For example, an intellectual property framework should encourage research and development activities, but should not deny or restrict individuals' access to medicine.[76]

Finally, the positive obligation to *fulfill* requires states to adopt appropriate legislative, administrative, budgetary and judicial as well as other measures.[77] At the national level, the obligation to fulfill imposes on states a need, for instance, to give sufficient recognition to the right to health in

---

Social and Cultural Rights: A Text Book, 2014, 18 et seqq. See also the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 1997, para. 6.

70 CESCR, *General Comment No. 14*, above Fn. 3, para. 33.

71 Ibid., para. 34.

72 ILA Study Group on Due Diligence in International Law, *First Report*, Duncan French (Chair) and Tim Stephans (Rapporteur), March 7, 2014, 16.

73 Pisillo-Mazzeschi, R, *Responsabilité de l'état pour violations des obligations positives relatives aux droits de l'homme. Collected Courses of the Hague Academy of International Law 2008*, vol. 333, chapter III, 2009, 334 et seq.

74 Ibid. See also for example ECtHR, *Kelly and Others v UK*, Judgment of May 4, 2001 (App. No. 30054/96), para. 96.

75 CESCR, *General Comment No. 14*, above Fn. 3, para. 35.

76 CESCR, *General Comment on States Obligations under the International Covenant on Exonomic, Social and Cultural Rights in the context of Business Activities*, Draft prepared by Olivier De Schutter and Zdzislaw Kedzia, Rapporteurs, October 17, 2016 (E/C.12/60/R.1), para. 20.

77 CESCR, *General Comment No. 14*, above Fn. 3, para. 33.

national political and legal systems, preferably by way of legislative implementation, and to adopt national health policies for realizing that right. States have to ensure the provision of health care, including immunization programs and the guarantee of equal access for all to the underlying (social) determinants of health.[78]

3 The Affected States: "Unwilling or Unable"?

Based on the above, the question arises whether the Ebola-affected states, which have the primary obligation to ensure the right to health of their own population, have taken sufficient measures to ensure the right to health of the victims of disease. From a preventive perspective, this also includes functioning health systems as well as good infrastructure able to respond to foreseeable threats, such as disease outbreaks.[79]

In practice, reports on the Ebola crisis have shown that the health systems in Sierra Leone, Guinea and Liberia have been considerably weakened by armed conflict, lacking the necessary resources for the realization of the right to health. *Toebes* has demonstrated that the affected countries have asserted that they have investet the "maximum of their available resources" in the Ebola crisis.[80] However, states are required to guarantee the minimum core of the right by not falling below the minimum threshold.[81] To illustrate, according to the World Bank, in 2014 Guinea spent only 5.6 % of the GDP on public health, whereas in the case of Liberia this was 10 % and Sierra Leone 11.1 %, similar to Germany with 11.3 %.[82] The question that arises here is whether Guinea has violated the minimum core of the right to health because it failed to invest in public health in order to protect the right to

78 Ibid., para. 36.
79 Toebes, "The Ebola crisis", above Fn. 26.
80 Ibid.
81 Ibid.
82 The World Bank, *Database on health expenditure, total (% of GDP)*, available at http://data.worldbank.org/indicator/SH.XPD.TOTL.ZS?locations=GN-LR-SL. See also Toebes, "The Ebola crisis", above Fn. 26.

health of its own population. In principle, the fundamental problem is attached to the inefficiency of the money spent, as well as corruption.[83] Transparency International stated in its report of 2006 that the health sector is among the most corrupt state sectors.[84]

The question arises whether states other than the territorial state – in a subsidiary or even complementary way – have obligations to assist the affected states in cases of a disease outbreak, where the territorial state is unwilling or unable to deal with a health crisis.

III Assessment of Non-Affected States' Obligations Concerning Disease Outbreaks

1 Extraterritorial Obligations

The term *extraterritorial obligations* (also referred to as international or transnational obligations, third states obligations or global obligations[85]) is one of the notions that has emerged in the recent debate on the "paradigmatic shift of mainstream human rights law"[86] as it adjusts to new realities where states other than the territorial (or jurisdictional) state are considered to be the bearers of human rights obligations. Extraterritorial obligations here mean obligations of non-affected states towards individuals that are situated in other countries.

The idea of invoking obligations against states other than the territorial (or jurisdictional) state, as far as socio-economic rights are concerned, can be found in the *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights* (Maastricht Principles).[87] This set of non-legally binding principles was adopted in 2011

---

83 Toebes, "The Ebola crisis", above Fn. 26.

84 Transparency International, *Global Corruption Report 2006: Corruption and Health*, available at http://bit.ly/2lJkiQP; see also Toebes, "The Ebola crisis", above Fn. 26.

85 See on terminology Gibney, M, "On Terminology. Extraterritorial Obligations" in Langford, Vandenhole & Scheinin et al. (eds.), *Global Justice, State Duties*, above Fn. 18, 32 et seqq.

86 Vandenhole, "Extraterritorial Human Rights Obligations: Taking Stock, Looking Forward", above Fn. 18, 805.

87 *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights*, adopted in September 2011 by leading human rights experts and NGOs, is available at http://bit.ly/2mbsSsx.

by a group of international human rights experts and reflects a "landmark development in international law".[88]

Against this backdrop, international legal relationships which might trigger extraterritorial obligations in particular unfold in a triangle of actors: a potentially obliged state, a potential recipient state, and affected individuals. Potential obligations to act will therefore typically have an extraterritorial dimension that involves action outside the acting state's territorial boundaries. This is the case concerning acts or omissions[89] of a state outside its national borders or when its domestic policies have extraterritorial effects outside its territory (for example based on policy measures that have been taken inside that state).[90] Extraterritorial obligations might therefore not only be relevant and effective in the area of international assistance but also, as in the field of intellectual property for medicines and other key goods, international trade and investment protection law.[91]

The following analysis on extraterritorial obligations is twofold. First, it will be scrutinized whether the ICESCR enshrines extraterritorial obligations on states and as regards the right to health, whether these obligations are legally binding. The second step considers the question when and beyond which threshold extraterritorial obligations of states arise in practice.

Any attempt to analyze extraterritorial obligations from a legal perspective is inevitably confronted with the strong politicization of the issue at hand. Different regional blocs (for example Global North vs. Global South) have taken different positions.[92] For instance, the African group of states has emphasized that international assistance is a legally binding obligation, whereas states from the Global North, such as the UK, Canada and France,

88 Wilde, "Dilemmas in Promoting Global Economic Justice through Human Rights Law", above Fn. 19, 132.

89 See ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts of 2001 (UN Doc. A/56/10 (2001)). According to Article 2 of the ILC Draft Articles the international responsibility of a state can be also triggered by an omission.

90 Bartels, L, "The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects" (2014), 25 *European Journal of International Law*, 1071 (1071).

91 Vandenhole, "Extraterritorial Human Rights Obligations: Taking Stock, Looking Forward", above Fn. 18, 806.

92 Ibid., 811 et seq.

have pointed out that international cooperation and assistance is a moral obligation but not a legal entitlement.[93]

Nevertheless, a growing body of scholarship argues that extraterritorial obligations do exist under the ICESCR.[94] Crucially, unlike the International Covenant on Civil and Political Rights (ICCPR) that obliges states to respect and to ensure the rights of the individuals "within its territory and subject to its jurisdiction"[95] and the European Convention on Human Rights[96] (ECHR), the ICESCR does not contain a general jurisdictional clause (Article 2 para. 1), but it does makes several references to international cooperation and assistance.[97] However, international courts and human rights bodies have previously dealt with and clarified the meaning of the absence of a jurisdictional clause in treaty law (for example with respect to the ICESCR, the Genocide Convention and the Geneva Conventions). The International Court of Justice (ICJ) held in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, considering whether Israel had obligations under the ICESCR to individuals in the Occupied Territories, that

---

93 Ibid., 811. Report of the Open-Ended Working Group on an Optional Protocol to the Covenant on Economic, Social and Cultural Rights on its fourth session (Geneva July 16-27, 2007), August 30, 2007 (A/HRC/6/8), para. 164; Report on the Open-Ended Working Group to Consider Options Regarding the Elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on its second session, February 10, 2005 (E/CN.4/2005/52), para. 76.

94 Langford, M, Coomans, F & Gómez Isa, F, "Extraterritorial Duties in International Law" in Langford, Vandenhole & Scheinin et al. (eds.), *Global Justice, State Duties*, above Fn. 18, 51; Coomans, F, "Some remarks on the Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights" in Coomans, F & Kamminga, M (eds.), *Extraterritorial Application of Human Rights Treaties*, 2004, 183.

95 Article 2 (1) of the ICCPR (emphasis added).

96 European Convention on Human Rights (ECHR) of November 4, 1950 (ETS No. 005), Article 1: "The High Contracting Parties shall secure to everyone *within their jurisdiction* the rights and freedoms defined in Section I of this Convention." (emphasis added).

97 See for the wording of Article 2 (1) of the ICESCR above II.1. The only exception is Article 14 of the ICESCR as well as Article 2 of the Optional Protocol to the ICESCR of December 10, 2008 (adopted in General Assembly Resolution A/RES/63/117) that contains references to jurisdiction. See also Milanovic, M, *Extraterritorial Application of Human Rights Treaties. Law, Principles, and Policy*, 2011, 11 et seqq.

> "[t]he International Covenant on Economic, Social and Cultural *Rights contains no provision on its scope of application*. This may be explicable by the fact that the Covenant guarantees rights *which are essentially territorial*. However, it is not to be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State *exercises territorial jurisdiction*."[98]

In *Georgia v. Russian Federation*, the ICJ found that the

> "provisions of CERD [Convention on the Elimination of All Forms of Racial Discrimination] generally appear to apply, like other provisions of instruments of that nature, to the actions of a State party *when it acts beyond its territory*."[99]

With respect to the Geneva Conventions, the ICJ has clarified that negative and positive extraterritorial obligations do exist under common Article 1 of the Geneva Conventions.[100] Furthermore, in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Case)*, the court stated that the obligations of states as contained in the Genocide Convention are obligations *erga omnes* and that the obligation to prevent genocide is not territorially limited.[101]

In a number of judgments, the European Court of Human Rights (ECtHR) has argued that jurisdiction is primarily territorial and only in exceptional circumstances extraterritorial.[102] Furthermore, in *Franklin Guillermo Aisalla Molina (Ecuador/Colombia)* the Inter-American Commission on Human Rights (IACHR) held

> "that it has competence *ratione loci* with respect to a State for acts occurring on the territory of another State, when the alleged victims were subjected to the authority and control of its agents."[103]

---

98 ICJ, Legal *Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion of July 9, 2004, ICJ Reports 2004, 136, para. 112 (emphasis added).

99 ICJ, Case Concerning Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation), provisional measures, order of October 15, 2008, ICJ Reports 2008, 353, para. 109.

100 ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, above Fn. 98, para. 158 (positive duty); ICJ, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment of June 27, 1986, ICJ Reports 1986, 114, para. 220.

101 ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Preliminary Objections of July 11, 1996, ICJ Reports 1996, 595, para. 31.

102 See for example ECtHR, *Case of Ilascu and Others v. Moldova and Russia*, Judgment of July 8, 2004 (App. No. 48787/99), para. 312; *Al-Skeini and others v. UK,* Grand Chamber Judgment of July 7, 2011 (App. No. 55721/07), para. 131.

103 IACHR, *Franklin Guillermo Aisalla Molina (Ecuador/Colombia)*, Admissibility Decision of October 21, 2010, Report No. 112/10 (OEA/Ser.L/V/II.140), para. 98.

Otherwise, it is asserted, there would be a legal lacuna in the protection of the individuals' human rights, which would be contrary to the object and purpose of the American Convention of Human Rights.[104] Consequently, the absence of a jurisdictional clause has not been considered a barrier against extraterritorial application of the abovementioned treaties.[105]

The CESCR has also explicitly confirmed the existence of extraterritorial obligations on a number of occasions,[106] in particular with respect to the obligations arising from the right to health as discussed above:

> "To comply with their international obligations in relation to article 12, States parties *have to* respect the enjoyment of the right to health *in other countries*, and to prevent third parties from violating the right *in other countries*, if *they are able to influence* these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law. *Depending on the availability of resources*, States *should facilitate* access to essential health facilities, goods and services *in other countries*, wherever possible and provide the necessary aid when required. States parties *should* ensure that the right to health is *given due attention in international agreements* and, to that end, should consider the development of further legal instruments. In relation to the conclusion of other international agreements, States parties *should* take steps to ensure that these instruments do not adversely impact upon the right to health. Similarly, States parties have an obligation to ensure that *their actions as members of international organizations* take *due account* of the right to health. Accordingly, States parties which are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, *should* pay greater attention to the protection of the right to health in *influencing the lending policies, credit agreements and international measures of these institutions*."[107]

As in the domestic context, the CESCR uses the tripartite typology of duties with regard to extraterritorial obligations. Although the General Comments of the CESCR are not legally binding, it should be noted that the Committee

104 Ibid., para. 98.

105 See also Bartels, "The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects", above Fn. 90, 1084. See also ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, December 19, 2005, ICJ Reports 2005, 168, para. 216.

106 See for example CESCR, *General Comment No. 15, The right to water*, Article 11 and 12 of the ICESCR, January 20, 2003 (UN Doc. E/C.12/2002/11, para. 31; on the right to food see *General Comment No. 12*, above Fn. 65, para. 36.

107 CESCR, *General Comment No. 14*, above Fn. 3, para. 39. (emphasis added). See also Milanovic, *Extraterritorial Application of Human Rights Treaties*, above Fn. 97, 228.

uses stronger ("have to") in respect of negative obligations.[108] The negative obligation to respect entails refraining from actions that interfere, directly or indirectly, with the enjoyment of the right to health.[109] For instance, states should refrain at all times from imposing *embargoes or similar measures* restricting the supply of medicines and medical equipment to another state.[110] Sanctions should never be used as an instrument of political and economic pressure.[111] Negative obligations are, in the work of the CESCR, but also politically, the least controversial.[112] Therefore, according to *Milanovic*, negative obligations have no territorial limitation.[113]

As regards the positive obligation to protect, states as members of international financial institutions, such as the International Monetary Fund (IMF) or the World Bank, should take into account their obligations arising from the right to health and ensure that the policies and decisions of these institutions are in conformity with their obligations under the ICESCR.[114] This does not concern the direct obligations of these institutions, but rather the conduct of states, which have the capacity to *influence* the behavior of such institutions. A state should demonstrate that it has taken all reasonable measures, for example in the decision-making processes, to prevent institutional activities from harming the right to health of the individuals concerned.[115] Furthermore, the obligation to protect extends to business entities, such as multinational corporations, whose activities have an impact on the right to health of individuals in other territories.[116] In that context, the

108 Bartels, "The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects", above Fn. 90, 1085, 1087.

109 Tobin, *The Right to Health*, above Fn. 34, 332.

110 CESCR, *General Comment No. 14*, above Fn. 3, para. 41.

111 Ibid., para. 41.

112 Salomon, M, *Global Responsibility for Human Rights: World Poverty and the Development of International Law*, 2007, 189.

113 Milanovic argues that negative obligations to respect are territorially unlimited, while the positive obligations arising from such treaties would generally require the exercise of territorial jurisdiction, Milanovic, *Extraterritorial Application of Human Rights Treaties*, above Fn. 97, 228.

114 See for example CESCR, Concluding Observations on United Kingdom, June 5, 2002 (UN Doc. E/C.12/1/Add.79), para. 26. See also Tobin, *The Right to Health,* above Fn. 34, 333 et seq.

115 Tobin, ibid., 338.

116 Tobin, ibid., 339.

CESCR uses language that is non-obligatory ("should"),[117] presumably due to the controversial nature of positive obligations.

In the same line, the CESCR remains quite reluctant as regards the obligation to fulfill that requires states to provide aid to other countries.[118] The obligation of international assistance and cooperation thereby provides the basis for the obligation to fulfill.[119]

2 The Obligation of International Cooperation and Assistance

Article 2 (1) of the ICESCR explicitly anchors a general "obligation of international assistance and cooperation" among states.[120] Article 56 of the UN Charter, with reference to Article 55, also contains a duty to cooperate: "All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."[121] Moreover, the CESCR articulates with regard to the right to health that

> "the existing gross inequality in the health status of the people, *particularly between developed and developing countries*, as well as within countries, is politically, socially and economically unacceptable and is, therefore, of *common concern to all countries*".[122]

---

117 Bartels, "The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects", above Fn. 90, 1085 et seq.

118 Ibid., 1086.

119 CESCR, *General Comment No. 3*, above Fn. 54, para. 14; Salomon, *Global Responsibility for Human Rights,* above Fn. 112, 189 et seq.

120 Article 2 (1) of the ICESCR.

121 Article 55 of the UN Charter reads: "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
a. higher standards of living, full employment, and conditions of economic and social progress and development;
b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

122 See CESCR, *General Comment No. 14*, above Fn. 3, para. 38 (emphasis added).

Against this backdrop, it is not surprising that the CESCR has taken a clear stance, affirming that the obligation of international cooperation and assistance is an obligation on *all* states.[123]

The obligation to cooperate operates generally, as it requires that states work together internationally in order to realize the right to health everywhere.[124] International cooperation includes the development of international rules to establish an enabling environment for the realization of socio-economic rights, but also financial and technical assistance.[125] Furthermore, states should refrain from nullifying or impairing human rights in other countries.[126] However, the scope of the obligation remains vague, and it is not clear what it might *concretely* entail.[127] As regards the Ebola outbreak, for instance, UN Security Council Resolution 2177 (2014) states that

> "the control of outbreaks of major infectious diseases requires urgent action and greater national, regional and international collaboration […] stressing the crucial and immediate need for a *coordinated international response*."[128]

Here, General Comment No. 14 on the right to health seems to be of importance with respect to disaster relief and emergency situations. It provides:

> "States parties have a joint and individual responsibility, in accordance with the Charter of the United Nations and relevant resolutions […] *to cooperate in providing disaster relief and humanitarian assistance in times of emergency* […]. Each State should contribute to this task *to the maximum of its capacities* […]. Moreover, given that some diseases are easily transmissible beyond the frontiers of a State, the international community has a *collective responsibility* to address this problem. The economically *developed States* parties have a *special responsibility* and interest to assist the poorer *developing States* in this regard."[129]

The potential duty to cooperate as enshrined under Article 2 (1) of the ICESCR asks first whether the affected state has an obligation to seek assistance from other states where that state is unable or unwilling to protect its population in acute health emergencies (a) and, second, whether non-

123 CESCR, *General Comment No. 3*, above Fn. 54, para. 14.
124 Peters, A, *Beyond Human Rights. The Legal Status of the Individual under International Law*, 2016, 245.
125 De Schutter, O, Eide, A & Khalfan, A et. al., "Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights" (2012), 34 *Human Rights Quarterly,* 1084 (1104).
126 Ibid.
127 Tobin, *The Right to Health,* above Fn. 34, 340, 342.
128 Preamble of the UN Security Council Resolution 2177 (2014), above Fn. 11.
129 CESCR, *General Comment No. 14*, above Fn. 3, para. 40 (emphasis added).

affected states, essentially developed ones, bear an obligation to provide assistance and cooperation to the individuals concerned (b).

a The Obligation to Seek International Assistance and Cooperation

The affected (or territorial) state's obligation to seek international assistance and cooperation is derived from that state's positive obligations to take action towards the realization of the right to health as required by Article 2 (1) of the ICESCR, which also requires states to work together through international assistance and cooperation.[130] As alluded to above, the territorial state's obligation "to take steps […] to the maximum of its available resources"[131] not only refers to that state's own resources, but also includes resources that are available from the international community through international assistance and cooperation.[132] Hence, the territorial state is obliged to seek assistance in cases where its capacity is exhausted.[133] Concurringly, Principle 34 of the Maastricht Principles also confirms that a state has an obligation to seek international assistance and cooperation on mutually agreed terms when that state is unable to guarantee socio-economic rights within its territory.[134]

In this regard, Article 10 of the *ILC Draft Articles on the Protection of Persons in the Event of Disasters* (ILC Articles on Disaster Protection of 2016), although not legally binding, stresses that the affected state has the primary duty to ensure the protection of the individuals' rights in its territory or under its jurisdiction.[135] Article 11 of the ILC Articles on Disaster Protection of 2016 *transforms* this primary duty of the territorial state into a secondary one in stating that the territorial state has the duty to *seek* assistance from other states where its national response capacity is exceeded by the disaster in question.[136]

130 Article 2 (1) of the ICESCR. See above II.
131 Article 2 (1) of the ICESCR.
132 CESCR, *General Comment No. 3*, above Fn. 54, para. 14.
133 ILC, *Fourth report of the Special Rapporteur Eduardo Valencia-Ospina, on the Protection of Persons in the Event of Disasters*, May 11, 2011 (UN Doc. A/CN.4/643), para. 60.
134 Principle 34 of the Maastricht Principles, above Fn. 87.
135 Article 10 of the ILC Draft Articles on the Protection of Persons in the Event of Disasters, May 27, 2016 (A/CN.4/L.871).
136 Ibid., Article 11.

The principle of sovereignty requires that external assistance must be provided with the affected state's consent.[137] However, the affected state does not have an unlimited right to refuse assistance.[138] Consent to external assistance should not be withheld *arbitrarily*.[139]

b The Obligation to Provide International Assistance and Cooperation

Alston and *Quinn* argue that "on the basis of the preparatory work it is difficult, if not impossible, to sustain the argument that the commitment to international cooperation contained in the Covenant can accurately be characterized as a legally binding obligation upon any particular state to *provide* any particular form of assistance."[140] Under contemporary circumstances, too, it is disputed whether developed states have a duty to provide assistance to developing countries.[141] Article 12 of the ILC Articles on Disaster Protection of 2016 includes a right to *offer* assistance to the affected state.[142] However, controversially, states are only obliged to give due consideration to a request for assistance.[143]

In contrast to this, it is increasingly argued that non-affected states should be obliged to provide assistance where it is required.[144] Principle 33 of the

137 Sivakumaran, S, "Arbitrary Withholding of Consent to Humanitarian Assistance in Situations of Disaster" (2015), 64 *International and Comparative Law Quarterly* 501 (505 et seq.).

138 Peters, *Beyond Human Rights*, above Fn. 124, 243. See also Akande, D & Gillard, E-C, "Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict" (2016), 92 *International Law Studies*, 483 (510).

139 Article 13 (2) of the ILC *Draft Articles on the Protection of Persons in the Event of Disasters*, above Fn. 135. See for the meaning of "arbitrary" in this context Akande, D & Gillard, E-C, "Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict", above Fn. 138, 492 et seqq.; Peters, *Beyond Human Rights*, above Fn. 124, 243.

140 Alston & Quinn, "The Nature and Scope of States Parties' Obligations", above Fn. 59, 191 (emphasis added).

141 Bartels, "The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects", above Fn. 90, 1086.

142 Article 12 of the ILC *Draft Articles on the Protection of Persons in the Event of Disasters*, above Fn. 135.

143 Ibid.

144 Peters, *Beyond Human Rights*, above Fn. 124, 245.

Maastricht Principles obliges states to provide international assistance to affected states when they are in a position to do so.[145]

Essentially, a legal obligation on states to provide assistance can be based on Article 2 (1) of the ICESCR because international cooperation as such requires that states work together, and international assistance is a component of international cooperation.[146] The duty to cooperate is therefore a mutual obligation that is directed to the affected state as well as to non-affected states. This is also in line with the purpose of such an obligation, namely the action or process of working together to the same end.[147] The obligation to provide assistance and cooperate therefore remains a legal obligation, although only a "weak conduct obligation".[148]

As alluded to above, this section has argued that the field of extraterritorial obligations is in an evolutionary phase and that there are considerable legal foundations in international human rights confirming the existence of extraterritorial obligations of states under the law as it stands.[149] However, it has not been sufficiently elaborated what the applicable benchmarks would be in an extraterritorial context, that would justify assigning these obligations to a particular state or states.[150]

VI Assigning Extraterritorial Obligations to Non-Affected States

1 The Scope of Jurisdiction

Principle 8 of the Maastricht Principles differentiates between two dimensions of extraterritorial obligation, and define them as follows:

> "a) obligations relating to the *acts and omissions of a State*, within or beyond its territory, that *have effects* on the enjoyment of human rights *outside of that State's territory*; and

145 Principle 33 of the Maastricht Principles, above Fn. 87.
146 De Schutter, Eide & Khalfan et al., "Commentary to the Maastricht Principles", above Fn. 125, 1157.
147 See for the definition of cooperation English Oxford Living Dictionaries, available at https://en.oxforddictionaries.com/definition/cooperation.
148 Tobin, *The Right to Health,* above Fn. 34, 342.
149 Vandenhole, "Extraterritorial Human Rights Obligations: Taking Stock, Looking Forward", above Fn. 18, 817.
150 Salomon, *Global Responsibility for Human Rights,* above Fn. 112, 190.

> b) obligations of a *global character* that are set out in the Charter of the United Nations and human rights instruments to take action, *separately, and jointly through international cooperation*, to realize human rights universally."[151]

Under the first paragraph, extraterritorial obligations might be triggered by domestic measures of a state, which have extraterritorial effects on socio-economic rights of individuals outside of its territory.[152] With respect to the right to health, States Parties to the ICESCR have to respect the right to health in other countries and to prevent third parties form violating the right in other countries, if they are able to influence these third parties by way of legal or political means.[153] This implies a form of specific relationship or link that has to be present between the state and individuals situated outside that state's territory.[154]

Second, global obligations, *such as the obligation of international cooperation, in turn* operate generally and do not require any link between the state concerned and individuals residing in other countries in order to be triggered.[155] With respect to the obligation to cooperate, notably the obligation to *provide* assistance, the Commentary to the Maastricht Principles stipulates that:[156]

> "[…] the obligation to provide assistance to other states in order to strengthen respect for human rights in those states, *in the absence of any particular link* between a state and the denial of human rights in those states, arises only by virtue of the obligation of a global character as described in Principle 8 (b)."[157]

The extraterritorial applicability of obligations in the area of socio-economic rights has been increasingly scrutinized within the context of an extended scope of *jurisdiction*. Jurisdiction refers to "the relationship between the individual and the state in connection with a violation of human rights, wherever it occurred, so that acts of states that take place or produce effects outside their territories may be deemed to fall under the jurisdiction of the

---

151 Principle 8 of the Maastricht Principles, above Fn. 87 (emphasis added).
152 Bartels, "The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects", above Fn. 90, 1071.
153 CESCR, *General Comment No. 14*, above Fn. 3, para. 39.
154 De Schutter, Eide & Khalfan et al., "Commentary to the Maastricht Principles", above Fn. 125, 1102; see also Wilde, "Dilemmas in Promoting Global Economic Justice through Human Rights Law", above Fn. 19, 156.
155 Wilde, ibid., 160.
156 Ibid. See also section III.2.b.
157 De Schutter, Eide & Khalfan et al., "Commentary to the Maastricht Principles", above Fn. 125, 1101 et seq.

state concerned."[158] Under international human rights law, the notion of jurisdiction functions as a restraint of state power.[159] However, it remains disputed what role jurisdiction plays with respect to socio-economic rights (as opposed to civil and political rights) and how it is defined.[160] The Maastricht Principles define the concept of jurisdiction as follows:

> Principle 9:
> "A State has obligations to respect, protect and fulfil economic, social and cultural rights in any of the following:
> a) situations over which it exercises *authority or effective control* […];
> b) situations over which State acts or omissions bring about *foreseeable effects* on the enjoyment of economic, social and cultural rights, whether within or outside its territory;
> c) situations in which the State […] is *in a position to exercise decisive influence or to take measures* to realize economic, social and cultural rights extraterritorially."[161]

Principle 9 of the Maastricht Principles refer to a broad notion of jurisdiction that goes further than the existing law: it not only covers situations over which a state exercises authority or effective control but also acts or omissions by a state which bring about *foreseeable effects* outside its territory or where states are even in a position to exercise *decisive influence* or *to take measures* extraterritorially.[162]

First, extraterritorial obligations may be present in cases of *factual power*, where effective control is exercised over a territory, such as in cases of military occupation,[163] or over persons, for instance in cases of detention

158 Ibid., 1106.
159 Vandenhole, "Extraterritorial Human Rights Obligations: Taking Stock, Looking Forward", above Fn. 18, 818.
160 Ibid., 818. See on human rights jurisdiction Besson, S, "The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to" (2012), 25 *Leiden Journal of International Law*, 857.
161 Principle 9 of the Maastricht Principles, above Fn. 87 (emphasis added).
162 See also Wilde, "Dilemmas in Promoting Global Economic Justice through Human Rights Law", above Fn. 19, 158; Principle 25 of the Maastricht Principles that contains a very broad notion of jurisdiction over companies, above Fn. 86.
163 See for example ECtHR, *Case of Cyprus v. Turkey*, Grand Chamber Judgment of May 10, 2001 (App. No. 25781/94), para. 77.

in foreign countries.[164] The ECtHR has developed the effective control doctrine with respect to civil and political rights.[165] But the situation is different in regard to deprivations of socio-economic rights as these will mainly occur in situations where a state does not exercise factual power, but where its domestic measures produce negative repercussions outside its territory.[166]

Second, extraterritorial obligations are triggered when a state knows or should have known that its policy measures would have extraterritorial effects – directly or indirectly – in another country (*normative power*). Direct extraterritorial effects cover domestic actions such as the imposition of embargoes on medicines that will have negative impact on the right to health of the individuals concerned.[167] In the case of indirect effects of a state's conduct that are based on a chain of events occurring outside the relevant state's control – and that are most likely not identifiable and foreseeable – it will be much more difficult to attribute human rights violations to the state in question.[168] Therefore, the state will not necessarily be held responsible for the negative impacts of its conduct.[169] While the ECtHR clearly articulates that jurisdiction may extend to the conduct of a state that produces effects outside its territory, it is not clear whether the ICESCR is applicable to domestic measures that (merely) have effects abroad.[170]

Third, the inclusion of situations where a state is in a position to take measures to realize socio-economic rights, regardless of any notion of effect or causation, seems to go beyond any doctrinal consensus, and may have

---

164 See for example *Öcalan v. Turkey*, Judgment of March 12, 2003 (App. No. 46221/99), para. 93.

165 See ECtHR, *Case of Al-Skeini and Others v. UK*, above Fn. 102, para. 138-140; see also Langford, Vandenhole & Scheinin et al., "Introduction. An Emerging Field", above Fn. 26, 9.

166 Langford, Vandenhole & Scheinin et al., "Introduction. An Emerging Field", above Fn. 26, 9; Vandenhole, "Extraterritorial Human Rights Obligations: Taking Stock, Looking Forward", above Fn. 18, 820.

167 Canizzaro, E, "The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects: A Reply to Lorand Bartels" (2015), 25 *European Journal of International Law*, 1093 (1096).

168 Ibid., 1097.

169 De Schutter, Eide & Khalfan et al., "Commentary to the Maastricht Principles", above Fn. 125, 1109.

170 ECtHR, *Case of Al-Skeini and Others v. UK*, above Fn. 102, para. 133; *Case of Ilascu and Others v. Moldova and Russia*, above Fn. 102, para. 317. See also Bartels, "The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects", above Fn. 90, 1084 et seq.

far-reaching implications.[171] This is the case with positive obligations, namely the obligation to protect and fulfill. The latter requires positive measures by a state, which is usually cost-dependent and assumes the redistribution of resources that (in principle) falls into the domestic realm of states.[172]

2 The Threshold for Positive Obligations

As a first point of critique, the most controversial aspect of extraterritorial obligations under the ICESCR relates to the positive obligations to protect and fulfill. The obligation to fulfill is divided into three categories. The duty to *facilitate* does not necessarily require resources in the form of international aid, but rather that states cooperate with each other to provide an enabling environment for the fulfillment of ICESCR rights.[173] The duty to *promote* requires, for example, the dissemination of information and the raising of awareness of the right. The duty to *provide* demands that states deliver assistance according to their available resources to the individuals in need.[174] The latter also concerns emergency aid in the context of disaster relief and humanitarian assistance.[175]

The core question is when and beyond which jurisdictional threshold a positive extraterritorial obligation under the ICESCR arises. Against this backdrop, *Milanovic* differentiates between negative and positive obligations, arguing that negative obligations to respect are territorially unlimited, while positive obligations to protect and fulfill require the exercise of *effective control* over an area.[176] This would notably imply that non-affected states are obliged to provide assistance to the affected states merely on the basis that these states exercise effective control over the territory or persons concerned. According to *Milanovic*, the exercise of *legal power* or *authority*

171 Bartels, "The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects", above Fn. 90, 1084 et seq.
172 Wilde, "Dilemmas in Promoting Global Economic Justice through Human Rights Law", above Fn. 19, 162.
173 Commission on Human Rights, *Report of the Special Rapporteur on the right to food, Jean Ziegler*, January 24, 2005 (UN Doc. E/CN.4/2005/47), para 57.
174 Ibid., para. 58.
175 Ibid.
176 Milanovic, *Extraterritorial Application of Human Rights Treaties*, above Fn. 97, 228.

by a state over individuals outside of its territory would suffice to satisfy the jurisdiction threshold; however, "it would open the door to abuse creating an incentive for states to potentially violate the human rights of individuals abroad.[177] On the other hand, it has been argued that extraterritorial obligations might be triggered where purely legal effects have been created, namely through authority over persons, rather than factual power over territory.[178] Furthermore, it has been argued by *Besson* that the exercise of authority must be combined with effective power and overall control.[179]

Importantly, as regards socio-economic rights, a distinction between the extraterritorial applicability of negative and positive obligations must be assumed: first, because of the CESCR's statements, where the Committee has used different language ("must" versus "should")[180] to distinguish between the two sets of obligations; and second, because positive obligations, notably the obligation to fulfill, requires the redistribution of resources at the international level, requiring a higher threshold to be triggered. In this regard, the effective control doctrine developed in the area of civil and political rights is too restrictive.[181] As has been mentioned above, deprivations of socio-economic rights are mainly committed outside of limited situations such as occupation or control over armed forces.[182] Moreover, such deprivations may occur because of structural obstacles that result in gross violations of socio-economic rights.[183] In that sense, the question arises whether even a positive obligation to promote a *global institutional order* exists, that could contribute to the realization of the right to health.[184] It is important that states take the right to health into consideration in their international relations making that right visible in contexts where it may previously have been marginalized or devalued.[185]

---

177 Ibid., 207; see also Ganesh, A, "The European Union's Human Rights Obligations Towards Distant Strangers (2016), 37 *Michigan Journal of International Law*, 475 (519).

178 Ganesh, ibid., 523.

179 Besson, "The Extraterritoriality of the European Convention on Human Rights", above Fn. 160, 873.

180 See above III.1.

181 Narula, S, "International Financial Institutions, Transnational Corporations and Duties of States" in Langford, Vandenhole & Scheinin et al. (eds.), *Global Justice, State Duties*, above Fn. 18, 124.

182 Ibid., 125.

183 Salomon, *Global Responsibility for Human Rights,* above Fn. 112, 191.

184 Tobin, *The Right to Health,* above Fn. 34, 344 et seqq.

185 Ibid.

At the international level, negative obligations to respect and positive obligations to protect and fulfill are therefore not subject to the same jurisdictional rules.[186] Concomitantly, the disparity in power and influence among states also presupposes that they cannot be the duty-bearers of the same "extraterritorial" obligations.[187]

3 The Capacity of the Non-Affected State

Where the jurisdiction that activates extraterritorial obligations in general is established, a second essential prerequisite has to be extended in terms of *positive* extraterritorial obligations: A state must be "in a position to assist".[188] It must have the *capacity* to act, otherwise no extraterritorial obligation can arise. Consequently, a lesser capacity might give rise to less demanding obligations as capacity is a flexible criterion that depends on the action required and the resources available to the state. In a second step, (additional) normative requirements may come into play that limit the (general) obligations of *all* capable states, for example obligations that might be derived from a former historical link, such as the prior status of a state as a colonial power.

a Being "in a Position to Assist"

Positive extraterritorial obligations depend on the capacity of the state to act.[189] The CESCR has confirmed that states have extraterritorial obligations when they are "in a position to assist".[190] International human rights law, however, does not determine a system of international coordination and allocation.[191] The redistribution of resources is challenging even within

---

186 Contrast Ganesh, "The European Union's Human Rights Obligations Towards Distant Strangers", above Fn. 177, 524.

187 Salomon, *Global Responsibility for Human Rights*, above Fn. 112, 56.

188 CESCR, *General Comment No. 14*, above Fn. 3, para. 45.

189 See also Langford & Darrow, "Moral Theory, International Law and Global Justice", above Fn. 18, 441.

190 CESCR, *General Comment No. 14*, above Fn. 3, para. 45; see also *General Comment No. 3,* above Fn. 54, para. 14; *General Comment No. 12,* above Fn. 65, para. 35; *General Comment No. 15,* above Fn. 106, para. 38.

191 De Schutter, Eide & Khalfan et al., "Commentary to the Maastricht Principles", above Fn. 125, 1149.

a state, not least because of different political systems, but face particular difficulties in an extraterritorial context, where resources must be allocated to individuals of other countries.[192]

The obligation of international assistance and cooperation is not limited to the transfer of financial resources, but also includes material assistance.[193] With respect to the right to health, this would include, for instance, not only direct distribution of economic and technical resources, but also the influence of powerful states on pharmaceutical companies to deliver vaccines to affected countries, or on the decision-making processes of international organizations (such as the WHO) to ensure that measures be taken to respect the right to health of the affected individuals. Moreover, this would require that states engage in a discussion that not simply pursues the interests of (pharmaceutical) companies, but also takes into account strategies and action plans to provide access to medicines for the affected individuals.[194]

Arguably, capacity is therefore an indispensable and primary basis for assigning extraterritorial obligations to non-affected states.[195] A capacity requirement would essentially impose extraterritorial obligations on developed states. In principle, however, the obligation of cooperation is not limited to developed states but to all those with capacity and resources. Any state with the capacity and resources – be they economic, technical, technological, or the ability to influence the decision-making in an International Organization (such as the WHO) – might be obliged to also provide them to victims of disease in other countries.[196] There might even be important procedural components of a state's obligation to cooperate in devising a suitable international division of responsibilities necessary to give effect to the obligation to cooperate.[197] A state is not relieved of its obligation in this area because it lacks resources. It could still be held internationally responsible for not having worked towards the creation of an international system

192 See also Wilde, "Dilemmas in Promoting Global Economic Justice through Human Rights Law", above Fn. 19, 162.
193 Tobin, *The Right to Health,* above Fn. 34, 343.
194 Ibid., 367.
195 However, there are additional requirements that must be fulfilled, see section IV.3.b.
196 See principle 31 of the Maastricht Principles, above Fn. 87.
197 De Schutter, Eide & Khalfan et al., "Commentary to the Maastricht Principles", above Fn. 125, 1150.

of cooperation and for failing to have sought to mobilize the necessary resources *globally*.[198]

The dilemma of choosing amongst a multiplicity of possible duty-bearers possessing the needed resources is resolved by the CESCR in a way that the degree to which each state should assist depends on its individual capacity.[199] This can be assessed through an "adequate and reasonable" test developed by the CESCR to determine whether a state has met its extraterritorial obligations according to its available resources.[200]

Furthermore, the redistribution of resources also touches upon the question whether the obligation of states, for instance, to contribute to the realization of the right to health in the affected states is framed as a subsidiary obligation triggered only when the rights-holders' own state is *unable or unwilling* to fulfill it.[201] It is generally acknowledged that the obligation to fulfill socio-economic rights rests with the territorial state.[202] The obligation to fulfill socio-economic rights by states other than the rights-holders' own is argued to be based on a secondary or subsidiary obligation in circumstances where the affected state is unable or unwilling to accomplish them.[203] However, in the majority of cases, an outbreak of a disease will not be contained in the affected state(s) and will be transmitted to other countries, as was the case with Ebola. Therefore, one might argue that where the cross-border effects of the disease exceed a certain benchmark, positive measures are required by states in *complement* to the primary duty-bearer's obligations to protect their own population, at least with respect to the minimum core of the relevant right.[204]

In the *Genocide Case*, the ICJ further elaborated on various criteria concerning the allocation of extraterritorial obligations, including "the capacity

198 CESCR, *General Comment No. 3,* above Fn. 54, para. 13.
199 CESCR, *General Comment No. 14*, above Fn. 3, para. 40.
200 De Schutter, Eide & Khalfan et al., "Commentary to the Maastricht Principles", above Fn. 125, 1151.
201 Wernar, L, "Responsibility and Severe Poverty" in Pogge, T (ed.), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?*, 2007, 255 (265).
202 See for a philosophical discussion on that Miller, D, *National Responsibilty and Global Justice*, 2012.
203 Salomon, M, "How to keep promises: making sense of the duty among multiple states to fulfil socio-economic rights in the world" (2014), 53 *SHARES Research Paper*, 1 (5). See also 2005 World Summit Outcome, October 24, 2005 (UN Doc. A/RES/60/1), para. 139.
204 See also 2005 World Summit Outcome, ibid.

to influence effectively".[205] Since the obligation to prevent genocide rises to the level of *ius cogens*, such an obligation might arguably impose on states a higher threshold when it comes to the allocation of their resources. However, one might consider that in health emergencies the right to health is directly related to the right to life and therefore crucial for an individual's life. A state that is in a position to assist should use its available resources, or at least meet its core obligations towards individuals living in foreign states. The concept of minimum core obligations, however, has been criticized with respect to whether a universal minimum core obligation or a country-based minimum core obligation should be established, according to the variety of levels of development of the recipient state, on the one hand, or, on the other hand, according to the available resources of the state in action.[206] Country-specific thresholds could be developed by indicators that, for example, measure nutrition, disease frequency, life expectancy and adequate food consumption.[207] Different core contents according to the level of development could also be formulated, for instance, with respect to the classification of countries by the World Bank according to their GNI (gross national income) per capita.[208] Nevertheless, a relative standard concerning the core minimum obligations seems to be almost impossible to enforce and is refused here, especially due to the difficulties that arise in assessing such benchmarks.[209] This is also in line with the findings of the CESCR that enumerate the core obligations that every state has to realize, regardless of the different health levels in the world.[210]

Additionally, the ICJ has required a causal link, such as geographical distance, between non-affected states and individuals concerned.[211] In health emergencies, the geographical distance from the events in question

---

205 ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, above Fn. 101, para. 430.

206 Toebes, *The Right to Health as a Human Right*, above Fn. 40, 278.

207 Andreassen, B A, Skålnes, T & Smith, A G et al., "Assessing Human Rights Performance in Developing Countries: The Case for a Minimum Threshold Approach" in Andreassen, B A & Eide, A, *Human Rights in Developing Countries 1987/1988*, 1988, 333 (341).

208 Toebes, *The Right to Health as a Human Right*, above Fn. 40, 279 et seq. See also World Bank, *How does the World Bank classify countries?*, available at http://bit.ly/2luxCIo

209 Toebes, *The Right to Health as a Human Right*, above Fn. 40, 279.

210 Ibid., 280; see also CESCR, *General Comment No. 14*, above Fn. 3, para. 43.

211 ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, above Fn. 101, para. 430.

would indicate that neighboring states bear a "stronger" obligation to assist the affected states – on the premise that they are in position to do so.

Furthermore, the principle of "Common but Differentiated Responsibilities",[212] which stems from international environmental law, is based on the reality of historical differences in the contributions made by both developed and developing states to global issues. While this principle does not provide a basis for assigning obligations to non-affected states, it recognizes that states should possess different and specific duties relative to the different categorizations of states.[213] The principle of "*common but differentiated responsibility*" can be seen as a normative development in international law that requires action on the part of those who are in a position to assist. Furthermore, it also points to an emerging procedural requirement for states to coordinate with each other in the allocation of particular obligations.[214]

b Historical Relationship Between a State and Individuals in other Countries

A special relationship that might operate as a trigger for extraterritorial obligations concerns a former *historical link* between the right-holders and the relevant state that has previously contributed to the harm, for example as a prior colonial power. Extraterritorial obligations would thus be attributed on the basis of historical responsibility for past exploitation.[215] Current deprivations of socio-economic rights might then be traceable to the harmful effects of past actions. This notion is also inherent in the concept of "Common but Differentiated Responsibilities".

---

212 Common but Differentiated Responsibilities is a principle of international environmental law that recognizes historical differences in the contributions of developed and developing countries and differences in their respective economic and technical capacity to tackle environmental problems.

213 Salomon, "How to keep promises: making sense of the duty among multiple states to fulfil socio-economic rights in the world", above Fn. 203, 11.

214 See Principle 30 of the Maastricht Principles on Extraterritorial Obligations, above Fn. 87; Khalfan, A, "Division of Responsibility between States" in Langford, Vandenhole & Scheinin et al. (eds.), *Global Justice, State Duties*, above Fn. 18, 299.

215 Salomon, "How to keep promises: making sense of the duty among multiple states to fulfil socio-economic rights in the world", above Fn. 203, 8 et seq.

The claim that prior colonial powers bear specific extraterritorial obligations is traditionally advanced by developing countries.[216] According to an article in the *New York Times*, for instance, US administration officials urged the UK and France, which both have colonial ties to the Ebola-affected states, to come up with stronger responses.[217] In practice, former colonial powers do tend to direct international assistance to their former colonies, based on a *moral* sense of historical responsibility.[218]

The practice of former colonial powers supporting their "own" former colonies points towards historical responsibility forming a legitimate criterion for assigning extraterritorial obligations to non-affected states, under the promise that capacity would still be a necessary element.[219]

V Conclusion

The answer to the question raised in this article is that under the paradigmatic shift of international human rights law, extraterritorial obligations of non-affected states are increasingly considered to be acknowledged under the law as it stands. Extraterritorial obligations are derived from Article 2 (1) of the ICESCR, which does not contain a jurisdictional clause. On the one hand, these are extraterritorial obligations of particular states, and, on the other hand, a general "global" obligation to cooperate. International courts, the CESCR as well as other human rights bodies have also recognized the existence of extraterritorial obligations of states, but to a limited extent.

The ICESCR does not mention whether all States Parties to the ICESCR are the duty-bearers of extraterritorial obligations. Therefore, the core question is when and beyond which jurisdictional threshold extraterritorial obligations under the ICESCR might arise. In that respect, it is necessary to differentiate between negative obligations to respect and positive obligations to protect and fulfill that are not subject to the same jurisdictional rules. The latter is more controversial as positive obligations depend on the capacity of the state in question and require emergency aid in the form of the allocation of resources during health crises.

---

216 Ibid., 9.

217 Cooper & Fink, "Obama Presses Leaders to Speed Ebola Response", above Fn. 13.

218 Ibid.

219 Salomon, "How to keep promises: making sense of the duty among multiple states to fulfil socio-economic rights in the world", above Fn. 204, 8 et seq.

Therefore, the availability of resources is the key criterion for assigning extraterritorial obligations to non-affected states. Another special relationship between non-affected states and individuals in other countries might be derived from a former historical link (colonization) between the relevant actors. Besides states having historical or colonial ties with an affected state, it is argued that neighboring states, in particular, would also bear extraterritorial obligations towards victims of disease. Such a reading would be consistent with the ICJ's view in the *Genocide case*, where the Court affirmed that states have the duty to prevent genocide in cases where there is a geographic proximity to the occurrence of the events. African states have also been called on by the UN Security Council Resolution 2177 (2014) to "facilitate the delivery of assistance, including qualified, specialized and trained personnel and supplies".[220]

In practice, however, states such as Brazil, Canada and India have shown their (moral) solidarity by donating money or sending medical staff, medicine and equipment to Ebola-affected states.[221] While the decision to support the countries in need was based on moral considerations, it confirms a shift towards the acceptance of the applicability of extraterritorial human rights obligations beyond a state's territorial boundaries. Finally, it remains an open question whether this paradigmatic shift might be able to transform extraterritorial obligations into solid legal obligations complied with by all states, including developed countries.

220 UN Security Council Resolution 2177 (2014), above Fn. 11, para. 5.

221 Cooper & Fink, "Obama Presses Leaders to Speed Ebola Response", above Fn. 13.