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Challenging Territoriality in Human Rights Law

Building Blocks for a Plural and Diverse Duty-Bearer Regime

Edited by
Wouter Vandenhole

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Challenging Territoriality in Human Rights Law

Human rights have traditionally been framed in a vertical perspective with the duties of States confined to their own citizens or residents. Interpretations of international human rights treaties tend either to ignore or downplay obligations beyond this 'territorial space'. This edited volume challenges the territorial bias of mainstream human rights law. It argues that with increased globalisation and the impact of international corporations, organisations and non-State actors, human rights law will become less relevant if it fails to adapt to changing realities in which States are no longer the only leading actor.

Bringing together leading scholars in the field, the book explores potential applications of international human rights law in a multi-duty-bearer setting. The first part of the book examines the current state of the human rights obligations of foreign States, corporations and international financial institutions, looking in particular at the ways in which they address questions of attribution and distribution of obligations and responsibility. The second part is geared towards the identification of common principles that may underpin a human rights legal regime that incorporates obligations of foreign States as well as of non-State actors.

As a marker of important progress in understanding what lies ahead for integrating foreign States and non-State actors in the human rights duty-bearer regime, this book will be of great interest to scholars and practitioners of international human rights law, public international law and international relations.

Wouter Vandenhole holds the UNICEF Chair in Children's Rights – a joint venture of the University of Antwerp and UNICEF Belgium – at the Faculty of Law of the University of Antwerp (Belgium). He is the spokesperson of the Law and Development Research Group and chairs the European Research Networking Programme GLOTHRO. He has published widely on economic, social and cultural rights, children's rights and transnational human rights obligations and is a founding member of the Flemish Children's Rights Knowledge Centre and co-convener of the advanced summer course on human rights for development (HR4DEV).

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Preface

When we first started our collaborative work which has led to this volume, extraterritorial human rights obligations were quite peripheral or unarticulated in human rights scholarship. Ten years down the line, the issue may appear more topical than ever. It has been expanded beyond obligations of States to also cover non-State actors, and it is increasingly seriously addressed in mainstream scholarship.

The Research Networking Programme, *Beyond Territoriality – Globalisation and Transnational Human Rights Obligations (GLOTHRO)*, has sought to deepen the understanding of human rights obligations of foreign States, ie States other than the territorial ones, and to examine the legal implications of the expansion of the realm of human rights duty-bearers beyond the State. During its life as a European Science Foundation programme, GLOTHRO organised two major conferences, no less than ten workshops, a highly successful doctoral school, provided exchange grants to young scholars, and has produced a whole line of agenda-setting publications with leading publishers. In addition, it reached out to the non-academic community, both non-governmental and governmental actors, to engage in the debate.

Beyond activities and outputs, the legacy of GLOTHRO is first and foremost that it has built a European interdisciplinary research community of junior and senior scholars. The research community on transnational human rights obligations also extends far beyond Europe to include scholars from the US, Australia, India, Kenya, South Africa and Uganda, and many other countries. This relatively small but vibrant research community will now have the task of taking the research agenda forward. That is already happening, in particular by junior researchers who study specific cases of settings in which transnational human rights questions arise, in areas such as diplomacy, digital communication and armed conflict.

Substantively, the understanding of *extraterritorial human rights obligations* has increased rather dramatically during GLOTHRO's life-span. Thanks to the commitment of the ETO (Extra-Territorial Obligations) Consortium, a wide network of human rights related civil society organisations and academics, in September 2011 the Maastricht Principles on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights (the Maastricht Principles)

were adopted by 40 academic, NGO and practitioner experts. The Maastricht Principles are today the main point of reference in any debate on extraterritorial human rights obligations in the area of economic, social and cultural rights.

The increased attention over the last 15 years or so to the human rights obligations of other States than the territorial one is a discourse loaded with two foundational paradoxes. First, the position that human rights would be primarily or exclusively territorial in nature does not reflect the historical emergence of human rights as a concept of international law. Traditionally, a State could hold foreign States to account for how they treated its nationals but was not supposed to interfere in what those other States did with their own nationals. This was the paradigm of 'diplomatic protection' where a State was acknowledged as having a legitimate interest in protecting the rights of its own nationals, wherever situated. In the League of Nations era between the two World Wars, States were keeping an eye on each other as to how a foreign State treated 'national minorities' living within its borders, ie groups that had a historical, linguistic or other tie with another, often neighbouring State. Finally, the atrocities of the Nazis and of World War Two triggered the breakthrough of the concept of human rights in the United Nations Charter (1945) and the Universal Declaration of Human Rights (1948). The revolutionary significance of this step was that other States and the international community as a whole were finally acknowledged as having a legitimate interest in how a State treats its own nationals within its own territory. Previously, this would have been seen as an improper interference in the internal affairs of a sovereign State. The underlying idea was to fill a gap, not to create a regime of exclusivity. It is a sad paradox of history that the traditionally weak role that international law has had in shielding individuals against violence and oppression from their own State is now being used to deny exactly the same protection to any others than those who happen to live within the territory of a State.

It is true that some of the main human rights treaties that deal with civil and political rights – namely the UN Covenant on Civil and Political Rights and the European Convention on Human Rights – came to use the notion of 'jurisdiction' together with the word 'everyone' in pronouncing the central obligation of a State to respect and protect human rights. The consistent practice, since the very first Uruguayan cases of the early 1980s, of the Human Rights Committee acting under the first-mentioned treaty demonstrates that there is no conceptual difficulty in including extraterritorial acts of a State under that central obligation. Sadly, after the atrocious terrorist attacks of 11 September 2001 and the resulting global hunt for suspected terrorists, certain States, primarily the US and the UK, launched an articulated doctrinal attack against the idea of civil and political rights having also extraterritorial reach whenever a State violates those rights elsewhere than within its own borders. Those positions of blanket denial and the degree of understanding initially shown to them by the ECtHR in the *Bankovic* case should today be seen as a

temporary overreaction which is gradually being replaced by acknowledging that a State must not do overseas what would be a human rights violation at home. This move is reflected in subsequent cases also by the ECtHR and recent statements by the US before the UN Committee Against Torture.

The second paradox is that even if treaties on economic social and cultural rights, such as the UN Covenant on those rights, do *not* contain a clause referring to the territory or jurisdiction of a ratifying State as in any way defining the scope of its human rights obligations but, rather, contain explicit clauses that pronounce an obligation of international cooperation, the denial of extraterritorial obligations has all too easily been extended from civil and political rights to State obligations in respect of economic, social and cultural rights.

Having started its work with a focus on States, in its second phase GLOTHRO broadened its work to include non-State actors. Five trajectories were initiated in parallel in order to strengthen progress in the understanding of transnational human rights obligations. They engaged with other disciplines and dealt with transversal themes of global justice, common interest, and law enforcement and migration control, and with two focal types of non-State actors (companies and international financial institutions). In particular but not unexpectedly, the work on human rights obligations of non-State actors proved more challenging. First, the whole idea of non-State actors having human rights obligations triggers hesitations of a conceptual nature. The expansion of the duty-bearer side of human rights law challenges quite fundamentally the basic design of human rights law, with its traditionally exclusive focus on the State and the vertical relationship between the omnipotent State and its 'subject', the individual. Other reasons for hesitation balance between pragmatism (the topic is politically not yet ripe) and strategic considerations (other avenues than or alongside human rights law may be more effective in achieving accountability of non-State actors). As this edited volume demonstrates, important progress has been made, not in the least in understanding much better the key questions and issues that lie ahead of us if we want to integrate foreign States and non-State actors fully in the human rights duty-bearer regime.

Gradually but surely, we may have moved from the debate *whether* or not foreign States and non-State actors have human rights obligations – or at least responsibilities – to questions on the substantive content and limits of their duties, the ways in which responsibility for human rights violations may be adequately attributed to a whole range of actors, and the mechanisms through which accountability may be established.

Second, reality necessitates us to look at the role of other actors than the domestic State in human rights realisation. Opening up the duty-bearer side of human rights law certainly holds new prospects for victims of human rights violations: it may allow them to direct complaints against other actors than their own State. Then, the question arises about where and under what legal framework those complaints are formulated: they may be international human rights claims in substance but raised before domestic courts under those legal

frameworks that happen to be available there, including by arguing that some measures by private actors that result in the denial or destruction of human rights amount to *crimes* deserving penalties, or to *civil wrongs* that give rise to a compensation claim. The more duty-bearers there are, the more complex it may also become for victims to obtain redress. Therefore, the question whether actual victories towards the realisation of human rights are primarily reached through focusing on identifying new human rights duty-bearers, or through insisting on implementing and strengthening the human rights obligations of States is worth being raised from time to time. For the latter, legally binding international treaties and treaty-based mechanisms before regional human rights courts or other independent bodies already exist and can be used to transform recognised human rights into reality. For other actors, a matter of high priority is what mechanisms are available or can be created, in particular on the international level, for addressing substantive human rights claims in respect of, for instance, international organisations, such as international financial institutions, and transnational corporations.

In sum, GLOTHRO has undoubtedly taken the research agenda forward, but the work is not, and never will be, finished: old and new fundamental questions merit further scrutiny.

We would like to thank all colleagues who have contributed to the successes of GLOTHRO, in particular all Steering Committee members, those colleagues who have organised a GLOTHRO event, and all scholars who have intellectually contributed to our work. A special word of thanks goes to Arne Vandenbogaerde, who has skilfully and with enthusiasm assisted in the coordination of the programme.

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List of Abbreviations

AEDPA	Antiterrorism and Effective Death Penalty Act
ASR	Articles on State Responsibility
ATS	Alien Tort Statute
BWIs	Bretton Woods Institutions
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CAT Committee	Committee Against Torture
CDP	Committee for Development Policy
CESCR	Committee on Economic, Social and Cultural Rights
CEO	Chief Executive Officer
CP	Civil and Political
DARIO	Draft Articles on the Responsibility of International Organizations
DfID	Department for International Development
EBA	Everything But Arms
EC	European Communities
ECHR	European Convention on Human Rights
ECOSOC	Economic and Social Council
ECtHR	European Court of Human Rights
EMEP	European Monitoring and Evaluation Programme
ESC	Economic, Social and Cultural
ETOs	Extra-Territorial Obligations
EU	European Union
FSIA	Foreign Sovereign Immunity Act
GATT	General Agreement on Tariffs and Trade
HIV/AIDS	Human Immunodeficiency Virus infection/Acquired Immune Deficiency Syndrome
HRCommission	Human Rights Commission
GNI	Gross National Income
IBRD	International Bank for Reconstruction and Development
ICESCR	International Covenant on Economic, Social and Cultural Rights

ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDA	International Development Association
IFI	International Financial Institution
IGO	Inter-Governmental Organisation
IL	International Law
ILC	International Law Commission
ILO	International Labour Organization
IMF	International Monetary Fund
IACtHR	Inter-American Court of Human Rights
LRTAP Convention	Convention on Long-range Transboundary Air Pollution
MDB	multilateral development bank
MNC	multi-national corporation
MSI	Multi-stakeholder initiatives
NCP	National Contact Point
NGO	Non-governmental organization
NSAs	non-State actors
OECD	Organisation for Economic Co-operation and Development
OECD-DAC	Development Assistance Committee of the Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner on Human Rights
OP	Optional Protocol
SCFAIT	Standing Committee on Foreign Affairs and International Trade
TNC	Transnational Corporation
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNGPs	UN Guiding Principles on Business and Human Rights
UNCTAD	United Nations Conference on Trade and Development
UN-OHRLLS	UN Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and the Small Island Developing States
US	United States
VCLT	Vienna Convention on the Law of Treaties
VDPA	Vienna Declaration and Programme of Action