

Krista Nadakavukaren Schefer (ed.). *Poverty and the International Economic Legal System: Duties to the World's Poor*. Cambridge: Cambridge University Press, 2013. Pp. 453. £84.99. ISBN: 9781107032743.

Poverty and the International Economic Legal System is an edited collection of essays arising out of a conference held at the University of Basel in October 2011 with the intention of establishing a research agenda on the specific and previously under-explored relationship between poverty and international laws of trade, investment and finance. The book is divided into four parts. Following a brief introductory section in Part 1, contributions in Part 2 examine how the international laws of trade, investment, arbitration and finance impact on states' abilities to fulfil their duty to reduce poverty. Adopting a capabilities approach, Part 3 addresses the effects of international economic law on populations that are particularly susceptible to poverty or its effects, and, in Part 4, contributors take a step back to consider the key question underpinning the book – that is, whether states actually have duties to reduce poverty and, if so, what the character of such duties is. Given the breadth of the material considered, this review will focus on Parts 2 and 4.

Part 2 forms the bulk of the text and is split into three sections relating to the relationship between poverty and (i) trade; (ii) investment and commercial arbitration and (iii) international financial regulation. This review will explore each in turn.

A number of common themes emerge from the contributions to the first section of Part 2 on poverty and trade. The first theme considers the assertion, which is often advanced by proponents of trade, that trade liberalization is positively correlated to the reduction of poverty. For example, Bryan Mercurio reviews economic evidence to establish the relationship between trade and poverty, demonstrating that trade liberalization is necessary for economic growth and economic growth is necessary for poverty reduction. Similarly, Pasha Hsieh examines the internal and external free trade agreements (FTA) entered into by the Association of Southeast Asian Nations (ASEAN) and finds that the free trade regime development positively complements the bloc's poverty reduction, evidencing the positive impacts of trade liberalization on poverty reduction.

The second theme expands on the first by arguing that trade liberalization alone is not, or may not be, sufficient to help reduce poverty. Complementary steps are essential, whether they are international or domestic. With respect to the former, Gabrielle Marceau explains that a solution to global poverty requires a large package of measures, supported by international institutional coordination and coherence. With respect to the latter, Marceau states that developing countries must institute governance reforms providing for redistribution at the domestic level. Thomas Cottier agrees, highlighting the dialectical relationship between trade and welfare policies and the requirement of a safety net allowing for the adjustment of domestic redistribution and poverty alleviation. Mercurio stresses the importance of a sound legal and regulatory framework; a system of property rights; efficient and effective bureaucracy and institutions; the rule of law and minimal levels of corruption to produce conditions favourable for growth and poverty reduction.

There are also calls for specific changes to trade rules to manage poverty impacts. Christian Häberli, in an immensely readable chapter, considers the interface between the international human rights commitment of states and multilateral trade and investment rules with a bearing on hunger. He suggests that a specific package of coordinated measures could be implemented within the World Trade Organization and investment regimes to assist with extreme cases of food insecurity caused by the presently legal trade distortions. These suggested measures stress the importance of taking food security more seriously within trade and investment rules and include: (i) making the November 2011 G20 decision to exempt food aid supplies from export restrictions mandatory and (ii) including three types of food security-enhancing commitments (mandatory and quantified Aid for Trade, a formal commitment not to decrease food aid when

global food prices increase and the securance of non-reciprocal trade preferences for countries whose food security depends on their exports) in a 'Doha Final Act'. Emmanuel Laryea argues in favour of the implementation of paperless international trade offering developing countries the potential for development and poverty alleviation, and, on a regional level, Hsieh specifically identifies the need for improvements to the ASEAN Economic Community's legal framework in services liberalization as well as the requirement that ASEAN collectively pursue FTAs without hindering integration and poverty alleviation initiatives.

The second section of Part 2 covers investment and commercial arbitration. There are fewer common themes that can be identified within this section, reflecting the broad variety of topics covered and the different analytical frameworks adopted. However, as a starting point, Christopher Kee and Mariel Dimsey, in their respective contributions, consider whether and where poverty concerns can arise, or be addressed, within the process of commercial arbitration and investment arbitration.

Kee finds that none of the parties involved in commercial arbitration have an obvious interest in championing poverty. However, he concludes that poverty concerns could possibly be raised as applicable law during an arbitration. This could occur where the parties have included express obligations regarding poverty in the arbitration agreement or where ethical standards have otherwise been incorporated into sales contracts.¹ However, Kee concludes that unless a party raises this kind of argument it is unlikely that arbitrators will turn into 'champions of the poverty cause'. As an alternative, Kee finds that poverty concerns could potentially be addressed in the context of enforcement.² For Dimsey, reflecting the view that foreign direct investment (FDI) is an instrument for reducing poverty, each stakeholder she identifies (bilateral investment treaties, states, claimant investors, tribunals, and *amici curia*) has a role to play in raising and addressing poverty concerns.

Stephan Wilske and Willa Obel undertake a technical analysis of the effects on poverty of the 'corruption objection'. This objection, invoked by states, asserts that an investment tribunal should not accept jurisdiction in relation to a claim arising out of a contract or investment that was obtained by, or is associated with, corruption. Wilske and Obel demonstrate that accepting the 'corruption objection' may affect poverty in two ways. First, by discouraging future FDI and, second, by refusing to accept corruption as solely the responsibility of the investor, tribunals have the potential to motivate states to focus on legally formed and operated investments instead of on fraudulent and exploitative deals.

The importance of arbitration costs for poverty is also highlighted. Kee states that policy makers should be aware of the significance of commercial arbitration for impoverished individuals (and stresses the popularity of the United Nations Commission on International Trade Law's rules in relation to small value disputes in Africa). Brooks Daly and Sarah Melikian consider how the costs of international arbitration may act as a barrier to parties with limited financial resources, including states. Exploring ways of increasing access to international arbitration by reducing costs to the parties, they stress the importance of legal aid for international arbitration.

The remaining contributions are varied. Markus Krajewski argues that states and organizations offering investment guarantees are bound by human rights and obliged to: (i) support

¹ And Kee examines earlier work by Schwenzer and Leisinger, which considers the Convention on Contracts for the International Sale of Goods 1980, 1489 UNTS 3 and the UN Global Compact, available at www.unglobalcompact.org/ (last visited 30 January 2015). See I. Schwenzer and B. Leisinger, 'Ethical Values and International Sales Contracts' in B. Leisinger and M. Probst (eds), *Human Security and Business* (2007) 124–128.

² For example, as part of the 'public policy' exception to enforcement set out in the United Nations Commission on International Trade Law's Model Law on International Commercial Arbitration 1985, 24 ILM 1302 (1985) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1968, 7 ILM 1046 (1968).

foreign investment that helps to reduce poverty and (2) refuse guarantees to projects that would contribute or increase the risk to poverty. Mariana Hernandez Crespo's chapter focuses on the need to go beyond investor–state disputes to integrate civil society, investors and state at the local level. She argues that the structure of arbitration makes the voice of the poor inadequately heard and that the marginalized need to become protagonists in decision making. Finally, Stuart Kerr contributes a short piece on the Millennium Challenge Corporation, a US government institute designed to relieve poverty through investment projects – perhaps representing a new form of investment potential to reduce poverty.

Section 3 of Part 2 considers international financial regulations and poverty. Gavin Bingham's introduction presents the first theme that recurs in this section: that most of the impact of international financial organizations on poverty arises from the efforts of such organizations to influence policies and structures in national jurisdictions. This impact is particularly apparent in studies relating to the International Monetary Fund (IMF) and the World Bank. For example, Ross Buckley critically demonstrates how the IMF has directly worsened global poverty in the last 30 years through the analytical framework and perspective it has brought to its role in developing countries. Ben Thirkell-White highlights how the IMF's mandate places the burden of poverty reduction on poor countries, leaving the international environment in which they operate largely unchanged. And Mark Ellis finds that the World Bank's embrace of the Washington Consensus (and its introduction of conditionality based on the Washington Consensus) has had a largely negative effect on the poor.

In any study of poverty within the international financial system, a consideration of debt is also crucial. Buckley is critical of the socialization of private sector debt that the IMF has orchestrated (or been complicit in), which has directly contributed to poverty. Celine Tan considers sovereign debt within a wider normative context of global redistributive justice, global public goods and human rights. She argues that the limitations of the contemporary debt regime stem from its underlying conceptual approach to debt relief – a palliative approach rather than an approach incorporating a systematic and sustained view of the root causes of such indebtedness. Yvonne Wong considers odious debt and argues for an international framework that balances the interests of debtors and creditors; takes into account creditor co-responsibility in the build up of unsustainable debt and allows countries to remove odious debt from their balance sheets without jeopardizing their global reputations and future access to capital.

Part 4 returns to the original assumption underpinning the scholarship in the book, namely that states have obligations to reduce world poverty. This is a crucial assumption that raises two key questions: (i) is there a duty on states to reduce poverty (and, if so, is this duty legal?) and (ii) what is the geographical scope of this duty – that is, do states owe duties to persons not within their jurisdiction? The assumption is first introduced by the editor, Krista Nadakavukaren Schefer, in her brief introduction to the book. Nadakavukaren Schefer argues that it is easy to establish an ethical or moral duty to actively help persons in need of assistance. However, from a legal standpoint, the duty is less clear. For Nadakavukaren Schefer, international law on poverty is firmly grounded in principles of human rights. Although there is no 'right to be free from poverty', she stresses the relevance of the right to adequate food and water; the right to health; the right to adequate housing and the right to education, which are all contained within the International Covenant on Economic Social and Cultural Rights (ICESCR),³ as particularly potent to the reduction of poverty. However, this does not answer the question whether these rights impose corresponding duties on states to the world's poor.

Häberli, Dimsey, Krajewski and Tan, in Part 2, also analyse human rights as foundations for state duties to the world's poor. However, generally these contributions highlight the difficulties inherent in adopting a human rights framework in this context. Particularly difficult to resolve is

³ International Covenant on Economic Social and Cultural Rights 1966, 993 UNTS 3.

the geographical extent of a state's duty to reduce or counter poverty. This question is addressed through an analysis of the requirements within human rights law of international cooperation and extraterritoriality. However, it is clear that both are difficult, if not currently impossible, to justify as legal concepts.

Tan and Krajewski both stress the requirement of collective action contained within Article 2(1) of the ICESCR, which requires states, as Tan remarks, to 'take steps individually and *through international assistance and co-operation*, ... with a view to achieving progressively the full realisation of the rights in the present covenant' (at 310, emphasis in original). According to Tan, this requirement, together with the Declaration on the Right to Development,⁴ imposes an international duty on states to undertake collective action to uphold economic, social and cultural rights. Krajewski agrees that Article 2(1) of the ICESCR implies that states must cooperate and assist each other, particularly in poorer countries to achieve the realization of these rights. However, neither contribution considers what is meant and practically required by the requirement of 'international assistance and co-operation', which is not a legally precise term, or what the implications of this clause are – that is, does the requirement of 'international assistance and co-operation' actually impose a positive duty? If this is correct, how is the duty bearer identified and what about enforceability?

Extraterritoriality is even harder to establish, although Krajewski constructs an argument based on extraterritoriality to justify taking the world's poor into consideration when considering whether an investment should fall under the protection of an investment guarantee scheme.⁵ Nadakavukaren Schefer argues from a theoretical standpoint that a cosmopolitan view is emerging within international law supporting the global validity of individual legal rights and a corresponding duty on states to ensure the protection of such rights extraterritorially. However, she recognizes that there is nothing, within the law, to support this assertion or to impose duties on states.

It is against this context that the contributions in Part 4 specifically analyse human rights – as moral imperatives and/or legal obligations – as a framework against which state duties are owed to the world's poor. Monica Hakimi considers a state's obligation to 'protect' under human rights doctrine within the context of the emerging 'responsibility-to-protect' concept.⁶ She determines that the framework of obligations to protect and the emerging doctrine of 'state bystander responsibility' inform state duties to protect the poor from third party harm extraterritorially. However, she finds strict limits on legal extraterritorial duties, demonstrating that states: (i) only have legal extraterritorial obligations to 'protect' when they are in a special kind of relationship with the abuser and/or (ii) must 'protect' the poor only from certain kinds of harm.

Samantha Besson considers the supply side of human rights on a moral basis. She sees institutions as primary human rights duty bearers, with individuals as residual human rights duty bearers. However, she highlights the disparity between responsibilities and duties within human rights, concluding that this distinction has consequences for how human rights duties are conceived under international law and how duty bearers are identified. For Besson, the 'responsibility-to-protect' concept compares with the concept of responsibility within human rights (rather than imposing a duty). This distinction is important. Besson states that human right responsibilities are not owed to a specific right-holder by a specific duty bearer and do not have a specific content. Rather, they are abstract moral requirements that are part of international

⁴ Declaration on the Right to Development, UNGA Res. A/RES/41/128, 4 December 1986.

⁵ Relying in particular on the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, 2011, available at www.ciel.org/Publications/Maastricht_ETO_Principles_21Oct11.pdf (last visited 21 December 2014).

⁶ See International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect', 2001, available at responsibilitytoprotect.org/ICISS%20Report.pdf (last visited 21 December 2014).

responsibilities for global justice, whose extent and reasonable distribution among potential bearers are still indeterminate and subject to judgment.

Besson therefore posits that to find specific ways of alleviating world poverty, moral resources, other than human rights, and legal instruments, other than international human rights law, need to be focused on. Stephanie Leinhardt and Nadakavukaren Schefer agree. They stress that there is a lack of institutions upon which the international community has agreed to be the designated bearer of poverty-reduction duties. Without such an agreement, the international community's interest in reducing poverty remains a moral responsibility rather than a legal duty.

Therefore, perhaps a human rights framework is not the panacea for the establishment of duties relating to poverty alleviation. Accordingly, it is appropriate to highlight that alternative potential justifications for the imposition of duties to the world's poor are explored in this book. For example, Häberli investigates theological underpinnings; the principle of self-determination is relied on by Laryea; global justice is a recurring theme (see, in particular, Tan and Thirkell-White) and wider themes of redistribution (Cottier) as well as the law of state responsibility (Krajewski) are considered. Other contributors implicitly link the aims and ambitions of international economic law to poverty reduction, arguably equating the duties inherent in international economic law with the duties to reduce or alleviate poverty and thereby positing international economic law as the source of duties to the world's poor. This is an interesting approach deserving of further scholarship.

In summary, there are many themes running through this book, and a plethora of questions are raised. This important book demonstrates that, at the very least, there are difficulties remaining from a legal – and, of course, practical – standpoint in using a human rights framework to establish international or extraterritorial state duties for the world's poor. These difficulties are attributed in this book to the Westphalian underpinnings of the current international law system of nation states as well as to the problems identifying duty bearers within the current legal framework of human rights. While human rights considerations remain an important weapon in the fight against poverty, and will, no doubt, adapt in relation to movements recognizing transnational norms and obligations, this book interestingly also implies the possibility of using other legal norms – for example, international economic law – as tools to achieve morally recognized or accepted goals such as poverty reduction. This book is therefore a valuable read on a number of levels, encompassing a variety of content, which should encourage further research not only in relation to extending human rights doctrine on a transnational basis but also in relation to the development and use of other legal mechanisms to alleviate poverty.

Individual Contributions

Krista Nadakavukaren Schefer, Preface;

Krista Nadakavukaren Schefer, Poverty, Obligations and the International Economic Legal System: What Are Our Duties to the Global Poor?;

Colin Picker, Anti-poverty v. the International Economic Legal Order? A Legal Cultural Critique;

Gabrielle Marceau, Introductory Note: Trade and Poverty;

Thomas Cottier, Poverty, Redistribution, and International Trade Regulation;

Bryan Mercurio, Trade Liberalization and Poverty Reduction: Complimentary or Contradictory Aims?;

Christian Häberli, God, the WTO – and Hunger;

Pasha Hsieh, Does Free Trade Matter for Poverty Reduction? The Case of ASEAN;

Emmanuel T. Laryea, Poverty Alleviation through Paperless Trade;

J.J. Gass, Introductory Note: Arbitration, Insurance, Investment, Corruption and Poverty;

Christopher Kee, International Commercial Arbitration and Poverty, Not Obvious, but (Maybe) Possible;

Mariel Dimsey, Foreign Direct Investment and the Alleviation of Poverty: Is Investment Arbitration Falling Short of Its Goals?;

Stephan Wilske and Willa Obel, The ‘Corruption Objection’ to Jurisdiction in Investment Arbitration: Does It Really Protect the Poor?;

Markus Krajewski, Investment Guarantees and International Obligations to Reduce Poverty: A Human Rights Perspective;

Brooks W. Daly and Sarah Melikian, Access to Justice in Dispute Resolution: Financial Assistance in International Arbitration;

Mariana Hernandez Crespo, From Problem to Potential: The Need to Go beyond Investor-State Disputes and Integrate Civil Society, Investors and the State at the Local Level;

Stuart Kerr, The Millenium Challenge Corporation, Law, and Poverty Reduction;

Gavin Bingham, Introductory Note: Reflections on Law and Poverty;

Ben Thirkell-White, Ambitious Goals, Limited Tools? The IMF and Poverty Reduction;

Ross P. Buckley, The Direct Contribution of the International Financial System to Global Poverty;

Mark S. Ellis, The World Bank: Fighting Poverty – Ideology versus Accountability;

Celine Tan, Life, Debt, and Human Rights: Contextualizing the International Regime for Sovereign Debt Relief;

Yvonne Wong, Sovereign Debt, Odious Debt, and the Poverty of Nations;

Mark Pieth, Poverty and Corruption;

Barnali Choudhury, International Economic Law, Women and Poverty;

Caroline Hess-Klein, The Book Famine: International Copyright Rules as Barriers to Knowledge for Impoverished Persons with Disabilities;

Aline Doussin, Caring for Its Children: How the European Union Uses Free Movement Law to Tackle Child Poverty and Social Exclusion;

Stephanie B. Leinhardt and Krista Nadakavukaren Schefer, Positive or Negative, Legal or Moral, What Duties to Reduce Poverty?;

Monika Hakimi, Human Rights Obligations to the Poor;

Samantha Besson, The Allocation of Anti-Poverty Rights Duties: Our Rights, but Whose Duties?;

Krista Nadakavukaren Schefer, Epilogue

Elaine Kellman

PhD candidate, Dickson Poon School of Law, King’s College London

Email: elaine.kellman@kcl.ac.uk

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