

## THE VIOLENCE OF DISPOSSESSION: EXTRATERRITORIALITY AND ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Matthew Craven\*

In his article ‘The Politics of Utopia’ Frederic Jameson suggests that the present climate appears unpropitious for utopian theorising. He points out that the explanation for this may lie in the ‘extraordinary historical dissociation’ of two distinct worlds that characterizes globalization today:

‘In one of these worlds, the disintegration of the social is so absolute—misery, poverty, unemployment, starvation, squalor, violence and death—that the intricately elaborated social schemes of utopian thinkers become as frivolous as they are irrelevant. In the other, unparalleled wealth, computerized production, scientific and medical discoveries unimaginable a century ago as well as an endless variety of commercial and cultural pleasures, seem to have rendered utopian fantasy and speculation as boring and antiquated as pre-technological narratives of space flight.’<sup>1</sup>

Jameson’s point, in part at least, was clearly not that different people may stand in different temporal relations to the ‘other world’ that a utopian theorist may attempt to conjure into existence (that some may be closer, others more distant from that ideal), but that the temporal horizon is in fact a spatial one – for some, in certain parts of the world, the idea of a life without poverty, disease, malnutrition and the like, renders utopian speculation utterly lifeless, whereas for others, in other places, that speculation appears little more than a faintly modified description of daily life. What Jameson’s description of the apparent sterility of utopian discourse thus appears to communicate is two things. First is a dissipation of the sense of time or history in what he takes to be the post-modern experience in late capitalism (underpinned by its refutation of narratives of progress, and stories of development and fruition). Second, is a coeval concretisation of a spatial differentiation between the experience and outlook of different people in different places, in which each potential protagonist is locked into an imaginative stasis.

Jameson’s argument was by no means directed towards the contemporary discourse of human rights, let alone that accompanying the recognition of economic, social and cultural rights (what I will refer to henceforth as ‘social rights’). But his comments have some resonance in that context nevertheless. Here, from one perspective, social rights embody a kind of reformist agenda (linked to a progressive narrative of ‘development’) that has particular purchase or meaning for those living in poverty or destitution in certain parts of the world, but which is ultimately confronted by an array of obstacles ranging from those concerning the inadequacies of local systems of governance and social order, to those that condition the international environment (such as might relate to trade, investment, debt or technology). From another perspective, by contrast, the social rights agenda appears far more mundane – concerned as it appears to be with the

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\* I would like to express my enormous gratitude to David Harris, as supervisor for my doctoral thesis, who not only directed me towards researching in the field of economic, social and cultural rights, but who has also provided continued advice and support in my academic career. My thanks also go to Susan Marks whose comments on an earlier version of this chapter were invaluable.

<sup>1</sup> Jameson F., ‘The Politics of Utopia’, (2004) 25 *New Left Review*

staples of political debate in modern democratic societies (health, education, equality etc), and to which the language of 'rights' seems to have very little positive to add.

Within this debate, the question of space – or more specifically territory – seems to assume a significant place. Those, for whom the social rights agenda appears too remote, see the difficulties as lying largely beyond the confines of the nation state: domestic political or social reform always appears possible, whilst international reform seems inconceivable. Those, by contrast who see the project as mundane, do so largely by refusing to engage with the possibility that their lives may be somehow connected to those living in poverty elsewhere in the world (that the accrual of wealth and resources in the North is unconnected to their lack in the South). And it is, thus, in respect of the existence or otherwise of international (or extraterritorial) obligations in respect of social rights that much appears to depend.

In the course of this chapter I want to explore the significance of the ideas of space or territory for the contemporary understanding of social rights. In the process, I will touch upon the debate surrounding the imposition of economic sanctions and the position adopted, in respect of the question of extraterritoriality, by the United Nations (UN) Committee on Economic, Social and Cultural Rights. But the main focus will be to place the discussion of extraterritoriality and its relation to justificatory arguments about social rights in the context of the Arendt's critique of the 'Rights of Man' as it has been developed in the work of Agamben and Balibar. It will be argued that the Arendt's warning that the advancement of human rights might justify processes of exclusion and dispossession at precisely the same moment at which it opposes them, retains considerable force for the contemporary social rights project, particularly when the latter is understood in purely national terms.

Two points ought to be made, at the outset, about the title of this chapter. First of all, although I use the term 'dispossession' in relation to the non-enjoyment of social rights I do not intend by that to restrict analysis to those instances in which individuals or communities may have been deprived of some existing (legal) entitlement, but I also include within it the simple condition of 'being in poverty or destitution' (however problematic those terms may be). Dispossession remains the preferred terminology, however, insofar as it appears peculiarly expressive of the idea that poverty and destitution are not merely natural 'Malthusian' occurrences, but rather are socially generated and may themselves be produced through the legal relations of entitlement and exchange to which the narrower definition might refer. Secondly, dispossession is referred to as an act of 'violence'. The purpose here, is to direct attention to two plausible equivalences: one between the kinds of act that are typically regarded as violent (the use of force or coercion), and those that result from other 'technologies of power' (social organisation and legal entitlements perhaps); the other between the consequential physical manifestation of each (for which a differentiation between physical pain and starvation, for example, is clearly problematic). To see poverty as violence, in other words, is to forefront both the catastrophic nature of poverty and the extent to which it is managed or produced through social, political, economic, or legal arrangements.

## **Part I.**

In December 1997, the UN Committee on Economic, Social and Cultural Rights, issued a general comment on the 'relationship between economic sanctions and respect for

economic, social and cultural rights'.<sup>2</sup> The main purpose of that general comment was to encourage the UN Security Council, and member states participating in its decision-making, to spend more time considering the impact that such sanctions may have upon the economic, social and cultural rights of the inhabitants of 'target' regimes. It was an issue that had been brought to the Committee's attention in several state reports,<sup>3</sup> and had assumed particular prominence in the case of Iraq. A number of studies that had been undertaken by the World Health Organisation (WHO), amongst others, in assessing the impact of the sanctions regime on Iraq in the aftermath of the first Gulf War,<sup>4</sup> indicated that whilst the UN had moved to mitigate the adverse effects of its sanctions regime – particularly through its operation of the 'Oil for Food' programme<sup>5</sup> – the imposition of sanctions had had a catastrophic effect upon the health and well-being of the Iraqi population. There were undoubtedly causal questions here relating to the relationship between the sanctions imposed and the consequential effects (for example, the extent to which humanitarian assistance was being diverted for the profit of the local elite) but even with such qualifications, the evidence was clear enough to suggest that the compatibility of sanctions regimes with states' commitments under the UN Covenant on Economic, Social and Cultural Rights could not be taken for granted.<sup>6</sup>

If the Committee felt itself compelled to respond to the issue – to point out, at least, that economic sanctions, if not carefully targeted, structured and monitored, might constitute something analogous to the deliberate starvation of the population, or the purposeful deprivation of medical assistance – there was the inevitable question as to how it might do so within the framework of the obligations under the Covenant itself. There were

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<sup>2</sup> CESCR General Comment No. 8. UN Doc. E/C.12/1997/8,

<sup>3</sup> The Committee was to make note of the fact that, at that stage, UN authorised sanctions had been imposed upon South Africa, Iraq/Kuwait, parts of the former Yugoslavia, Somalia, the Libyan Arab Jamahiriya, Liberia, Haiti, Angola, Rwanda and the Sudan. To this list might have been added Sierra Leone, Cambodia, Afghanistan, Eritrea, Ethiopia, the Democratic Republic of the Congo, and the Côte d'Ivoire

<sup>4</sup> FAO/WFP/WHO, 'Assessment of Food and Nutrition Situation in Iraq' (May/June 2000) noted that 800,000 children under 5 years of age were chronically malnourished and high levels of anaemia in school children. 2 million children were registered as suffering from protein, calorie and vitamin-related malnutrition in 1998. The Infant Mortality Rate has rose from 47 in 1984-89 to 108 in 1994-1999. *Child and Maternal Mortality Survey*, (UNICEF,1999).

<sup>5</sup> This was initially ill-fated. A scheme was proposed in **SC** Resolution 706 (1991) and a basic structure for its implementation laid down in **SC** Resolution 712 (1991). Neither of these resolutions **was** ever implemented. On 14<sup>th</sup> April 1995, the Security Council (**SC**) created a new arrangement to the same end in **SC** Resolution 986 (1995). This 'temporary' arrangement allowed for the sale of \$2 billion of Iraqi oil (\$1 billion in each of two 90-day periods), the terms of which were agreed with Iraq in a Memorandum of Understanding (S/1996/356) followed by the adoption of the necessary procedures by the Sanctions Committee in August (1996) (S/1996/636). On 10<sup>th</sup> December 1996, States were finally authorised to import petroleum and petroleum products from Iraq during specified periods (**SC** Resolution 1111 (1997); **SC** Resolution 1129 (1997)). In 1998 the Council extended the scope of the programme (**SC** Resolution 1153 (1998); 1210 (1998)) and at various points further extended the period of allowable trade. The sanctions were finally terminated pursuant to SC Resolution 1483 (2003).

<sup>6</sup> In his Supplement to the Agenda for Peace in 1995, for example, the UN Secretary-General admitted that: 'Sanctions, as is generally recognized, are a blunt instrument. They raise the ethical question of whether suffering inflicted on vulnerable groups in the target country is a legitimate means of exerting pressure on political leaders whose behaviour is unlikely to be affected by the plight of their subjects. Sanctions also always have unintended or unwanted effects. They can complicate the work of humanitarian agencies by denying them certain categories of supplies and by obliging them to go through arduous procedures to obtain the necessary exemptions. They can conflict with the development objectives of the Organization and do long-term damage to the productive capacity of the target country. They can have a severe effect on other countries that are neighbours or major economic partners of the target country. They can also defeat their own purpose by provoking a patriotic response against the international community, symbolized by the United Nations, and by rallying the population behind the leaders whose behaviour the sanctions are intended to modify'. *Supplement to an Agenda for Peace*, (1995), UN doc. S/1995/1, para. 70.

two obvious difficulties. First of all, there was a general question concerning the applicability of the Covenant in case of sanctions duly authorised by the Security Council acting under Chapter VII of the UN Charter insofar as Article 103 of the Charter provides that, in case of conflict, obligations under the Charter should prevail over those under any other international agreement. Secondly, and in some respects more fundamentally, there was a question as to whether state obligations under the Covenant extended extra-territorially to the point at which a state imposing sanctions might be held responsible for any consequential deprivation (of the right to food or health care for example) even if the sanctioning state exercised no formal jurisdiction or control over the population concerned. Whilst the question whether the effect of Security Council resolutions is to automatically nullify inconsistent conventional obligations is certainly of some general importance<sup>7</sup>, it is with respect to the second of these issues that this paper is concerned.

The Covenant itself, unlike the majority of other human rights treaties, makes no explicit mention of its scope of application. Whereas article 2(1) of the International Covenant on Civil and Political Rights speaks of the obligation of states to respect and ensure the rights of all individuals 'within its territory and subject to its jurisdiction', the parallel provision in Article 2(1) of the Covenant on Economic, Social and Cultural Rights avoids any reference to 'jurisdiction' or 'territory'. It does, however, impose an obligation upon all States to 'take steps, individually and through international assistance and cooperation' with a view to achieving the full realisation of the rights recognized on a progressive basis. The reference to international cooperation, here, is further reiterated in several other articles (such as Articles 11(2) and 15(4)), and it is 'agreed' under the terms of Article 23 that 'international action for the achievement of the rights recognized' should include 'such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study'.<sup>8</sup> Whilst clearly implying that states parties assume certain obligations of an external or international nature, the exhortation to 'cooperate' does not appear to go very far beyond a commitment to participate in certain types of international activity of a humanitarian character (such as through the provision of a certain amount of aid or assistance to a number of undefined states). It certainly leaves open the larger question as to whether states parties may assume obligations directly in respect of individuals in third states.<sup>9</sup>

Despite the absence of an unambiguous textual provision determining the nature and extent of extra-territorial obligations, the Committee in its General Comment on Sanctions reaffirmed what had largely been hinted at in its earlier practice<sup>10</sup> concerning

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<sup>7</sup> See chapter by Nigel White in this volume on this point.

<sup>8</sup> Article 22, in addition, authorises the Economic and Social Council to 'bring to the attention of other organs of the United Nations, their subsidiary organs and specialised agencies... any matters arising out of the reports [submitted by States parties] which may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant.'

<sup>9</sup> Coomans suggests, however, that in consequence of these provisions 'a certain extraterritorial (in the sense of international) scope was intended by the drafters and is part of the treaty'. Coomans F., 'Some Remarks on the Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights', in Coomans F. & Kamminga M. *Extraterritorial Application of Human Rights Treaties* (Intersentia, Antwerp-Oxford, 2004) p. 183 at 185

<sup>10</sup> See Craven M., *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford University Press, Oxford, 1995) pp. 144-150.

the activities of international lending agencies and transnational corporations<sup>11</sup> by asserting that States parties did assume certain substantive obligations of an extra-territorial nature:

‘Just as the international community insists that any targeted State must respect the civil and political rights of its citizens, so too must ... the international community itself do everything possible to protect at least the core content of the economic, social and cultural rights of the affected peoples of that State (see also General Comment 3 (1990), paragraph 10).’<sup>12</sup>

States imposing sanctions thus were under an obligation to take economic, social and cultural rights fully into account when designing an ‘appropriate sanctions regime’,<sup>13</sup> to monitor and protect those rights<sup>14</sup> and take appropriate steps ‘in order to respond to any disproportionate suffering experienced by vulnerable groups within the targeted country’.<sup>15</sup> The Committee’s general position in this respect has subsequently been reaffirmed in later practice. In its General Comment on the Right to Food, for example, the Committee maintained that

‘States parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required.’<sup>16</sup>

This, implied, in the view of the Committee, not only an obligation to ‘refrain at all times from food embargoes or similar measures which endanger conditions for food production and access to food in other countries’, but also an obligation to ‘provide disaster relief and humanitarian assistance in times of emergency’.<sup>17</sup> Similarly in its General Comment on the Right to Water, the Committee insisted that States parties ensure that water is never used ‘as an instrument of political and economic pressure’, that they should ‘prevent their own citizens and companies from violating the right to water of individuals and communities in other countries’ and that, when acting as members of international organizations, should take steps to ensure that those organizations take the right to water into account in their various activities.<sup>18</sup>

For all the Committee’s insistence that the Covenant does impose certain extraterritorial obligations upon states – at least as regards a duty to ‘respect’ or ‘protect’ the enjoyment

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<sup>11</sup> See e.g., General Comment No. 2 (1990), UN doc. E/C.12/1990/para. 9; General Comment No. 3 (1990) UN doc. E/C.12/1990/, para. 13.

<sup>12</sup> General Comment No. 8, UN doc. E/C.12/1997/8, para. 7.

<sup>13</sup> Ibid, para. 12.

<sup>14</sup> Ibid, para. 13 (‘When an external party takes upon itself even partial responsibility for the situation within a country (whether under Chapter VII of the Charter or otherwise), it also unavoidably assumes a responsibility to do all within its power to protect the economic, social and cultural rights of the affected population.’)

<sup>15</sup> Ibid, para. 14.

<sup>16</sup> General Comment No.12, UN Doc. E/C.12/1999/5, para. 35.

<sup>17</sup> Ibid, para. 37.

<sup>18</sup> General Comment No. 15, UN Doc. E/C.12/2002/11, paras. 32, 33 and 36. The Committee has also repeatedly called upon ‘other actors’ such as UN Agencies, the World Bank and the International Monetary Fund (IMF) to incorporate a concern for economic, social and cultural rights more directly in their work. See e.g., General Comment No. 2; General Comment No.14, UN Doc. E/C.12/2000/4, paras. 63-5; General Comment No. 15 (2002), UN Doc. E/C.12/2002/11, para. 60.

of economic, social and cultural rights on the part of those living in other countries<sup>19</sup> – the issue has clearly remained a contentious one. In recent years, for example, the United States (US) has responded very sharply to the suggestion of the UN Commission’s Special Rapporteur on the Right to Food that states were burdened with a range of extraterritorial obligations in the fulfilment of that right.<sup>20</sup> In the 2004 session of the UN Commission on Human Rights, for example, the US representative declared his support for the idea of the ‘progressive realization’ of the right to food, but emphasised categorically that such a right ‘did not give rise to international obligations’.<sup>21</sup> He suggested, furthermore, that the Special Rapporteur should be chastised for his ‘irresponsible and unfounded statements’ in that regard.<sup>22</sup> Similarly, in the 2006 session, the US representative again objected to the ‘novel legal assertions’ concerning extraterritorial obligations of states found in the Special Rapporteur’s reports on the right to food.<sup>23</sup> Whilst the US may have been most vocal in this regard, it has not been alone. In critical votes on such issues in the Commission, the US was joined by several other Western European and Northern states, and a number of the same states raised similar concerns in debates surrounding the drafting of an Optional Protocol to the Covenant.<sup>24</sup>

Although the question of the extraterritorial effect of the Covenant was briefly discussed by the International Court of Justice in the *Legal Consequences case*<sup>25</sup> its conclusions really took the matter no further. There the Court emphasised, in light of the position adopted by the UN Committee, that the obligations under the Covenant could be thought to extend to occupied territory, or territory otherwise falling within a state’s ‘jurisdiction’ albeit not under its sovereignty.<sup>26</sup> But in this respect, it merely reprised the position that had otherwise been established in cases such as *Loizidou*,<sup>27</sup> and gave little indication as to whether the Committee’s more general position regarding extraterritorial obligations was a sound one. Ultimately, its explanation for the absence of a jurisdictional clause in the Covenant – namely that the guarantees were ‘essentially territorial’<sup>28</sup> – tends to affirm the inference that extraterritorial obligations only exist in largely exceptional cases.

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<sup>19</sup> For an analysis of extraterritorial obligations in terms of the tripartite category of obligations see Coomans, *supra*, p. 7; Skogly S. & Gibney M., ‘Transnational Human Rights Obligations’, (2002) 24 *Human Rights Quarterly*, 781

<sup>20</sup> Ziegler J., ‘The Right to Food’, UN Doc. E/CN.4/2005/47.

<sup>21</sup> Williamson (USA), E/CN.4/2004/SR.51, p. 16, para. 84. Comments made in respect of draft resolution E/CN.4/2004/L.24.

<sup>22</sup> *Ibid.*

<sup>23</sup> Piedra (USA), E/CN.4/2005/SR.50, p. 17, para. 95.

<sup>24</sup> Report of Open-ended Working Group, UN Doc. E/CN.4/2005/52, para. 76 (‘The representatives of the United Kingdom, the Czech Republic, Canada, France and Portugal believed that international cooperation and assistance was an important moral obligation but not a legal entitlement, and did not interpret the Covenant to impose a legal obligation to provide development assistance or give a legal title to receive such aid.’)

<sup>25</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* [2004] ICJ Rep para. 112.

<sup>26</sup> In case of Israel’s obligations with respect to the West Bank, therefore, it suggested that ‘the territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the Occupying Power. In the exercise of the powers available to it on this basis, Israel is bound by the provisions of the International Covenant on Economic, Social and Cultural Rights.’ *Legal Consequences*, para. 112.

<sup>27</sup> *Loizidou v. Turkey*, (1995) ECHR, Preliminary Objections, Series A. No. 310, para. 57. Here, the European Court of Human Rights took the view that Turkey could be held responsible for acts of interference in the applicant’s enjoyment of her property rights in Northern Cyprus by reason of its ‘effective control’ over that territory.

<sup>28</sup> The one provision which appears to support this interpretation is article 14 of the Covenant which provides that any state party which, at the time of becoming a Party ‘has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge’ should formulate a plan for doing so.

The purpose of this chapter is not to revisit the general arguments as to what might represent the most legitimate construction of the terms of the Covenant as regards 'international' or 'extraterritorial' obligations, nor seek to articulate how sanctions may be made more 'human rights friendly'. Studies of that particular nature have been undertaken elsewhere.<sup>29</sup> Rather, the purpose is to explore the significance of the notion of territorialism (which I take to be the idea that economic, social and cultural rights should be understood exclusively in terms of a relationship between a single sovereign and its subjects within a bounded space) for the project of economic, social and cultural rights as a whole. The particular argument developed in this chapter is that a territorial conception of economic, social and cultural rights not only, and rather obviously, provides a convenient analytical space for the deployment of coercive economic measures internationally, but also, and more invidiously, puts into question the very rationale of economic, social and cultural rights. It is suggested that whilst instruments for the protection of economic, social and cultural rights (for which I take the International Covenant to be paradigmatic) are built upon the premise that they may advance or substantiate the claims of the disempowered, marginalised or deprived, precisely that 'community of the dispossessed' is excluded from being able to represent themselves as rights-claimants when their experience is located within a specific territorial framework. To put the argument in a different way, the cost of resistance to the idea of extraterritorial responsibility, is not simply an incidental one (one that may be articulated, for example, in terms of 'collateral damage', or 'necessary suffering') but rather a cost which may seriously prejudice any continued commitment to such rights.

## Part II

In the development of my argument, I want to take as my starting point, Hannah Arendt's critique of the rights of man in the Second Part of her work *The Origins of Totalitarianism*.<sup>30</sup> As Balibar has subsequently suggested,<sup>31</sup> Arendt famously inverted the terms of traditional political philosophy in two important ways. First of all, Arendt brought to the fore – in terms reminiscent of Schmitt<sup>32</sup> and, more recently, Agamben<sup>33</sup> – the place of the excluded (and specifically the stateless) in the constitution of European politics in the early 20<sup>th</sup> Century. She was to make clear that the inherited tradition of political philosophy in Europe came to be based upon, or function through, the exclusion of those who were not citizens and therefore lacked rights (those who were 'thrown back, in the midst of civilization, on their natural givenness'<sup>34</sup>), and in exposing

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<sup>29</sup> See e.g., Reinisch A., 'Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions', (2001) 95 *American Journal of International Law* 851; Joyner C., 'United Nations Sanctions after Iraq: Looking Back to Look Ahead', (2003) 4 *Chinese Journal of International Law* 329.

<sup>30</sup> Arendt H., *The Origins of Totalitarianism* (Harcourt, San Diego, 1968) pp. 267-302

<sup>31</sup> Balibar E., *We, The People of Europe? Reflections on Transnational Citizenship* (Princeton University Press, Princeton, 2004) pp. 117-8.

<sup>32</sup> Schmitt C. *Political Theology* (trans Schwab G; MIT Press, Cambridge Mass. and London, 1985). Schmitt's insight was to bring the concept of the 'exception' to the centre of political philosophy. He thus defines the sovereign as 'he who decides on the exception' (pp. 5-7).

<sup>33</sup> Agamben G., *Homo Sacer: Sovereign Power and Bare Life* (Stanford University Press, Stanford, 1995); *id.* *State of Exception* (trans. Attell K, University of Chicago Press, Chicago 2004)

<sup>34</sup> Arendt, *supra*, n. 30 above, p. 302.

the tragedy, she also exposed the fragility of the political order - particularly in terms of its capacity to resist the totalitarian urge.<sup>35</sup>

In the second place, Arendt brought to the fore the relationship between human rights and political rights: whereas originally the former were thought to be the basis for the latter (the identification of universal rights preceding their articulation in particular constitutional documents), in Arendt's view this relationship was subsequently reversed through the conflation of human rights with popular sovereignty: the enjoyment of civil rights, of membership in a community, thereafter came to be the basis for human rights (the condition under which rights might be enjoyed).<sup>36</sup> The point, however, was not, as one might be inclined to suppose, that this was a case of 'faulty transposition' or a failure in the political project of emancipation, but rather a failure that cut to the heart of the humanitarian ideal. As Arendt put it,

'the conception of human rights... based upon the assumed existence of a human being as such, broke down at the very moment when those who professed to believe in it were for the first time confronted with people who had indeed lost all other qualities and specific relationships – except that they were still human'.<sup>37</sup>

Arendt thus understood the value of being 'human' to which the idea of 'human rights' refers in a quite specific way. For her, being 'human' was not something that connoted, as Hegel might have put it, the notion of seeking and enjoying recognition within society. Rather, it was the opposite: a quality that lacked specificity or particularity, a quality of being that was neither spatially nor temporally determinate, a quality that ensued from being excluded (whether internally or externally) from community. What the quality of being 'human' lacked, above all else, was the 'right to have rights', and in that respect, the stateless were able to conceive of themselves as little more than savages awaiting civilisation.

The central feature of Arendt's critique in this respect – particularly as it has been conceived in the work of Agamben, Balibar and others - is the intrinsic relationship between the idea of human rights on the one hand and the categories of the nation-state on the other (citizenship/ sovereignty). Agamben insists, for example, that:

'it is time to stop regarding declarations of rights as proclamations of eternal, metajuridical values binding the legislator (in fact, without much success) to respect eternal ethical principles, and to begin to consider them according to their real historical function in the modern nation-state'.<sup>38</sup>

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<sup>35</sup> Arendt was fiercely critical, in that respect, of the 'liberal identification of totalitarianism with authoritarianism' (*Between Past and Future* (Faber and Faber, London 1961) p. 97) and was keen to demonstrate the conditions under which democracy may move in precisely the same direction.

<sup>36</sup> She remarks '[t]he people's sovereignty... was not proclaimed by the grace of God but in the name of Man, so that it seemed only natural that the "inalienable" rights of man would find their guarantee and become an inalienable part of the right of the people to self-government.... The whole question of human rights, therefore, was quickly and inextricably blended with the question of national emancipation; only the emancipated sovereignty of the people, of one's own people, seemed to be able to insure them.' Arendt, *supra*, n. 29 above, p. 291.

<sup>37</sup> *Ibid.*, p. 299.

<sup>38</sup> Agamben, *Homo Sacer*, *supra*, n. 32 above, p. 127.



For him, declarations of rights were the means by which ‘natural life’ was inscribed in the ‘juridico-political order of the nation-state’ and became the ‘earthly foundation of the state’s legitimacy and sovereignty’.<sup>39</sup> At the same time as sovereignty came to be based upon the assumed relationship between man and the citizen, birth and nationality, the figure of the refugee or the stateless immediately placed that ‘originary’ fiction in crisis.<sup>40</sup> For Agamben, the stateless were not merely as those who were *incidentally* excluded from the politics of the nation state, but were rather the *central referent* for Western ‘biopolitics’.<sup>41</sup> They represented, in his terms, the symbolic figure of the sacred person (*homo sacer*) whose perilous existence on the one hand recalled the juridical foundation of political society (to render secure the life of the individual within society), but whose insecurity was also, and paradoxically, produced through that legal-political order. *Homo sacer*, understood as the person who may be ‘killed yet not sacrificed’ (whose body is regarded as sacred, yet whose exclusion from the political order is such as to allow them to be killed without punishment) thus represented the personification of a constitutive paradox within Western biopolitics.

For present purposes, I am less concerned with exploring the complexities of this account of the underpinnings of sovereignty in the nation-state or the terms of the contemporary Western biopolitical order, than with developing a more simple idea, but one which is yet implicit in the work of Agamben and Arendt: that the humanitarian ideals that underpin the contemporary commitment to economic and social rights are put to the test precisely at those critical moments in which the individuals or communities who stand to be empowered, are themselves excluded from the discourse. I adopt from Arendt, therefore, the idea that it is the socially peripheral – the marginalised, dispossessed or subaltern – who stand at the centre of any concern for social rights as part of a discourse of human rights. I adopt from Agamben the idea that the exclusion of the socially peripheral from the enjoyment of rights may not only remain the cause for any continued commitment to social rights (in the sense that is their rights which are to be fulfilled), but may also be a product of the processes through which those rights have come to be legally articulated in the first place.

### Part III

In order to understand the central place of this process of inclusion/exclusion within the framework of the discourse of social rights, it is necessary to step back once again into the realm of extraterritoriality. In its most basic form, one might be inclined to take the view that the relationship between an individual and the state assuming authority over that individual is fully expressive of the content of the rights in question. Just as, it might be argued, a state’s territorial sovereignty is exclusive, so also, it must have exclusive responsibility for the fulfilment of the rights of those that come within its jurisdiction or under its control. In some ways this makes obvious sense – who else is going to take responsibility for education, housing or health care? Who else may assume obligations here? If there is a right to housing, then it surely only makes sense to say that it is opposable as against those who have the capacity to provide it. To argue otherwise, is to move beyond the sanctified boundaries of moral agency, and maintain a view which is simply utopian. Just as an ‘ought’ seems to imply a ‘can’, obligations must surely be built upon a contingent capacity.

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<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*, p.131.

<sup>41</sup> Agamben draws upon Foucault for his account of biopolitics. See Foucault M., *History of Sexuality Volume 1: An Introduction* (Random House, New York, 1978).

Of course, pushed to its extreme, asserting an inextricable nexus between capacity and obligation may be such as to render the idea of economic, social and cultural rights largely incoherent – we are all too aware of the resource limitations that affect the realisation of economic, social and cultural rights in many parts of the globe, and that prefiguring obligations by reference to any momentary capacity to fulfil them would not only undermine the conditions for their universality but would render that distribution immutable. One finds in article 2(1) of the Covenant, therefore, the idea not merely that the realisation of social rights is dependent upon available resources, but also the idea that they should be realised in a progressive manner.<sup>42</sup> The idea of progress thus brings into view, on the horizon, the possibility of universality (encapsulated in the idea of the ‘full realization’ of social rights), through the unspoken medium of a change in the global distribution of resources. It allows, thereby, a certain mediation between the idea that the contemporary global context precludes universal realisation of social rights, and the idea that there exists an immanent potential for their realisation. Progressivism, to put it in a different way, seems to be a means of negotiating in, a temporal sense, between an apologetics for destitution and a utopian fable of ‘rights enjoyment’.

This temporal separation between present and future, however, does not overcome the difficulties associated with the relationship between the imaginative ideal of rights-fulfilment on the one hand and the particular constraints that face states committed to their realisation on the other. The problem, here, arises most clearly when one seeks to articulate the terms of the relationship between rights and obligations within the Covenant. In typical Hohfeldian terms,<sup>43</sup> one might be inclined to insist that the content of all rights (including social rights) must be capable of being described in terms of correlative obligations: where there is no right there is no obligation and *vice versa*. When describing that relationship by reference to the terms of Article 2(1) of the Covenant, however, certain difficulties arise: if the obligation is to realise the rights in a progressive manner, does that render the rights themselves ‘progressive’? Might a state be capable of violating a procedural obligation (for example, in failing to establish a plan of action to implement the right to free primary education as required by Article 14) but yet not violate a substantive right?

The aporia, here, is particularly evident when one comes to speak about social rights in terms of their violation.<sup>44</sup> To illustrate the point, reference might be made to an introductory paragraph in the UN Committee’s General Comment on the Right to Water in which it made the following remark:

‘The Committee has been confronted continually with the widespread denial of the right to water in developing as well as developed countries. Over one billion persons lack access to a basic water supply, while several billion do not have access to adequate sanitation, which is the primary cause of water contamination and diseases linked to water.’<sup>45</sup>

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<sup>42</sup> The text of article 2(1) reads as follows:

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

<sup>43</sup> Hohfeld W., *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Yale University Press, Yale, 1923) ch. 1.

<sup>44</sup> For the advancement of a ‘violations approach’ to economic, social and cultural rights see Chapman A.,

<sup>45</sup> General Comment No. 15, *supra*, n.17 above, para. 1.

As a justification for concerning itself with the question of access to water when considering state reports, the Committee might be forgiven for believing that the facts spoke for themselves. But could the Committee rightly claim that lack of access to a basic water supply constituted a ‘widespread denial of the right to water’? Surely, prior to any such claim, the Committee would have had to undertake an evaluation as to whether the states concerned had sufficient resources to make such water available, and whether their efforts at distribution were adequate in the circumstances. Even if, as the Committee has maintained, states have an obligation to fulfil the ‘core content’ of rights (for which one supposes the Committee means a minimum essential level of enjoyment<sup>46</sup>) it is clear that the presence or absence of resources would still be relevant to the evaluation, and hence no categorical statement in that respect can be made merely on the facts themselves.<sup>47</sup> There is, thus, an apparent disjunction between the proclamation of rights, on the one hand, and the contingent conditions for their fulfilment on the other – a disjunction that appears may only effectively be resolved in this context either by reformulating the rights (in the sense such as the ‘right to the progressive realisation of the right to housing, education’ etc), or by conceptually separating what it means to have a right on the one hand, and what it means to have an obligation on the other.

The most obvious way of understanding this problem, however, is to think of the Committee as speaking about the rights in question in two different ways. On the one hand is the legal conception of right – one whose fulfilment or denial is determined by an exhaustive evaluation of the circumstances and conditions in which it occurs (in accordance with the terms of Article 2(1) of the Covenant). On the other hand is the idea of ‘right’ in a metajudicial, ethical, or ‘pre-legal’ sense whose referent is the metaphorical figure, or image of the starving child, the homeless family or the dispossessed community. In this latter sense, one might be encouraged to speak of a person’s rights being denied or violated by virtue of the very fact of deprivation, and quite apart from any tangible legal chain of responsibility being identified.

The key question, here, however, is what function is served by this metajudicial notion of right? What is its relationship to the legal conception of rights? Why should the UN Committee invoke that idea when seeking to articulate obligations incumbent upon states in the context of the right to water? The answer appears plain enough. Just as the idea of progress that lies at the heart of the articulation of obligations under the Covenant reaches out towards a (forever postponed) moment of ‘rights fulfilment’, so also it moves away from a dystopian understanding of contemporary society – one beset by disease, illness, malnutrition and homelessness. That dystopia, however, is not (or at least not merely) a representation of some fictional past, cast back in order to give sense to the idea of progress or as an apology for institution building, but far more importantly as an idea that forms a central feature of arguments that justify the enunciation of rights in the first place. Just as it is evident that a particular social context shaped the articulation of rights in the Universal Declaration of Human Rights (UDHR) and the two Covenants (excluding, for example, reference to minority rights or refugees, to the elderly or those with disabilities) so also an enduring and dynamic sense of injustice (the injustice of deprivation or loss of freedom), provides the continuing justification for resort to the language of human rights.

At this point it becomes apparent that, as with the stateless in Arendt’s critique, the dispossessed become both central and marginal to the account of social rights. They are

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<sup>46</sup> *Ibid.* paras. 37-8.

<sup>47</sup> For the initial elaboration of the ‘core content’ see General Comment No. 3 (1990) para. 10.

clearly central in the sense that they provide the continuing imperative for the articulation of rights claims. Without the images of suffering or dispossession with which we are constantly confronted no universal project of social rights would plausibly be maintained.<sup>48</sup> At the same time, however, the dispossessed are also evidently marginal in the sense that they are constantly one step away from being able to represent themselves as rights holders. At every moment, they are faced with the impossibility of being 'claimants' by virtue of the fact of destitution – having to precede any such claim by reference to some original enactment of ownership or by some evaluation as to the adequacy of social resources and the inadequacy of their distribution. The destitute are thus the original category of the excluded – the category whose exclusion provides the constitutional impulse for the development of institutional initiatives for the protection and promotion of social rights, and the category whose continued exclusion is lamentably its point of immanent critique. The violence of their destitution may thus be thought to be a privileged one, but also one that denies the sense of any such privilege.

In some degree this bears upon a fundamental ambivalence within the category of 'victimhood'. As Mutua has suggested, the presentation of human rights victims as a 'horde of nameless, despairing, and dispirited masses'<sup>49</sup> is such as to view them as incapable of capacity for action or initiative and to present them as objects of possible intervention. It obscures, thereby, the extent to which their capacity for action 'may be a source of residual and ongoing pleasure: the pleasure of solidarity, the pleasure of expression, the pleasure of re-imagining the world'.<sup>50</sup> The point being made here, however, is that these two different senses, or experiences, of victimhood (the passive sense of the victim as an 'object of intervention', the active sense of the victim as 'agent') are separated in the discourse of social rights. In this context the dispossessed may be identified by others (states, non-governmental organisations etc) as the reason for action, and their plight the inducement for adoption of protective or ameliorative measures, but they are prevented in the terms of the existing discourse from presenting *themselves* as victims in the sense of having any entitlement to specific claims or capacity for legal agency.

## Part IV

Thus far, I have sought to suggest that the exclusion of the dispossessed from the discourse of social rights follows from the immediate resource constraints that impinge upon the capacity of many governments to deal effectively with that dispossession, and have suggested that the discourse itself is imperilled as a consequence. I have only hinted, however, at the relationship between this narrative of dispossession and the question of territoriality, and have largely left untouched the significance of territorial borders. In the work of both Agamben and Balibar, the 'excluded' are seen to inhabit particular space – for Agamben it is the 'camp',<sup>51</sup> for Balibar the urban ghetto, the detention zone, or more broadly, and figuratively, the 'South'. Balibar, in particular, is

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<sup>48</sup> See Baxi U., 'Voices of Suffering and the Future of Human Rights', (1998) 9 *Transnational Law and Contemporary Problems* 125 at 159-162.

<sup>49</sup> Cf. Mutua M., *Human Rights: A Political and Cultural Critique* (University of Philadelphia Press, Philadelphia, 2002) pp. 28-9.

<sup>50</sup> Marks S. and Clapham A. *International Human Rights Lexicon* (Oxford University Press, Oxford, 2005) p. 404

<sup>51</sup> Agamben describes the 'camp' as 'a piece of land placed outside the normal juridical order' but which is not simply 'an external space' but which is 'included' in the juridical order 'through its own exclusion', *supra*, n. 32 above, pp. 169-70.

vexed by the apparent multi-locational nature of ‘the border’ which, when taken to describe the boundaries of the *demos* (the ‘nondemocratic condition of democracy’),<sup>52</sup> may come to be located on some occasions, in the ‘middle of political space’<sup>53</sup> and, on others, outside the limits of a state’s formal jurisdiction.

For present purposes, I am not so much concerned for the way in which borders are representative of the point at which the nature of coercive authority subtly changes character, (the point at which, as Balibar puts it ‘the status of citizens returns to the condition of a “subject”’<sup>54</sup>) but their role in excluding the dispossessed from being able to represent themselves, as such, in the language of social rights. The conditions described above that underpin the inability of the dispossessed to speak of the violation of their rights are, in the main, a function of a territorial framework that ultimately encourages an association of poverty with the inadequacy, and/or mismanagement, of national resources. When located within an exclusively national context, poverty and dispossession tend to be seen as local problems - problems associated with ‘lack of development’, economic mismanagement, corruption, or lack of knowledge or expertise – for which aid, development assistance, or other forms of international intervention may act as suitable palliatives. In some respects, and as is emphasised in the work of Sen amongst others, questions of governance and the mechanics of local distribution will frequently be critical to an individual’s enjoyment of access to food, housing, water and other rights and freedoms.<sup>55</sup> At the same time, however, the presentation of the problem in this way not only obscures the broader international context in which those problems are socially produced, but would also mean that the dispossessed would constantly be faced by the economic incapacity of their national governments, and hence only ever able to represent themselves as potential claimants or aspirational rights-holders.

If the key condition that prevents the dispossessed from representing themselves as ‘rights claimants’ is the problem of resource scarcity, then one way of avoiding that exclusionary framework is by broadening the horizons of the engagement. It has long been fairly clear, that problems of dispossession (poverty, malnutrition etc) are not exclusively local – that they also implicate questions of trade, debt, or investment that may be configured within or through the international environment. This much at least, was the insight of those proponents of the New International Economic Order and the Right to Development<sup>56</sup> even if those projects are no longer the focus of sustained attention. The importance of this emphasis upon the international environment, however, is found in the way it shifts the emphasis away from the problem of scarcity, and places greater importance instead upon the question of distribution. The issue becomes, in other words, less a matter as to whether a particular government may have at its command, sufficient resources to ‘lift’ the dispossessed out of poverty, and rather more a matter of understanding the various, and multiple, ways in which both the local and international environment may condition an individual’s access to the necessary resources for their survival, well-being and active social agency.<sup>57</sup> If that is the starting point, one may then think about resources on a global scale being available but unevenly

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<sup>52</sup> Balibar, *supra*, n. 30 above, p. 109.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> Sen emphasises, here, the significance of ‘capabilities’ in the conception of development. See e.g., Sen A., *Development as Freedom* (Oxford University Press, Oxford, 1999) pp. 3-5.

<sup>56</sup> For an insightful discussion see Orford A., ‘Globalisation and the Right to Development’, in Alston P. (ed) *Peoples’ Rights* (Oxford University Press, Oxford, 2001) 127.

<sup>57</sup> For an investigation into the disconnect between local poverty and global wealth see Pogge T., *World Poverty and Human Rights* (Publisher, Place of Publication, 2002)

distributed, and thereby allow the dispossessed to speak of themselves literally in those terms - as having been *dis-possessed* of their rights rather than awaiting their conferral.

An insistence upon the importance of the global context for an understanding of social rights is not, ultimately, a polemical rejection of local responsibility for problems of distribution or lack of access to resources or the means to ensure basic subsistence, nor an attempt to insist that the only response may be to hold accountable international actors (international financial institutions, multinational corporations, foreign governments) for the crises that affect millions around the globe. Rather, and more simply, it is to observe that the conditions for legitimising the discourse of social rights necessarily involve placing the issues of poverty, disease or malnutrition within a global, rather than a local framework, so as to make possible the idea that the dispossessed are legitimate agents, capable of articulating meaningful claims on their own behalf. Without this, it is hard to avoid Arendt's conclusion that being 'human' for purposes of human rights, is to mean little other than being the object of an exclusionary politics.

## **Part V**

In the course of this chapter I have suggested that, insofar as the debates concerning the question of extraterritorial obligations seem to suppose that one can readily demarcate between different realms of rights and responsibilities in the field of social rights (the internal/ external, the national / international), these configurations ultimately put in jeopardy any continued commitment to the discourse. One response, of course, may be to suggest that the discourse itself is inherently problematic – that it attempts to depoliticise inherently 'political' struggles over the form or structure of public projects, over distribution of resources within a given society, or over the legitimacy of different kinds of social arrangements. Framing such struggles in terms of individual rights, it might be argued, does little to advance the cause of those who are dispossessed (insofar as it fails to understand the issues as being social rather than strictly individual) and may ultimately be the cause of further dispossession (through the shifting of social resources away from other vulnerable groups or individuals). At the same time, it is important to recognize that arguments advancing the idea that social rights 'depoliticise' issues of social contestation don't go very far if they merely entail a call for such issues to be dealt with through existing political procedures rather than through judicial intervention, or if they are seen to emphasise the obvious fact that the values in question are themselves opaque. Both of these might, in turn, be regarded as 'depoliticising' moves if their sense is such as to merely re-affirm the ongoing marginalisation of those who do not have access to social resources and whose voices are not heard within the current political order; and if one is looking towards the elaboration of a new brand of politics, then talking about social rights as a way of allowing the dispossessed to express their sense of injustice, or otherwise become active social and political agents, may not be quite so out of place.

Another objection, of course, is that even if one may recognise the significance of the international context for purposes of maintaining a commitment to social rights, this is still confronted by the idea of sovereignty. How might a state retain a simultaneous commitment to the idea that it has a domestic political constituency to which it is responsible, with the notion that it also has responsibility for the lives and livelihood for those living beyond its borders? As both Agamben and Balibar intimate, it is the inextricable relationship between the idea of sovereignty on the one hand and human rights on the other, that makes the elaboration of a non-exclusionary, 'humane', political

project peculiarly difficult. Jameson echoes this observation in a somewhat different way in his discussion of the idea of a ‘utopia of full employment’:

‘As the economic apologists for the system today have tirelessly instructed us, capitalism cannot flourish under full employment; it requires a reserve army of the unemployed in order to function and to avoid inflation. That first monkey-wrench of full employment would then be compounded by the universality of the requirement, inasmuch as capitalism also requires a frontier, and perpetual expansion, in order to sustain its inner dynamic. But at this point the utopianism of the demand becomes circular, for it is also clear, not only that the establishment of full employment would transform the system, but also that the system would have to be already transformed, in advance, in order for full employment to be established’.<sup>58</sup>

Just as, for Jameson, the social potential of the idea of full employment is dependent upon a prior transformation of the system that it seeks to transform, so also the idea of social rights might seem dependent upon the prior reconfiguration of the idea of sovereign competence in relation to resource distribution that it seeks to bring into effect. Jameson, however, is nonetheless clear as to the significance of the utopia he propounds, and his observations are equally pertinent for the project of social rights in general, as they are for the specific idea of full employment:

‘To foreground full employment [social rights] in this way, as the fundamental utopian requirement, allows us, indeed, to return to concrete circumstances and situations, to read their dark spots and pathological dimensions as so many symptoms and effects of this particular root of all evil identified as unemployment [dispossession].... At this point, then, utopian circularity becomes both a political vision and programme, and a critical and diagnostic instrument.’<sup>59</sup>

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<sup>58</sup> *Supra*, n. 1, p.

<sup>59</sup> *Ibid.* (Words in parentheses added).