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EMERGING NORMATIVE FRAMEWORKS ON
TRANSNATIONAL HUMAN RIGHTS OBLIGATIONS

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Abstract

Human rights problems and issues have become global, but human rights law has continued to focus primarily or exclusively on the domestic or territorial State. Given the multiplicity of State and non-state actors with varying degrees of power and importance, human rights law needs to be adapted, so that new duty-bearers such as foreign States, transnational corporations and international organisations can be integrated into the human rights legal regime. Over the last decade, efforts have been made to elaborate principles or frameworks that define the human rights obligations of different types of other duty-bearers than the domestic or territorial State. In this paper, we are concerned with what can be learnt from these norm-setting efforts conceptually.

Keywords

Transnational human rights obligations – extraterritorial states – transnational corporations – international financial institutions

I. Introduction*

Economic globalisation has so far not been paralleled by a “globalisation of human rights law”¹. But it should. That is the starting point of this paper. While the “institutions of the global economy”² – the International Financial Institutions³ such as the World Bank and the International Monetary Fund (IMF), the World Trade Organisation (WTO) and transnational corporations (TNCs) all have grown in importance and impact,⁴ the applicability of human rights law, and its meaning and scope, has not followed suit. While “problems have become transnationalized”,⁵ human rights law has continued to focus primarily or exclusively on the domestic or territorial State. This had led scholars to conclude with regard to the IFIs for example, that they enjoy a “privileged exceptionalism under international law”, for “de facto international law imposes few constraints on IFI operations”.⁶

So while territorial States legally bear the primary responsibility for human rights violations, they are not always able (nor willing) to live up to their human rights obligations. When it comes to issues of poverty and the lack of realisation of economic, social and cultural rights, the territorial State sits not always in the driving seat: decisions of other, equally powerful actors, such as the international economic institutions, transnational corporations and/or other States may have a much larger and profound impact on the realisation of socio-economic human rights than the territorial State has. Likewise, States may be subject to acts of other States that act outside their own territory, in military or civil operations, through development cooperation or otherwise.

These new realities pose fundamental challenges to human rights law.⁷ In *practice*, human rights law may not be able to properly address these news situations, and therefore runs a risk of

* Law and Development Research Group, University of Antwerp Law Research School; chair of the Research Networking Programme Beyond Territoriality: GLObalisation and Transnational Human Rights Obligations (GLOTHRO), which is funded by the European Science Foundation. This paper has been written following a doctoral school jointly organized by the EUI Global Governance Programme and GLOTHRO.

¹ The expression is borrowed from Morais, though he used it in a different sense, it seems: H.V. Morais, *The Globalization of Human Rights Law and the Role of International Financial Institutions in Promoting Human Rights*, 33 *The George Washington International Law Review* 2000, 71-96.

² D. Kinley, *Civilising Globalisation. Human Rights and the Global Economy*, Cambridge, CUP, 2009, 3.

³ While the notion of International Financial Institutions (IFIs) is broader than the World Bank and IMF, and includes also the regional development banks, for ease of reference we will use IFIs here to mean World Bank and IMF.

⁴ See, e.g., with regard to transnational corporations, D.D. Bradlow and C. Grossman, *Limited Mandates and Intertwined Problems: A New Challenge for the World Bank and the IMF*, 17 *Human Rights Quarterly* 1995, 411-442, at 423 and Kinley and Chambers, who have stressed the “enormous economic power that TNCs wield and the often considerable size of their social footprint” (D. Kinley and R. Chambers, *The UN Human Rights Norms for Corporations: The Private Implications of Public International Law*, 6 *Human Rights Law Review* 2006, 447-497 at 493). Bradlow and Hunter have pointed out “the profound, and sometimes irreversible, impact that IFI operations can have in many of those Member States that actually use their financial services.” and the “growing discretion, power, and reach of the IFIs in carrying out their expanding mission” (D.D. Bradlow and D.B. Hunter, *Conclusion: The Future of International Law and International Financial Institutions* in D.D. Bradlow and D.B. Hunter (eds.), *International Financial Institutions & International Law*, Alphen aan den Rijn, Kluwer Law International, 2010, 387-397, at 387 and 389.

⁵ D.D. Bradlow and C. Grossman, *Limited Mandates and Intertwined Problems: A New Challenge for the World Bank and the IMF*, 17 *Human Rights Quarterly* 1995, 411-442 at 415.

⁶ D.D. Bradlow and D.B. Hunter, *Conclusion: The Future of International Law and International Financial Institutions* in D.D. Bradlow and D.B. Hunter (eds.), *International Financial Institutions & International Law*, Alphen aan den Rijn, Kluwer Law International, 2010, 387-397, at 388.

⁷ For a more thorough elaboration of economic globalisation and the concomitant rise of new human rights duty-bearers, see e.g. M.E. Salomon, A. Tostensen and W. Vandenhole, *Human Rights, Development and New Duty-Bearers*, in M.E. Salomon, A. Tostensen and W. Vandenhole (eds.), *Casting the Net Wider: Human Rights, Development and New Duty-Bearers*, Antwerp, Intersentia, 2007, 3-24, in particular at 3-17.

marginalization in endeavours to bring about social justice. *Conceptually*, the displacement of the territorial State in a good number of instances necessitates a fundamental re-thinking of a basic tenet of human rights law, i.e. that human rights obligations are primarily if not exclusively incumbent on the territorial State. Given the multiplicity of State and non-state actors with varying degrees of power and importance, human rights law needs to be adapted, so that new duty-bearers such as foreign States, transnational corporations and international organisations can be integrated into the human rights legal regime. For with power comes responsibility and accountability. Or, as some have put it purely at a legal level, as these non-state actors influence the making of the law, they should also accept to be subjected to it.⁸

Human rights law therefore needs to be re-thought, so as to make it responsive to realities on the ground and to enable it to act as a corrective to power regardless of the identity of the power holder.⁹ However, that does not mean that the domestic State is let off the hook. As Kinley and Chambers put it, “from the expansion of sites of responsibility [does not come] a corresponding reduction of a state’s liability in respect of human rights protection and promotion.”¹⁰ Elsewhere, Kinley has argued in favour of the “state’s essential guardianship of human rights within the context of the global economy”.¹¹ Bradlow and Hunter have echoed this proposition as follows: “defining the international responsibility of IFIs [...] does not obviate the need for states to fulfil their own obligations under international law in their relations with IFIs”, both with regard to the governance as well as the operations of IFIs.¹²

Over the last decade, efforts have been made to elaborate principles or frameworks that define the human rights obligations of different types of other duty-bearers than the domestic or territorial State. As far as non-state actors are concerned, we will limit the analysis here to their extraterritorial or transnational acts or effects. The 2011 *Maastricht Principles on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights* focus exclusively on the human rights obligations of foreign states. The 2003 *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights* and the 2011 *UN Guiding Principles on Business and Human Rights* address the obligations of home States and of transnational companies as direct duty-bearers. Thirdly, the 2002 *Tilburg Guiding Principles on the World Bank, IMF and Human Rights* address the obligations of members States of international organizations (the international financial institutions in particular) and of these organizations themselves as direct duty-bearers. While it is true that the legal, moral or political status of each document varies, and that none of them has as yet binding legal effect, they may have a declaratory importance to the extent that they codify existing international law; moreover, there may be possibilities for becoming indirectly binding,¹³ and anyhow, they reflect the status of current thinking on these issues. Whatever their legal status is, in this paper we are primarily concerned with what can be learnt from these norm-setting efforts conceptually. Is

⁸ P. Muchlinski, *Multinational Enterprises as Actors in International Law: Creating ‘Soft Law’ Obligations and ‘Hard Law’ Rights* in M. Noortmann and C. Ryngaert (eds.), *Non-State Actors Dynamics in International Law: From Law-Takers to Law-Makers*, Farnham, Ashgate, 2010, 9-39, 10; D.D. Bradlow and D.B. Hunter, *Conclusion: The Future of International Law and International Financial Institutions* in D.D. Bradlow and D.B. Hunter (eds.), *International Financial Institutions & International Law*, Alphen aan den Rijn, Kluwer Law International, 2010, 387-397, at 395-396.

⁹ For a more general analysis of human rights obligations for non-state actors, see A. Clapham, *Human Rights Obligations of Non-State Actors*, Oxford, OUP, 2006.

¹⁰ D. Kinley and R. Chambers, *The UN Human Rights Norms for Corporations: The Private Implications of Public International Law*, 6 *Human Rights Law Review* 2006, 481.

¹¹ D. Kinley, *Civilising Globalisation. Human Rights and the Global Economy*, Cambridge, CUP, 2009, 222.

¹² D.D. Bradlow and D.B. Hunter, *Conclusion: The Future of International Law and International Financial Institutions* in D.D. Bradlow and D.B. Hunter (eds.), *International Financial Institutions & International Law*, Alphen aan den Rijn, Kluwer Law International, 2010, 387-397, at 394.

¹³ D. Kinley and R. Chambers, *The UN Human Rights Norms for Corporations: The Private Implications of Public International Law*, 6 *Human Rights Law Review* 2006, 483-488.

the fragmented method of elaboration of principles for each different actor bound to fail in dealing with the global landscape and its various actors? Is a holistic approach to be preferred, and how feasible would it be?

In the next three sections, we will analyse the four above-mentioned sets of principles applying an analytical grid that focuses on three questions: first, the legal nature of the principles and more importantly, the legal sources that they draw on; second, the scope and meaning of the obligations identified; and third, the division of responsibility between the domestic State and the other actors, and among them. We will conclude by pointing out some of the characteristics and potential weaknesses of each of the sets of principles in a comparative perspective, and by flagging up some possibilities for future research and conceptual advancement.

II. The Maastricht Principles on Extra-Territorial Obligations in the Area of Economic, Social and Cultural Rights

A. Background

On 28 September 2011, the *Maastricht Principles on Extra-Territorial Obligations in the Area of Economic, Social and Cultural Rights* (hereafter: Maastricht Principles) were adopted in Maastricht, at the end of a three day expert meeting.¹⁴ These Maastricht Principles continue a strong tradition of adopting landmark documents in the field of economic, social and cultural rights (hereafter: ESC rights). In 1986, the *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights* were adopted.¹⁵ They spelt out the nature and scope of the obligations of States Parties. In 1997, the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* were adopted.¹⁶ These Guidelines sought to clarify the nature and scope of violations of ESC rights, as well as responses and remedies. Twenty-five years after the adoption of the Limburg Principles, a new set of principles was adopted, this time on the extra-territorial obligations of States in the area of economic, social and cultural rights, i.e. the Maastricht Principles.

Human rights NGOs, with FIAN taking the lead, have raised the issue consistently over the last fifteen years or so. Together with some pioneering scholars in the field, an ETO Consortium was established in 2006-2007.¹⁷ Consortium meetings in Geneva, Heidelberg, Lancaster and Antwerp laid the groundwork for the Maastricht Principles, mainly by creating an enabling environment for the

¹⁴ The Maastricht Principles can be found on <http://www.icj.org/dwn/database/Maastricht%20ETO%20Principles%20-%20FINAL.pdf> and have been published in 29/4 Netherlands Quarterly of Human Rights 2011, 578-590.

¹⁵ The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights were adopted in 1986 in Maastricht. The Limburg Principles have been published in E/C.12/2000/13; 2 October 2000 and 9/2 Human Rights Quarterly 1987, 122-135.

¹⁶ The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights were agreed upon by a group of experts on the occasion of the 10th anniversary of the Limburg Principles in 1997. The Maastricht Guidelines can be found in UN Doc. E/C.12/2000/13, 20/3 Human Rights Quarterly 1998, 691-704 and in T. van Boven, C. Flinterman and I. Westendorp (eds.), *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*. Proceedings of the Workshop of Experts organised by the International Commission of Jurists (Geneva, Switzerland), the Urban Morgan Institute on Human Rights (Cincinnati, USA) and the Maastricht Centre for Human Rights of Maastricht University, 22-26 January 1997, SIM-Special no. 20, SIM, Utrecht, 1998, 1-12.

¹⁷ An academic network on the issue, Beyond Territoriality: GLObalisation and Transnational Human Rights Obligations (GLOTHRO), a Research Networking Programme funded by the European Science Foundation (2010-2014) was launched in 2010 (for more information, see www.glothro.org). The ETO Consortium and GLOTHRO have a partly overlapping membership, which has facilitated mutual reinforcement of both networks. A joint working group meeting of drafting group and Consortium steering committee on the one hand, and of GLOTHRO on the other hand, was held in November 2010, and the 2011 Consortium meeting took place back to back with the GLOTHRO stocktaking conference in May 2011, in Antwerp.

elaboration of the Principles: these meetings allowed exploring core questions, provided a testing ground for concepts and principles, and offered a forum for examining real life cases. A small and mixed drafting group of scholars and NGO representatives was established in late 2009. This group prepared several drafts of the Maastricht Principles before the final discussions took place in Maastricht from 26 to 28 September 2011.

The Maastricht Principles are remarkable in different respects. First of all, they try to bridge the divide between the two traditional human rights categories, i.e. that of economic, social and cultural rights (ESC rights) and that of civil and political rights (CP rights). Secondly, they lead, instead of follow, developments in the field of civil and political rights. The Limburg Principles and Maastricht Guidelines were considered to be needed in order to “catch up” with conceptual sophistication in the area of civil and political rights. To the contrary, the 2011 Maastricht Guidelines address an issue which has not yet been strongly clarified, let alone satisfactorily settled, in the area of civil and political rights, i.e. that of extraterritorial obligations. In the field of civil and political rights, the question of extraterritorial human rights obligations has mainly been reduced to questions of jurisdiction. By and large, extraterritorial human rights obligations have only been recognized in cases of effective control over territory or physical power or control over persons. With regard to ESC rights, it has been suggested that there may be more space for the recognition of extraterritorial obligations.

B. General

The body of the Maastricht Principles is preceded by a preamble, which explains inter alia the need for the Principles and some basic legal sources. The body of the Principles consists of seven sections, dealing with general principles (Principles 1-7); the scope of extraterritorial obligations of States (Principles 8-18); the extraterritorial obligations to respect (Principles 19-22), protect (Principles 23-27) and fulfil (Principles 28-35); accountability and remedies (Principles 36-41); and final provisions (Principles 42-44).

The Maastricht Principles contain some compromises to get around potentially divisive issues that arose in the early stages. Also, some important questions have remained unaddressed – often deliberately, so as to keep the exercise manageable – and necessitate further reflection and elaboration. During the process, the need for “Maastricht IV Principles or Guidelines” was already openly mentioned, in particular to clarify the obligations of non-state actors.

C. Legal Nature of the Maastricht Principles and Legal Basis of the Obligations Identified

The Maastricht Principles are quite vague on their own legal status, and remain almost silent on the sources they draw on. Whereas the Limburg Principles were said to be believed by the participants to reflect the then present state of international law, except when otherwise indicated, the Maastricht Principles only make a vague claim that they are “[d]rawn from international law” (Preambular para. 8). Nor is the legal basis for extraterritorial obligations clearly spelt out: reference is simply made to the “[e]conomic, social and cultural rights and the corresponding territorial and extraterritorial obligations [that] are contained in the sources of international human rights law, including the Charter of the United Nations; the Universal Declaration of Human Rights; the International Covenant on Economic, Social and Cultural Rights; and other universal and regional instruments” (Principle 6).

In academic literature, emphasis has mainly been put on the different wording of art. 2 (1) ICESCR as compared to the ICCPR, and on the explicit reference to international cooperation and assistance in art. 2 (1) ICESCR, art. 4 Convention of the Rights of the Child (CRC) and art. 32 Convention on the Rights of Persons with Disabilities (CRPD). Evidence for recognition of extraterritorial human rights

obligations has equally been sought in customary international law as well as in general principles of international law.¹⁸

D. Scope and Meaning of the Obligations

One of the salient discussion points in the lead-up to the Maastricht expert meeting was the scope of extraterritorial obligations and the most appropriate terminology. Should there be an exclusive focus on extraterritorial obligations of *States*, or should the Principles also include human rights obligations of non-State actors? And if the focus was to be on extraterritorial obligations of States, should the Principles be confined to extraterritorial obligations *sensu stricto*, or also include global obligations?

The Maastricht Principles only deal with extraterritorial obligations of *States*, although the drafters¹⁹ have felt some temptation to go beyond that scope in some of the Principles, e.g. with regard to corporations and other business enterprises, and with regard to international organizations. In Principle 16, e.g., indirect reference is made to the applicability of the Principles to international organisations.²⁰

In Principle 1, extraterritorial obligations are said to encompass both extraterritorial obligations *sensu stricto* and global obligations:

1. 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
2. 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.

However, most of the further analysis seems to be applicable first and foremost to extraterritorial obligations *sensu stricto*. As was pointed out by the University of Antwerp Law and Development Research Group,

In Principle 1, two kinds of extraterritorial obligations are mentioned, i.e. (a) obligations arising from foreseeable effects on the enjoyment of human rights outside a State's territory, and (b) obligations of a global character. However, the Principles remain completely silent on global obligations in the remainder of the text. This is especially problematic in Principle 6, which stipulates that the 'State's obligation to respect, protect and fulfil economic, social and cultural rights extraterritorially is limited to the scope of its jurisdiction in accordance with the UN Charter and general principles of international law' (emphasis added). Such a limitative provision is incompatible with the notion of global obligations set out in Principle 1b.²¹

This brings us to the difficult question whether or not to include any reference to jurisdiction. Jurisdiction has been at the core of the discussion on extraterritorial obligations in the area of civil and political rights. As it has often been more a hindrance to than a help for extending States' human rights obligations beyond their territory – by and large, extraterritorial human rights obligations have only

¹⁸ Most recently in M. Langford, F. Coomans and F. Gómez Isa, *Extraterritorial Duties in International Law* in M. Langford, W. Vandenhole, M. Scheinin, en W. van Genugten (eds.), *Global Justice, State Duties. The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law*, Cambridge, CUP, 2012, forthcoming; see also S.I. Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation*, Antwerp, Intersentia, 2006, in particular 73-188.

¹⁹ 'Drafters' refers here not only to the drafting group, but to the expert group that adopted the Maastricht Guidelines.

²⁰ Principle 16 reads: "Obligations of international organisations. The present Principles apply to States without excluding their applicability to the human rights obligations of international organisations under, inter alia, general international law and international agreements to which they are parties."

²¹ For an elaboration of this point, see the comments of the Law and Development Research Group on an earlier draft (on file with author).

been recognized in cases of effective control over territory or physical power or control over persons²² – there was quite some hesitation and even strong opposition from some to include any reference to jurisdiction in principles on extraterritorial obligations in the area of economic, social and cultural rights. Others argued that jurisdiction was a concept one cannot escape from, and pleaded for imbuing it with new meaning. The latter position eventually made it: the notion of jurisdiction has been included in the Maastricht Principles, but it has been given a very broad meaning, including not only situations of authority or effective control, but also situations in which acts or omissions bring about foreseeable effects, and situations in which a State is in a position to exercise decisive influence (Principle 9).²³

In addition to this attribution based on their own acts or omissions, or on their position to exercise decisive influence, States that transfer competences to or participate in an international organisation “must take all reasonable steps to ensure that the relevant organisation acts consistently with the international human rights obligations of that State.”²⁴ In the 1996 Maastricht Guidelines, this obligation was qualified as a protect obligation.²⁵ State responsibility also extends to non-State actors – such as business enterprises – that “are empowered by the State to exercise elements of governmental authority [...]”²⁶

As to the meaning of extraterritorial human rights obligations, a general, negative obligation to “avoid causing harm” has been identified: “States must desist from acts and omissions that create a real risk of nullifying or impairing the enjoyment of economic, social and cultural rights extraterritorially.”²⁷ State responsibility is engaged where the breach of this obligation is “a foreseeable result of their conduct.”²⁸ A procedural obligation intrinsically linked with the obligation to avoid causing harm is to conduct prior impact assessments.²⁹

Further on in the Principles, the meaning of extraterritorial obligations is fleshed out along the well-established tripartite typology of obligations to respect, to protect and to fulfil. The general, negative obligation to avoid causing harm is reflected in the obligation to respect:³⁰ i.e. “to refrain from conduct which nullifies or impairs the enjoyment and exercise of economic, social and cultural

²² See many of the contributions in F. Coomans and M.T. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties*, Antwerp, Intersentia, 2004; M. Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties*, School of Human Rights Research Series vol. 32, Antwerp, Intersentia, 2009; M. den Heijer, *Europe and Extraterritorial Asylum*, Oxford: Hart Publishing, 2012 and the recent case of the European Court of Human Rights, 7 July 2011, *Al-Skeini and others v. UK*, in particular paras. 130-142.

²³ Principle 9, “Scope of jurisdiction” reads: “A State has obligations to respect, protect and fulfil economic, social and cultural rights in any of the following:

situations over which it exercises authority or effective control, whether or not such control is exercised in accordance with international law;

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;

situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive influence or to take measures to realize economic, social and cultural rights extraterritorially, in accordance with international law.”

²⁴ Principle 15.

²⁵ Elsewhere, I have suggested to see this rather as a respect obligation, see W. Vandenhole, *Third State Obligations under the ICESCR: A Case Study of EU Sugar Policy*, 76 *Nordic Journal of International Law* 2007, 73-100, at 94-95.

²⁶ Principle 12.

²⁷ Principle 13.

²⁸ *Ibid.*

²⁹ Principle 14.

³⁰ Somewhat confusingly, Principle 19 that clarifies the general obligation to respect stipulates that States must take action to respect ESC rights, which suggests a positive obligation.

rights of persons outside their territories.” (under the heading of direct interference).³¹ In addition, States need to refrain from conduct that impairs the ability of another State or international organisation with its obligations, or that “aids, assists, directs, controls or coerces” another State or international organisation to breach its obligations (indirect interference).³² A specific Principle has also been included on sanctions and equivalent measures.

The obligation to protect against violations by non-State actors, i.e. private individuals and organisations, transnational corporations and other business enterprises, has been disentangled in the Maastricht Principles as an obligation to regulate, to influence and to cooperate. The obligation to influence is a minimal obligation, which applies “even if [States] are not in a position to regulate [the conduct of non-State actors].”³³ Quite paradoxically, it is worded as a weak legal obligation (“should” rather than “must” exercise). The strong legal obligation (“must”) to regulate is limited to circumscribed positions to regulate, defined by leads such as territory; nationality; or simply a reasonable link between the State and the conduct. Specifically for business enterprises, the centre of activity, place of registration or domicile, or main place of business or substantial business activities are mentioned. Finally, a category of conduct is added that qualifies as violations of a peremptory norm of international law. For this category, the meaning of the obligation to protect if these violations also constitute a crime under international law is spelt out: “States must exercise universal jurisdiction over those bearing responsibility or lawfully transfer them to an appropriate jurisdiction.”³⁴ An obligation to cooperate is incumbent on all States to “prevent human rights abuses by non-State actors, to hold them to account for any such abuses, and to ensure an effective remedy for those affected.”³⁵

Under the obligation to fulfil, States must take steps to create “an international enabling environment conducive to the universal fulfilment of economic, social and cultural rights, including in matters relating to bilateral and multilateral trade, investment, taxation, finance, environmental protection, and development cooperation.”³⁶ This can be done through standard-setting, foreign policies and measures, and domestic policies and measures. Priority in the fulfilment of ESC rights extraterritorially must go to “the realisation of the rights of disadvantaged, marginalized and vulnerable groups” and to the “core obligations to realize minimum essential levels of economic, social and cultural rights”.³⁷ Furthermore, States need to observe international human rights standards and principles, “move as expeditiously and effectively as possible towards the full realization of economic, social and cultural rights”, and avoid retrogressive measures.

In addition, obligations to coordinate cooperation and to provide international assistance rest on States under the obligation to fulfil. The obligation to provide international assistance is defined quite unfortunately as a *contribution to* the fulfilment of ESC rights.³⁸ A State that is unable to guarantee ESC rights within its territory is under an obligation to seek international assistance and cooperation. States that receive such a request and are in a position to provide assistance or to cooperate, “must consider the request in good faith, and respond in a manner consistent with their obligations to fulfil

³¹ Principle 20.

³² Principle 21.

³³ Principle 26.

³⁴ Principle 25.

³⁵ Principle 27.

³⁶ Principle 29.

³⁷ Principle 32.

³⁸ For a scholarly suggestion on this, see R. Künnemann, Extraterritorial application of the International Covenant on Economic, Social and Cultural Rights in F. Coomans and M.T. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties*, Antwerp, Intersentia, 2004; for a critique, see W. Vandenhole and W. Benedek, *Extraterritorial Human Rights Obligations and the North-South Divide* in M. Langford, W. Vandenhole, M. Scheinin, en W. van Genugten (eds.), *Global Justice, State Duties. The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law*, Cambridge, CUP, 2012, forthcoming.

economic, social and cultural rights extraterritorially.” The requesting State has in turn the obligation “to ensure that assistance provided is used towards the realisation of economic, social and cultural rights.”³⁹

The meaning of extraterritorial obligations has been explored in literature too, mainly building on the UN Committee on Economic, Social and Cultural Rights’ reading of them.⁴⁰ The Maastricht Principles, by offering a more conceptual approach, hold the potential of assisting the Committee in further elaboration of their meaning.

E. Distribution of Responsibility⁴¹

The Maastricht Principles are pretty silent on the distribution of responsibility between the domestic State and third States, and among third States. That the domestic State bears primary responsibility for the realisation of ESC rights on its territory seems to go unquestioned. Principle 4 proclaims that each State has “the obligation to realize economic, social and cultural rights, for all persons *within its territory* [...]” (emphasis added), and that all States “*also* have extraterritorial obligations [...]” (emphasis added). Principles 19, 23 and 28 echo this approach. In particular for the obligation to fulfil ESC rights, the primary responsibility of the domestic State has been emphasized: “A State has the obligation to fulfil economic, social and cultural rights in its territory to the maximum of its ability”⁴² and is under the obligation to seek international assistance and cooperation when it is unable to realise ESC rights within its territory.⁴³ Logically, if the primary responsibility rests with the domestic State, other States can only have a complementary obligation. At first sight, that complementary obligation applies simultaneously: “All States have obligations to respect, protect and fulfil human rights, including civil, cultural, economic, political and social rights, both within their territories and extraterritorially.”⁴⁴ On closer look, the extraterritorial obligation to fulfil has been further qualified, in that it is defined as an obligation to *contribute* to the fulfilment commensurate with capacities, available resources and influence.⁴⁵ The obligations to provide international assistance and to cooperate in order to contribute to the fulfilment of ESC rights extraterritorially also seem to depend on a legitimate request from a State that is “unable, despite its best efforts,” to realise ESC rights within its territory, which illustrates once more the subsidiary or secondary nature of the extraterritorial obligation to fulfil.

The Principles do not detail the apportioning of responsibility among third States. While they repeatedly state that all States “must take action, separately and jointly through international cooperation”,⁴⁶ that all States must cooperate to protect ESC rights extraterritorially,⁴⁷ and that they

³⁹ Principles 33-35.

⁴⁰ See, e.g., M. Langford, F. Coomans and F. Gómez Isa, *Extraterritorial Duties in International Law* in M. Langford, W. Vandenhole, M. Scheinin, en W. van Genugten (eds.), *Global Justice, State Duties. The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law*, Cambridge, CUP, 2012, forthcoming; W. Vandenhole, *EU and Development: Extraterritorial Obligations under the International Covenant on Economic, Social and Cultural Rights* in M.E. Salomon, A. Tostensen and W. Vandenhole (eds.), *Casting the Net Wider: Human Rights, Development and New Duty-Bearers*, Antwerp, Intersentia, 2007, 85-106, at 92-97.

⁴¹ Responsibility is used here in its plain language meaning, and not in the specific sense of the ILC Articles on State Responsibility. In the latter, responsibility is confined to a violations approach, i.e. responsibility is engaged as a result of attributable conduct that constitutes a breach of an international obligation. We use responsibility here to refer in a general way to the set of human rights obligations incumbent on a particular state.

⁴² Principle 31.

⁴³ Principle 34.

⁴⁴ Principle 4, and echoed for the obligations to respect, protect and fulfil in Principles 19, 23 and 28.

⁴⁵ Principle 31. This is reiterated in particular also for the obligation to provide international assistance in Principle 33.

⁴⁶ Principles 19, 23 and 28-29.

“should coordinate with each other in order to cooperate effectively in the universal fulfilment of ESC rights”, little is said on what *particular* States should do. Some guidance can nevertheless be found. With regard to the extraterritorial obligation to protect, reference is made to those States that are in a position to regulate or to influence.⁴⁸ With regard to the extraterritorial obligations to fulfil, and more in particular the obligation to coordinate, it is clarified that lack of coordination “does not exonerate a State from giving effect to its separate extraterritorial obligations.” Principle 31 clarifies that the contribution to the fulfilment of ESC rights extraterritorially must be commensurate with capacities, resources and influence. The obligation to provide international assistance is confined to States “in a position to do so”.⁴⁹

Scholarly attempts to clarify the distribution of responsibility between States have based their analysis on the tripartite typology of obligations, i.e. obligations to respect, to protect and to fulfil. They do not challenge the primary responsibility of the territorial State, but argue that the extraterritorial obligations to respect and to protect are broadly similar in scope and meaning to territorial obligations (Vandenhole and Benedek qualify them as *complementary and simultaneous* for that reason).⁵⁰ The extraterritorial obligation to fulfil on the other hand has been considered in principle to be of a supplemental (Khalfan) or subsidiary (Vandenhole and Benedek) nature to the territorial one. The subsidiary nature refers not to a reduced extraterritorial obligation to assist in fulfilment, but to the fact that that obligation is not immediate, in the sense that it is qualified by time and resources. With regard to the division of responsibility among extraterritorial States under the obligation to fulfil, Vandenhole and Benedek have suggested ways for identifying which States are in a position to assist, what the scope of their obligation is, and towards whom they hold the obligation.⁵¹

F. Intermediate Conclusions on the Maastricht Principles

The Maastricht Principles represent a major step forward in conceptualising the human rights obligations of foreign States. They have imbued the often problematic notion of jurisdiction, which is central to the attribution of responsibility in the field of civil and political rights, with new meaning, and have clarified well how the tripartite typology of obligations to respect, protect and fulfil may work out in the area of extraterritorial obligations. On the other hand, they are rather weak in clarifying their legal sources and do not make a major contribution to the question of distribution of responsibility among States, be they domestic or foreign. Moreover, their scope of application remains limited to extraterritorial States, to the exclusion of non-State actors.

(Contd.) _____

⁴⁷ Principle 27.

⁴⁸ Principles 24 and 26.

⁴⁹ Principles 33 and 35.

⁵⁰ In their view, “‘complementary’ recognises that a State’s extraterritorial obligations are always present while simultaneously affirming that the domestic State’s obligation remain primary”, W. Vandenhole and W. Benedek, *Extraterritorial Human Rights Obligations and the North-South Divide* in M. Langford, W. Vandenhole, M. Scheinin, en W. van Genugten (eds.), *Global Justice, State Duties. The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law*, Cambridge, CUP, 2012, forthcoming.

⁵¹ A. Khalfan, *Division of Responsibility between States* in M. Langford, W. Vandenhole, M. Scheinin, en W. van Genugten (eds.), *Global Justice, State Duties. The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law*, Cambridge, CUP, 2012, forthcoming.

III. Business Enterprises

A. Background

There are two sets of principles governing the human rights obligations of business enterprises: the UN *Guiding Principles on Business and Human Rights* (2011) (hereafter: the Guiding Principles)⁵² and the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (2003) (hereafter: the Norms).⁵³ The latter built on the work of Weisbrodt, and were initially drafted as a code of conduct for transnational corporations.⁵⁴ They were adopted in 2003 by the UN Sub-Commission on the Promotion and Protection of Human Rights. Following their rejection by the UN Commission on Human Rights in 2004, in line with the hostile reception that they had received from the business community, Ruggie was appointed as Special Representative of the Secretary-General in 2005.⁵⁵

Ruggie was dismissive (at least in part) of the Norms, inter alia on the fact that they spoke directly to corporations.⁵⁶ He developed during his mandate his own Protect, Respect and Remedy Framework,⁵⁷ which culminated in the Guiding Principles. The latter were endorsed by the UN Human Rights Council in July 2011. While the Guiding Principles will dominate the debates in the coming years,⁵⁸ for our purposes the Norms offer more engaging starting points. As Kinley and Chambers have argued, the “Norms do have [the] potential and ought to be supported as a viable first step in the establishment of an international legal framework through which companies can be held accountable for any human rights abuses they inflict, or in which they are complicit.”⁵⁹ This is not to ignore the political reality that the Norms are dead, but to underline the continuing conceptual relevance of the Norms, as they speak directly to a non-State actor, i.e. corporations. Moreover, the Norms have an explicit focus on transnational corporations, which are central to our concerns here.

⁵² Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, UN Doc. A/HRC/17/31 of 21 March 2011.

⁵³ Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights*, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 of 26 August 2003.

⁵⁴ D. Kinley and R. Chambers, *The UN Human Rights Norms for Corporations: The Private Implications of Public International Law*, 6/3 *Human Rights Law Review* 2006, 447-497, at 454.

⁵⁵ *Ibid.*, at 449-450, 457-458 on opposition from some business groups and States.

⁵⁶ Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, UN Doc. E/CN.4/2006/97, paras. 64-69; for an analysis, see D. Kinley and R. Chambers, *The UN Human Rights Norms for Corporations: The Private Implications of Public International Law*, 6/3 *Human Rights Law Review* 2006, 447-497, at 460-461.

⁵⁷ For all documents, see <http://www.business-humanrights.org/SpecialRepPortal/Home>.

⁵⁸ Compare Jägers, who qualifies Ruggie’s work as an “authoritative focal point embraced by many of the stakeholders involved” (N. Jägers, *UN Guiding Principles on Business and Human Rights: Making Headway towards Real Corporate Accountability?*, 29/2 *Netherlands Quarterly of Human Rights* 2011, 159-163, at 159.

⁵⁹ D. Kinley and R. Chambers, *The UN Human Rights Norms for Corporations: The Private Implications of Public International Law*, 6/3 *Human Rights Law Review* 2006, 447-497, at 450.

B. General

The Norms were meant as a statement of the human rights obligations of transnational corporations⁶⁰ within their spheres of activity and influence. Rights covered include the right to equal opportunity and non-discriminatory treatment, the right to security of persons, and the rights of workers. Additionally, obligations with regard to consumer protection and environmental protection were identified.

The Guiding Principles build on the Protect, Respect and Remedy Framework and mainly emphasize the State obligation to protect. As pointed out by Jägers, “Ruggie has steered determinedly away from the concept of human rights obligations for corporations and instead placed exclusive emphasis on the State as the sole duty-bearer.”⁶¹ In addition to the State obligation to protect, a corporate responsibility to respect human rights and access to remedy are the two other major building blocks of the Guiding Principles. For each of the three building blocks, foundational and operational principles have been identified.

Our focus is on *transnational* corporations only, and on two aspects in particular: i.e. the obligations incumbent on home States of transnational corporations on the one hand, and the direct obligations of transnational corporations on the other hand.

C. Legal Nature of the Norms and Guiding Principles, and Legal Basis of the Obligations Identified

The Norms as adopted by the Sub-Commission in 2003 clearly intended to contribute to the making and further development of international law, as is reflected in preambular paragraphs 12 and 14. They note that “further standard-setting and implementation are required” and that the human rights norms in the Norms “will contribute to the making and development of international law” regarding the human rights obligations and responsibilities of transnational corporations and other business enterprises. So while the Norms clearly drew on international human rights hard law,⁶² extending their applicability to business enterprises was clearly recognized as law in the making. It has been pointed out usefully in the literature on the topic that direct duties of (transnational) corporations have already been accepted in areas other than international human rights law, so that there is no “doctrinal bar to such duties”.⁶³

The Guiding Principles explicitly claim not to create new human rights obligations:

The Guiding Principles’ normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved.⁶⁴

Here too, the innovation potentially lies in extending the applicability of existing norms to a new actor beyond the State, i.e. business enterprises. The Guiding Principles do so in a much more limited way than the Norms however.

⁶⁰ D. Kinley and R. Chambers, *The UN Human Rights Norms for Corporations: The Private Implications of Public International Law*, 6/3 *Human Rights Law Review* 2006, 447-497, at 451.

⁶¹ N. Jägers, *UN Guiding Principles on Business and Human Rights: Making Headway towards Real Corporate Accountability?*, 29/2 *Netherlands Quarterly of Human Rights* 2011, 159-163, at 160.

⁶² See in particular the references in the Commentary, Sub-Commission on the Promotion and Protection of Human Rights, *Commentary on the Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights*, UN Doc. E/CN.4/Sub.2/2003/38/Rev.2 of 26 August 2003.

⁶³ S.R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 *The Yale Law Journal* 2001, 443-545, at 450.

⁶⁴ Guiding Principles, para. 14.

D. Scope and Meaning of the Obligations Incumbent on Transnational Corporations and Home States

a. Transnational Corporations

The Norms define the substantive obligation of all business enterprises, including transnational corporations, in exactly the same way as that incumbent on States, i.e. they have the “obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law.”⁶⁵ However, in para. 12, with regard to economic, social and cultural rights, reference is made to *contribution* to their realisation.⁶⁶ We disagree with this approach, as we pointed out earlier more specifically with regard to the extraterritorial obligation to fulfil.⁶⁷ More detailed provisions have been elaborated on non-discrimination, right to security⁶⁸ and rights of workers.

The scope of that obligation is however seriously circumscribed, in that they only have that obligation “[w]ithin their respective spheres of activity and influence”,⁶⁹ or in the words of Kinley and Chambers, they have “only those human rights obligations proximate to a corporation’s business”.⁷⁰ This delineation criterion builds in part on language used in the Global Compact and arguably also the OECD Guidelines.⁷¹ Nevertheless, the obligation “applies equally to activities occurring in the home country or territory of the transnational corporation or other business enterprise, and *in any country* in which the business is engaged in activities.”⁷² (emphasis added). The latter is of particular interest to us for present purposes.

The Guiding Principles evoke a weak corporate responsibility to respect human rights, i.e. to “avoid infringing on the human rights of others and [...] [to] address adverse human rights impacts with which they are involved.”⁷³ So, first of all, mention is only made of a responsibility in the sense of a “global standard of expected conduct”⁷⁴ or a “basic expectation [of] society”,⁷⁵ not of a legally binding obligation. Secondly, it mainly entails a negative obligation of abstention, besides a positive one to “address adverse human rights impacts with which they are involved.”⁷⁶ The latter is further clarified, and arguably partly watered down, in Principle 13, which holds that business enterprises need to address adverse human rights impacts of their own activities, as well as “[s]eek to prevent or

⁶⁵ Norms, para. 1. This seems to be an attempt to combine the tripartite typology now commonly used with regard to economic, social and cultural rights (respect, protect and fulfil) and the one found in art. 2 ICCPR (respect and ensure).

⁶⁶ Kinley and Chambers have argued that that is the “correct obligation”, D. Kinley and R. Chambers, *The UN Human Rights Norms for Corporations: The Private Implications of Public International Law*, 6/3 *Human Rights Law Review* 2006, 447-497, at 29, footnote 121.

⁶⁷ *Supra* note 38.

⁶⁸ Kinley and Chambers have pointed out that the obligation is broader with regard to the right to security in para. 3, see D. Kinley and R. Chambers, *The UN Human Rights Norms for Corporations: The Private Implications of Public International Law*, 6/3 *Human Rights Law Review* 2006, 447-497, at 454.

⁶⁹ Norms, para. 1.

⁷⁰ D. Kinley and R. Chambers, *The UN Human Rights Norms for Corporations: The Private Implications of Public International Law*, 6/3 *Human Rights Law Review* 2006, 447-497, at 462.

⁷¹ *Ibid.*, at 469.

⁷² Commentary, p. 4.

⁷³ Guiding Principles, para. 11.

⁷⁴ Guiding Principles, para. 11, Commentary.

⁷⁵ Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, UN Doc. A/HRC/8/5 of 7 April 2008, para. 9.

⁷⁶ Guiding Principles para. 11.

mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships [...].”⁷⁷ (emphasis added). Furthermore, while reference is made to “internationally recognized human rights”, a minimal content is then given to that expression by referring to the International Bill of Rights (the Universal Declaration and the two 1966 Covenants) and the “principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work”,⁷⁸ thereby seemingly ignoring seven other UN core human rights treaties.

On a positive note, the corporate responsibility to protect is said to apply up to parent companies and down to the supply chain:⁷⁹

The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise’s adverse human rights impacts.⁸⁰

However, by downplaying the legal nature of this responsibility, its practical relevance may be limited.

Business enterprises, including transnational corporations, have a stronger responsibility in conflict-affected areas in particular, where there may be increased risks of being complicit in gross human rights abuses. They “should treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate”, given the potential corporate civil and/or criminal legal liability through extraterritorial civil claims or the Rome Statute.⁸¹

Ratner has developed “a theory in four parts” to define the scope of direct obligations for companies, “based on an inductive approach that reflects the actual operations of business enterprises”.⁸² That scope is defined by four clusters of issues: “the corporation’s relationship with the government, its nexus to affected populations, the particular human right at issue, and the place of individuals violating human rights within the corporate structure.”⁸³ As to the relationship with the government, three types of relationship are examined: the corporation as governmental agency, as complicit with governments, and as having command responsibility. The nexus to affected populations as a second cluster is needed because, contrary to States, corporations cannot be said to have obligations towards individuals on their territory, for they do not have a territory. Ratner draws therefore on moral philosophy on interpersonal duties,⁸⁴ and forwards the degree of proximity between individuals and a company (in concentric circles or spheres of influence: employees, their families, the locality where it has a plant, its consumers, the territory it manages in case of exploitation of natural resources and so on). The third cluster, i.e. the particular human right at issue, zooms in on substantive rights. Central to the analysis is the need to balance the right at issue with the company’s interests, with the exception of those rights that are recognized in the traditional State paradigm as absolute or non-derogable. The author argues strongly against extending corporate duties beyond the negative

⁷⁷ Guiding Principles, para. 13.

⁷⁸ Guiding Principles, para. 12.

⁷⁹ Compare N. Jägers, UN Guiding Principles on Business and Human Rights: Making Headway towards Real Corporate Accountability?, 29/2 *Netherlands Quarterly of Human Rights* 2011, 159-163, at 162.

⁸⁰ Guiding Principles, para. 14.

⁸¹ Guiding Principles, para. 23.

⁸² S.R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 *The Yale Law Journal* 2001, 443-545, at 496.

⁸³ *Ibid.*, at 496-497.

⁸⁴ *Ibid.*, at 506-507.

obligation not to do harm⁸⁵ as that “seems inconsistent with the reality of corporate enterprise.”⁸⁶ This limited focus on negative obligations only, seems to be mainly informed by pragmatism, i.e. that it is too early in the international legal process of recognizing the human rights obligations of companies to include also positive obligations.⁸⁷ Given the wide recognition of positive human rights obligations, and the often blurry lines between negative and positive obligations, a minimalistic approach may not be warranted. Finally, secondary rules of attribution are addressed, in particular to “connect individual violators to the company”.⁸⁸ While Ratner’s theory was developed for business enterprises in general, by and large it can also be applied to transnational corporations more in particular.

b. Home States of Transnational Corporations

In the Guiding Principles, the responsibility of the home State to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction is framed much more weakly as a soft obligation (“should”) “to set out clearly the expectation” that these business enterprises “respect human rights throughout their operations”.⁸⁹ The rationale for the soft obligation can be found in the Commentary: “At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction.”⁹⁰ The Guiding Principles mainly see “strong policy reasons” to do so, “especially where the State itself is involved in or supports those businesses.”⁹¹

These foundational principles have been further elaborated in a number of operational principles. With regard to our focus on the responsibility of *home* States, the operational principles under the headings of “The State-business nexus” and “Supporting business respect for human rights in conflict-affected areas” are particularly instructive. Operational principle 4 requires additional protective steps by the State towards business enterprises that are owned or controlled by the State, or that receive substantial support or services from the State, e.g. through export credit agencies, official investment insurance agencies, development agencies or development finance institutions. These additional steps may include, “where appropriate”, “requiring human rights due diligence”.⁹² Home States also have the duty to help ensure that transnational corporations operating in conflict-affected areas are not involved in gross human rights abuses. This duty may include prevention but also liability for transnational companies that they are home to, and that are involved in gross human rights abuses.⁹³

The Guiding Principles accept without any qualification that “States retain their international human rights law obligations when they participate in [multilateral] institutions.”⁹⁴ States as members of multilateral institutions are therefore said to have the following (soft) obligations: they should seek to ensure that multilateral institutions do not restrain the ability of States to meet their obligation to

⁸⁵ With the limited exception of those positive obligations “clearly necessary to effect” the negative obligations, see *ibid.*, at 517.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*, at 517.

⁸⁸ *Ibid.*, at 518.

⁸⁹ Guiding Principles, para. 2.

⁹⁰ For a fierce criticism, labeling this statement as “not correct” and in contradiction with established obligations for States, see N. Jägers, UN Guiding Principles on Business and Human Rights: Making Headway towards Real Corporate Accountability?, 29/2 *Netherlands Quarterly of Human Rights* 2011, 159-163.

⁹¹ Guiding Principles, para. 2, Commentary.

⁹² For an exploration of the concept in both corporate law, human rights law and Ruggie’s framework, see T. Lambooy, Corporate Due Diligence as a Tool to Respect Human Rights, 28/3 *Netherlands Quarterly of Human Rights* 2010, 404-448.

⁹³ Guiding Principles, para. 7, Commentary.

⁹⁴ Guiding Principles, para. 10, Commentary.

protect, nor hinder corporations from respecting human rights, and they should encourage the multilateral institutions to “promote business respect for human rights” and to help States meet their duty to protect “where requested”.⁹⁵

E. Distribution of Responsibility between Transnational Corporations and States

While the Norms generally and primarily focus on the *direct* human rights obligations of business enterprises, they start off in the first paragraph by repeating the well-established human rights tenet that States have the primary responsibility for human rights, including the obligation to protect against business enterprises. Moreover, there is a savings clause that *inter alia* provides that nothing in the Norms should be construed as diminishing the human rights obligations of States.⁹⁶ This suggests that business enterprises themselves have a complementary obligation, albeit simultaneously with States.⁹⁷ Kinley and Chambers see “the subordination of corporate responsibility to state responsibility” as a “key substantive feature”,⁹⁸ but do not rule out joint responsibility for a state and an TNC within their respective spheres of activity and influence, in case a State fails his human rights duties e.g.⁹⁹ They also envisage corporate responsibility in instances of complicity of a corporation in a State’s human rights violations.¹⁰⁰ While the notion has been borrowed from criminal law, it has already broader use in international (see e.g. the Articles on State Responsibility) and national law.¹⁰¹ Nevertheless, the concept of complicity has evolved over time as a secondary rule for establishing *individual* and *criminal* responsibility,¹⁰² and is therefore not so easily to transplant to *corporate, human rights* responsibility. The threshold for corporate human rights complicity is not clear either. Kinley and Chambers have suggested that knowledge of foreseeable harmful effects (intentional participation though not intention to harm) may suffice to reach that threshold.¹⁰³

The Guiding Principles, which build on the protect, respect and remedy framework, rest on “differentiated but complementary responsibilities”.¹⁰⁴ They lay primary human rights responsibility, also with regard to corporate conduct, with States: primarily and as a strong obligation with the *host* State, and much more weakly with the home State of the business enterprise. Foundational Principle 1

⁹⁵ Guiding Principles, para. 10.

⁹⁶ Norms, para. 19.

⁹⁷ See our conceptualisation of distributing and apportioning of responsibility in W. Vandenhoe and W. Benedek, *Extraterritorial Human Rights Obligations and the North-South Divide*, in M. Langford, W. Vandenhoe, M. Scheinin, en W. van Genugten (eds.), (eds.), *Global Justice, State Duties. The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law*, Cambridge, CUP, 2012, forthcoming; compare Kinley and Chambers who argue that “the Norms provide for the imposition of contemporaneous and complementary human rights responsibilities on corporations within their ‘spheres of activity and influence.’” (D. Kinley and R. Chambers, *The UN Human Rights Norms for Corporations: The Private Implications of Public International Law*, 6/3 *Human Rights Law Review* 2006, 447-497, at 21).

⁹⁸ D. Kinley and R. Chambers, *The UN Human Rights Norms for Corporations: The Private Implications of Public International Law*, 6/3 *Human Rights Law Review* 2006, 447-497, at 462.

⁹⁹ *Ibid.*, 467.

¹⁰⁰ *Ibid.*, 455 and 468.

¹⁰¹ *Ibid.*, 468.

¹⁰² S.R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 *The Yale Law Journal* 2001, 443-545, at 491-494.

¹⁰³ D. Kinley and R. Chambers, *The UN Human Rights Norms for Corporations: The Private Implications of Public International Law*, 6/3 *Human Rights Law Review* 2006, 447-497, at 455, 469. Compare .R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 *The Yale Law Journal* 2001, 443-545, at 500-504.

¹⁰⁴ Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, UN Doc. A/HRC/8/5 of 7 April 2008, para. 9.

holds that the host States “must protect against human rights abuse within their territory and/or jurisdiction by [...] business enterprises.” This host State duty to protect is said to be a standard of conduct.¹⁰⁵ The responsibility of the home State to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction is framed much more weakly as a soft obligation “to set out clearly the expectation” that these business enterprises “respect human rights throughout their operations”, as noted above.¹⁰⁶ Only in the case of involvement of transnational corporations in *gross* human rights violations *in conflict-affected areas* some light is shed on the division of responsibility between the host and home State, albeit that the commentary defines that responsibility as having “roles to play in assisting both those corporations and host States”. Justification for the home State obligation is sought in the fact that “the “host” State may be unable to protect human rights adequately due to a lack of effective control.”¹⁰⁷ So, in these particular instances of transnational corporations that are involved in gross human rights violations in conflict-affected areas, responsibility tilts towards the home State, which has then also more specific obligations (see higher). As to the relationship of State obligations with the direct responsibility of transnational corporations, no clarification can be found in the Guiding Principles.

F. Intermediate Conclusions

The human rights obligations of transnational corporations themselves have been addressed most explicitly in the Norms, which however do not enjoy much support. The Guiding Principles are not very outspoken on the human rights obligations of home States and of transnational corporations themselves, and where they address them, they tend to do so in soft and non-legal terms – with the exception of gross human rights violations in conflict-affected areas.

IV. International Financial Organisations

A. Background

The Tilburg Guiding Principles, the only attempt so far to identify principles on the human rights obligations of the International Financial Institutions, were drafted by a group of experts at two meetings at Tilburg University in October 2001 and April 2002. Of the four sets of principles here under discussion, they are probably most “private” in nature. A decade later, they were revisited at a GLOTHRO workshop in April 2012.

B. General

The Tilburg Principles consist of two main parts: a part on underlying notions and observations, and one on the actual principles themselves. Both parts consist of three sections: one that addresses the point of human rights obligations for IFIs (paras. 1-8, respectively paras. 23-31), one on “Linking Legal Obligations in the Field of Human Rights to Economic and Political Realities” (paras. 9-16, respectively paras. 32-34), and one on evaluation and redress of adverse human rights impacts (paras. 17-22, respectively paras. 35-42).

¹⁰⁵ Guiding Principles, para. 1, Commentary.

¹⁰⁶ Guiding Principles, para. 2.

¹⁰⁷ Guiding Principles, para. 7, Commentary.

There is a long-standing debate on whether the International Financial Institutions, in particular the International Monetary Fund and the World Bank, have direct human rights obligations.¹⁰⁸ The IFIs themselves have also themselves engaged in that discussion, albeit the World Bank has done much more so than the IMF. Comparable to the question whether home States have human rights obligations in relation to these companies, there is also the question to what extent member States of IFIs – for the latter are intergovernmental organisations – have human rights obligations in relation to IFIs.

C. Legal Nature of the Guiding Principles, and Legal Basis of the Obligations Identified

The Tilburg Principles, as principles adopted by scholars, do not have any legal status as of themselves.

The Tilburg Principles primarily make the point that the International Financial Organisations have an organisational independence from their member States,¹⁰⁹ so that their own, direct human rights obligations need to be acknowledged. First of all, reference is made to the fact that the World Bank and the IMF are international legal persons. Secondly, their status as UN Specialized Agencies that have entered into Relationship Agreements with the UN is pointed out, as “another indication of their international legal personality separate from their members.”¹¹⁰ Secondly, it is argued that that organisational independence does not mean that they are not subjected to international law, rather to the contrary: as actors with international legal personality, they have international legal obligations.¹¹¹ The acknowledgment in the IMF Articles of Agreement that the domestic social and political policies of members must be respected is understood to also include international commitments to human rights.¹¹²

Senior legal advisors of the World Bank have accepted that a teleological (“purposive”) interpretation of the Articles of Agreement is needed.¹¹³ In light of a changed understanding of sovereignty, a reading of the World Bank Articles’ prohibition on political interference has been forwarded whereby “taking into account, where appropriate, human rights issues and members’ international human rights obligations does not contravene the Articles’ prohibition on political interference.”¹¹⁴ Beyond the possibility of taking into account human rights, it has also been argued that there are instances in which the World Bank *should* take human rights into account, i.e. “[w]here

¹⁰⁸ D.D. Bradlow and D.B. Hunter (eds.), *International Financial Institutions & International Law*, Alphen aan den Rijn, Kluwer Law International, 2010; M. Darrow, *World Bank and International Monetary Fund* in D.P. Forsythe (ed.), *Encyclopedia of Human Rights*, Oxford, OUP, 2009, 373-381; M.E. Salomon, *International Economic Governance and Human Rights Accountability* in M.E. Salomon, A. Tostensen and W. Vandenhole (eds.), *Casting the Net Wider: Human Rights, Development and New Duty-Bearers*, Antwerp, Intersentia, 2007, 153-183; M. Darrow, *Between Light and Shadow: The World Bank, the International Monetary Fund, and International Human Rights Law*, Oxford, Hart, 2003; S.I. Skogly, *The Human Rights Obligations of the World Bank and the IMF* in W. van Genugten, P. Hunt and S. Mathews, *World Bank, IMF and Human Rights*, Nijmegen, Wolf Legal Publishers, 2003, 45-78; S. Skogly, *The Human Rights Obligations of the World Bank and the International Monetary Fund*, London, Cavendish, 2001; D.D. Bradlow and C. Grossman, *Limited Mandates and Intertwined Problems: A New Challenge for the World Bank and the IMF*, 17 *Human Rights Quarterly* 1995, 411-442.

¹⁰⁹ They have been labeled as “radical” and “most ambitious attempt” for this reason, S. McInerney-Lankford, *International Financial Institutions and Human Rights: Select Perspectives on Legal Obligations*, in D.D. Bradlow and D.B. Hunter (eds.), *International Financial Institutions & International Law*, Alphen aan den Rijn, Kluwer Law International, 2010, 239-285, at 262 and 277.

¹¹⁰ Tilburg Principles, para. 6.

¹¹¹ Tilburg Principles, paras. 5-6.

¹¹² Tilburg Principles, para. 25.

¹¹³ R. Dañino, *Legal Opinion on Human Rights and the Work of the World Bank*, 27 January 2006, paras. 5-8, www.ifwatchnet.org/sites/ifwatchnet.org/files/DaninoLegalOpinion0106.pdf (last accessed 21 March 2012).

¹¹⁴ *Ibid.*, para. 14.

violations or non-fulfilment of obligations are at issue, and where these have an economic impact [...]” And “if a human rights violation leads to a breach of international obligations relevant to the Bank [...]”¹¹⁵ All in all, this cannot but be interpreted as a recognition (albeit not in plain language) of the Bank’s direct human rights obligations,¹¹⁶ as reflected also in the concluding paragraph of the Legal Opinion: “In conclusion, the Articles of Agreement permit, and in some cases require, the Bank to recognize the human rights dimensions of its development policies and activities since it is now evident that human rights are an intrinsic part of the Bank’s mission.”¹¹⁷ Moreover, the then World Bank Group General Counsel, Palacio, in 2006 still seemed to only accept that the World Bank can, but is under no obligation, to take human rights into account.¹¹⁸ McInerney, currently senior policy officer, Institutions, Law & Partnerships for Human Rights at the World Bank, writing in a personal capacity in 2010, has spoken out against direct human rights obligations for IFIs. She has argued in favour of “locating those obligations with states, at least initially”¹¹⁹ for the State is still the primary duty bearer in international human rights law.¹²⁰ She has even warned that “the eagerness to assign direct obligations to IFIs, particularly from non-treaty sources, has set the debate back because of the limitations attending those sources, deflecting attention from the relevant established obligations of states under human rights treaties.”¹²¹ IMF representatives have been less outspoken on the human rights obligations of that institution. In a publication of 2005 written by a former general counsel of the IMF, writing in his personal capacity, Darrow has identified “tacit concessions”, i.e. “an acknowledgement that the IMF is bound by relevant principles of customary law and general principles of law as they relate to human rights [...]”¹²²

In the literature, a strong argument has been made for considering IFIs as subjects of international law, based on their Articles of Agreement, their status as Specialized Agencies of the United Nations, and the facts that they are composed of States that have human rights obligations.¹²³ Sources for their human rights obligations have been said to include the (fundamental human rights principles of the) UN Charter, customary law, and general principles of international law. Indirectly, human rights treaties may play a role, as they do inform the development of the latter sources.¹²⁴

In addition, the Tilburg Guiding Principles reiterate the obligations of the member States of the IFIs: “When representatives of member States determine the policies of the two IFIs, they are bound by their States’ international obligations, including those arising from international human rights law.”¹²⁵ The UN Committee on Economic, Social and Cultural Rights has consistently emphasized that member States of the IFIs are under an obligation to pay greater attention to the protection of

¹¹⁵ Ibid., para. 20.

¹¹⁶ Compare M. Darrow, World Bank and International Monetary Fund, in D.P. Forsythe (ed.), *Encyclopedia of Human Rights*, Oxford, OUP, 2009, 373-381, at 378.

¹¹⁷ R. Dañino, *Legal Opinion on Human Rights and the Work of the World Bank*, 27 January 2006, para. 25, www.ifWATCHNET.org/sites/ifWATCHNET.org/files/DaninoLegalOpinion0106.pdf (last accessed 21 March 2012).

¹¹⁸ See S. McInerney-Lankford, *International Financial Institutions and Human Rights: Select Perspectives on Legal Obligations*, in D.D. Bradlow and D.B. Hunter (eds.), *International Financial Institutions & International Law*, Alphen aan den Rijn, Kluwer Law International, 2010, 239-285, at 251-252.

¹¹⁹ Ibid., 254.

¹²⁰ Ibid., 261-263.

¹²¹ Ibid., 285.

¹²² M. Darrow, World Bank and International Monetary Fund in D.P. Forsythe (ed.), *Encyclopedia of Human Rights*, Oxford, OUP, 2009, 373-381, at 380.

¹²³ See e.g. Skogly 2003, 46-50; M. Darrow, World Bank and International Monetary Fund in D.P. Forsythe (ed.), *Encyclopedia of Human Rights*, Oxford, OUP, 2009, 373-381, at 377-380.

¹²⁴ S.I. Skogly, *The Human Rights Obligations of the World Bank and the IMF* in W. van Genugten, P. Hunt and S. Mathews, *World Bank, IMF and Human Rights*, Nijmegen, Wolf Legal Publishers, 2003, 45-78, at 50-53.

¹²⁵ Tilburg Guiding Principles, para. 7.

economic, social and cultural rights within the policies of these organisations.¹²⁶ This position in turn seems to draw heavily on the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Guideline 19 of which holds:

Acts by International Organisations

19. The obligations of States to protect economic, social and cultural rights extend also to their participation in international organisations, where they act collectively. It is particularly important for States to use their influence to ensure that violations do not result from the programmes and policies of the organisations of which they are members. It is crucial for the elimination of violations of economic, social and cultural rights for international organisations, including international financial institutions, to correct their policies and practices so that they do not result in deprivation of economic, social and cultural rights. Member States of such organisations, individually or through the governing bodies [...] should encourage and generalise the trend of several such organisations to revise their policies and programmes to take into account issues of economic, social and cultural rights, especially when these policies and programmes are implemented in countries that lack the resources to resist the pressure brought by international institutions on their decision-making affecting economic, social and cultural rights.

D. Meaning and Scope of Obligations

a. Direct obligations of IFIs

The scope of the IFIs' direct human rights obligations is circumscribed in the Guiding Principles in a twofold way. First of all, they are limited to respect obligations, i.e. negative obligations. Secondly, these obligations only concern "situations where the institutions' own projects, policies or programmes negatively impact or undermine the enjoyment of human rights."¹²⁷ In the Guiding Principles part proper, it is said that the macro-economic policy of the IFIs "should take into account its impact on human development objectives, including human rights", and that they "should integrate human rights considerations into all aspects of their operations and internal functioning."¹²⁸ Prevention of human rights violations should be given high priority, and if violations occur nevertheless, "measures for mitigating the impact thereof and mechanisms of accountability and redress should be put into place."¹²⁹ In the clause proposed for inclusion in the policies of the IFIs, the negative nature of their obligation is reconfirmed: i.e. not to finance projects (in the case of the World Bank) or not to enter in financial agreements (in the case of the IMF) "that contravene applicable international human rights law".¹³⁰

In addition, procedural obligations of transparent decision-making and active participation of those affected have been identified.¹³¹ The IFIs should also ensure accessibility of accountability mechanisms and undertake human rights impact assessments *ex ante* and *ex post*.¹³²

Darrow has summarized the current understanding of the human rights obligations of IFIs as follows: "Mainstream international legal opinion would say that this translates into a minimum

¹²⁶ W. Vandenhoe, *EU and Development: Extraterritorial Obligations under the International Covenant on Economic, Social and Cultural Rights* in M.E. Salomon, A. Tostensen and W. Vandenhoe (eds.), *Casting the Net Wider: Human Rights, Development and New Duty-Bearers*, Antwerp, Intersentia, 2007, 85-106, at 94.

¹²⁷ Tilburg Guiding Principles, para. 5.

¹²⁸ Tilburg Guiding Principles, paras. 23-24.

¹²⁹ Tilburg Guiding Principles, para. 24.

¹³⁰ Tilburg Guiding Principles, paras. 30-31.

¹³¹ Tilburg Guiding Principles, paras. 32-33.

¹³² Tilburg Guiding Principles, paras. 35 and 38.

obligation that the bank and the IMF respect (or at least not violate) human rights commitments in force in member countries and arguably also to protect human rights within the scope of their influence and activities at the country level. Many commentators go further still to argue that these institutions should promote or perhaps even fulfil human rights.”¹³³ Skogly belongs to the latter category, and has argued that “the institutions are under negative obligations to *respect* and to *protect* human rights in their own operations through their policies, programmes and projects, and to *fulfil* human rights whenever this obligation stems from customary international law and general principles of law.”¹³⁴ She has limited the obligation to protect to the extent that the IFIs are “in a position to control the conduct of third parties.”¹³⁵

b. Member States of IFIs

The obligation under international human rights law of States in a position to assist, to provide international assistance and co-operation is said to mean for member States of the IFIs that they are under “the duty to work actively towards an equitable financial investment and multilateral trading system that is conducive to the reduction and eradication of poverty and the full realisation of all human rights.”¹³⁶ “When determining the policies, programmes and projects of the World Bank and the IMF, member States must comply with their obligations under international human rights law, including the duty to engage in international assistance and co-operation.”¹³⁷

E. Distribution of Responsibility

The Tilburg Guiding Principles are quite silent on the question of distribution or apportioning of responsibility between the IFIs themselves and their member States, let alone among their member States. They do recall though the basic tenet of current international human rights law that the “primary responsibilities and obligations in the field of domestic human rights enjoyment [...] remain with the State.” This is (also) intended as a savings clause, as the next sentence reads: “States cannot ‘delegate’ human rights obligations to, for instance, international institutions and relieve themselves of these obligations.”¹³⁸

In literature, some have emphasized the shared *and* separate responsibility of the IFIs themselves and their member States, with some attempts to assess and define the individual responsibility of those member States that have Executive Directors in the IFIs.¹³⁹ Skogly has identified substantive and procedural *separate* direct human rights obligations for the IFIs in addition to obligations that they share with creditor States.¹⁴⁰ A detailed discussion on a portioning responsibility to each of the actors involved does not seem to have undertaken yet.

¹³³ M. Darrow, World Bank and International Monetary Fund, in D.P. Forsythe (ed.), *Encyclopedia of Human Rights*, Oxford, OUP, 2009, 373-381, at 378.

¹³⁴ S.I. Skogly, *The Human Rights Obligations of the World Bank and the IMF*, in W. van Genugten, P. Hunt and S. Mathews, *World Bank, IMF and Human Rights*, Nijmegen, Wolf Legal Publishers, 2003, 45-78, at 57.

¹³⁵ *Ibid.*, 56.

¹³⁶ Tilburg Guiding Principles, para. 7.

¹³⁷ Tilburg Guiding Principles, para. 27.

¹³⁸ Tilburg Guiding Principles, para. 5.

¹³⁹ On the latter, see in particular e.g. M.E. Salomon, *International Economic Governance and Human Rights Accountability*, in M.E. Salomon, A. Tostensen and W. Vandenhole (eds.), *Casting the Net Wider: Human Rights, Development and New Duty-Bearers*, Antwerp, Intersentia, 2007, 153-183, at 178-181.

¹⁴⁰ S.I. Skogly, *The Human Rights Obligations of the World Bank and the IMF*, in W. van Genugten, P. Hunt and S. Mathews, *World Bank, IMF and Human Rights*, Nijmegen, Wolf Legal Publishers, 2003, 45-78, at 57-69.

F. Intermediate Conclusions on the Tilburg Guiding Principles

In 2002, the central point to be made was that IFIs do have own (at least negative) human rights obligations as subjects of international law. Time may now have come to move forward, and to follow up on what was said in para. 28: “For reasons of operationalisation, general human rights obligations for the World Bank and the IMF should be specified in a practical and accessible instrument by which the two IFIs are to be guided in all their decisions and on the basis of which they can be held accountable.”

V. Lessons learnt – Some Tentative Conclusions

What can be learnt from efforts over the last decade to define the human rights obligations of States when having transnational impact either through their own acts or through those of transnational corporations and the International Financial Institutions, and of transnational corporations and the International Financial Institutions themselves directly? Have the responsibility regimes for each of these actors been convincingly established, in a way that they are able to address the responsibility gaps perceived on the ground? Has the fragmented method of elaboration of principles for each different actor led to a coherent legal framework or rather to legal patchwork that is bound to fail in effectively dealing with the global landscape and its various actors? Is a holistic approach to be preferred? Can the current only fully developed regime of (territorial) state responsibility be used by analogy, or do we need to start from scratch?

As pointed out in the preceding intermediate conclusions, none of the sets of principles comprehensively addresses all issues of attribution and distribution of responsibility. However, it is safe to say that the Maastricht Principles are the most detailed and elaborate ones. The Tilburg Principles are much less advanced, and mainly seem to serve the purpose of supporting the point that IFIs do have human rights obligations. The Guiding Principles stop from making the basic point that transnational corporations are direct human rights duty bearers, in contrast with the Norms. A recurrent theme in all sets is the human rights obligations of States as members of international organisations. A theme specific to the Guiding Principles is the human rights responsibility of home States of transnational corporations. All in all, the responsibility regimes emerging from the different sets of principles under scrutiny here do not seem to capture yet the full scope of the respective actors’ impact on human rights on the ground.

As to the consistency of the current sets of principles, perhaps the most striking contradiction is that situated at the level of the basic point whether other actors than the territorial or domestic State do have human rights obligations: the Maastricht Principles, the Norms and the Tilburg Principles answer that question in the affirmative, the Guiding Principles downplay the direct human rights obligations of transnational corporations and propose instead a societal expectation. We thus still seem to be far away from universal acceptance that “there is no logical reason why the situation of a person whose economic or social rights have been adversely affected by the acts of a state or a transnational corporation should be given more attention and protection than a similarly situated person whose rights have been adversely affected by the operations of an IFI.”¹⁴¹

Looking at the sets of principles in yet some more detail, the following comparative conclusions can be drawn:

- a) the Maastricht Principles and the Guiding Principles are predominantly if not exclusively state-centred, while the Norms and the Tilburg Principles address the direct obligations of non-state actors, i.e. transnational corporations and International Financial Institutions respectively.

¹⁴¹ D.D. Bradlow and D.B. Hunter, Conclusion: The Future of International Law and International Financial Institutions in D.D. Bradlow and D.B. Hunter (eds.), *International Financial Institutions & International Law*, Alphen aan den Rijn, Kluwer Law International, 2010, 387-397, at 392.

- b) All remain fairly vague or silent on their own legal status, and on the legal sources they draw on.
- c) The meaning and scope of the human rights obligations identified are quite at variance, which does not seem to be explained by the varying degrees of power and impact that the actors concerned have. The broadest regime has been developed for foreign States: the Maastricht Principles contain an expansive notion of jurisdiction for the attribution of responsibility, and hold all three types of obligations (respect, protect and fulfil) to be applicable to these States. For transnational corporations, the Norms use the dual concept of sphere of activity and influence to attribute obligations to transnational corporations, and apply the same types of obligations as for States. The Guiding Principles however limit the obligations of transnational corporations to respect obligations. Finally, with regard to the International Financial Institutions, the Tilburg Principles also confine themselves to respect obligations.
- d) In the relationship between the traditional domestic or host State on the one hand, and foreign or host States, or non-State actors on the other hand, the primary responsibility of that domestic or host State goes completely unchallenged. Foreign or home States, or non-State actors have therefore always a complementary responsibility only, although that may be a simultaneous or a subsidiary one. There is less clarity, and possibly also less consistency in the way the distribution of responsibility is envisaged among other actors than the domestic or host State, e.g. among several foreign States, or among the home State and the transnational corporation itself, or among a creditor State and an IFI. The Maastricht Principles insist on the need for cooperation among foreign/extraterritorial States with regard to the obligations to protect and to fulfill.

Whether or not the current legal regime on territorial State obligations and State responsibility proper can be transplanted by analogy to the actors under discussion, a neat separation seems to be warranted between foreign States and home States on the one hand, and non-State actors on the other hand. As to foreign and home States, an analogy reasoning seems justified. However, for non-State actors, a point made by Bradlow and Hunter on IFIs is worth recalling here:

[T]he ILC process has stumbled by relying too heavily on state responsibility as an analogue for the responsibility of international organizations. [footnote omitted] Although the analogy has value, over-reliance on it tends to underplay the differences between states, which are geographically defined and have general powers and responsibilities, and international organizations, which can operate across regions and national borders, but have particular structures and limited powers and mandates defined by their founding treaties.”¹⁴²

This view allows for generalisation, in our view, to transnational corporations, which also are not geographically defined, but have particular structures and mandates. Of course, saying what should not be done is only a first step. The challenge ahead is to come with alternatives. A methodological proposal made by Ratner with regard to direct obligations for companies, i.e. to “construct a theory both *down* from state responsibility and *up* from individual responsibility” thereby acknowledging “that, in general terms, a corporation is, as it were, more than an individual and less than a state”,¹⁴³ deserves further scrutiny. However, more innovative methodologies may also be warranted, whereby inspiration is sought outside human rights law and/or the legal toolbox, such as in other fields of law but also in philosophy or ethics.¹⁴⁴

But even if we confine ourselves to the emerging sets of principles that we have discussed here, and do not seek a globalisation of human rights law at this stage yet, an enormous research agenda is

¹⁴² Ibid., at 392.

¹⁴³ S.R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 *The Yale Law Journal* 2001, 443-545, at 496.

¹⁴⁴ Compare Ratner, who documents the recognition of direct obligations for corporations in law other than human rights (ibid., at 475-488)

ahead of us. Several concepts are still in search of a definition (sphere of activity and influence¹⁴⁵; complicity¹⁴⁶), the onus of proof needs to be defined with regard to the meaning and scope of obligations,¹⁴⁷ and the distribution of responsibility is still in its infancy.

¹⁴⁵ Compare D. Kinley and R. Chambers, *The UN Human Rights Norms for Corporations: The Private Implications of Public International Law*, 6/3 *Human Rights Law Review* 2006, 447-497, at 9 and 24-25, and the reference to the notion of concentric rings.

¹⁴⁶ See also Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, *Clarifying the Concepts of "Sphere of influence" and "Complicity"*, UN Doc. A/HRC/8/16 of 15 May 2008.

¹⁴⁷ *Ibid.*, at 26.

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