Overview

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Introduction

An Emerging Field

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1. BEYOND WESTPHALIA

Human rights are often framed within a territorial perspective. The phrase can easily conjure up images of citizens struggling for their rights with their own governments rather than with distant foreign governments. The idea of human rights gained prominence in the wake of the establishment of a Westphalian world order of 1648, with territorially distinct States exercising sovereignty within their geographical borders. This territorial ordering has shaped the trajectory and vocation of domestic and international human rights law: it is a corrective to the domestic failures of the State. Whatever the content of the claim (rights to life, vote, education, etc.) or the nature of the government (democratic, authoritarian or colonial), the responsibilities of States are constrained by national borders. Even though the wording of international human rights standards suggest a much broader scope of application, obligations that extend beyond this domestic sphere have been largely understood or interpreted in residual, minimalistic or moral terms, if at all. This is particularly evident in mainstream political philosophy, international legal jurisprudence and most constitutional bills of rights.

Despite its ascendance, this Westphalian territorial framing of rights is a paradigm under strain. As Amartya Sen commented, there are "few non-non-neighbours left in the world today" because we are "increasingly linked not only by our mutual economic, social and political relations, but also by vaguely shared but far-reaching concerns about injustice and inhumanity".[1] The capacity of States and other actors to impact human rights far from home, whether positively or negatively, is impressive.

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[1] A. Sen, *The Idea of Justice* (Cambridge: Belknap Press, 2009), p. 173.

Most notable has been the rise of trade and investment regimes, international aid policies, global military operations and global finance, together with ever-speedier and comprehensive transport and telecommunications.[2] The result is that the world is a smaller place – the State has lost its omnipresence.

Economic globalisation in particular has fragmented and transformed State sovereignty, facilitating the growth of other powerful actors. This diffusion of authority has heralded what some call a new age of neo-medievalism, a phenomenon where "overlapping authorities and crisscrossing loyalties" co-exist[3] that is "held together by a duality of competing univeralistic claims", particularly those of the "nation-State system and the transnational market economy".[4] In addition, economic globalisation has arguably contributed to increasing socio-economic disparities even if absolute poverty levels have dipped slightly. Over the last two centuries, Branko Milanovic has estimated that global inequality amongst individuals has increased, from a global Gini coefficient of 43–45 to 65–70.[5]

The response of international law and relations to this phenomenon has been slow and creaking. Its architecture remains State-centric in two respects. First, States remain the principal decision makers and duty-bearers. International law has recognised that non-State actors can be *beneficiaries* of substantive or procedural rights, whether foreign investors, individuals, indigenous peoples, ethnic minorities, trade unions and so forth. There has been caution, however, in extending *responsibilities* to non-State or multilateral actors, particularly outside the framework of international humanitarian and criminal law. As the title of this book suggests, there is a tension between the ideals of global justice and the realities of the current State-based architecture.

Second, in international relations in the twentieth century, global misdistributions of power and poverty have been primarily understood as a lack of justice *between* States. This is evident in the recurring calls for economic redistribution between Southern developing and Northern developed States. In the 1950s and 1960s, Southern countries called for the right to self-determination and control over national resources; in the 1970s, they championed a New International Economic Order; in the 1980s, they pushed the General Assembly to recognise a right to development that

[2] This is not to overstate the transformation. For example, European trade policies in the nineteenth century wreaked havoc on some developing countries. Moreover, one of the most successful human rights campaigns in history – the movement for abolition of slavery – was fundamentally extraterritorial. The scale and reach of global activity are unparalleled, however.

[3] H. Bull, *The Anarchical Society* (New York: Columbia University Press, 2002), p. 246. See discussion in C. Bailliet, 'What Is to Become of Human Rights Rule-Based International Order within an Age of Neo-Medievalism?' in C. Bailliet (ed.), *Non-State Actors, Soft Law and Protective Regimes: From the Margins* (Cambridge: Cambridge University Press, 2012), pp. 95–125.

[4] J. Friedrichs, 'The Meaning of New Medievalism', *European Journal of International Relations*, Vol. 7, No. 4 (2001), pp. 475–501, at 475.

[5] See *Global Inequality and the Global Inequality Extraction Ratio: The Story of the Past Two Centuries*, Policy Research Working Paper 5044, World Bank, 2009.

covers both individuals *and* peoples; and in the 1990s and 2000s, fair trade and debt relief took centre stage.[6] Southern governments have not been alone in adopting this statist framework: The phenomenon of international development cooperation has been largely driven by Northern governments through State-to-State or multilateral relations.

However, calls for economic and social justice have taken on a new dimension. Individuals or groups increasingly express their grievances against foreign States in direct terms and outside the language of inter-State relations or colonial struggles. The territorial State is not viewed as their immediate proxy or representative in such situations. Rather such claims are conceived in diagonal terms, and often in the modus of rights. The non-territorial State is viewed as holding direct obligations to these individuals and groups.

Of course, these claims by individuals and groups may overlap with those articulated by their own governments. It is not uncommon to find alliances of civil society formations with their governments to oppose export dumping, investment arbitration, debt relief conditions or foreign military intervention. However, individuals and groups may have quite divergent interests from their governments. The domestic State may be actively cooperating with foreign States or international regimes, or it may simply lack the interest or capacity to defend these diverse interests. Thus, powerful extraterritorial actors may be able to operate with a high degree of immunity. Moreover, global frictions no longer follow a simple North-South divide. Globalisation has destabilised and disturbed the traditional lines of political economy and development, as Southern States grow in influence and Northern States become more enmeshed. The result is that the State under scrutiny for its extraterritorial behaviour may be Southern or the negatively affected group may be Northern.

This diagonal relationship has gained some recognition within international law. The first change has been the rediscovery that some international human rights standards are not as territorially limited as presumed. Extraterritorial obligations have simply gone unarticulated.[7] In some instances, there is no spatial limitation, such as in the Universal Declaration on Human Rights[8] or the International Covenant on Economic, Social and Cultural Rights (ICESCR).[9] The obligations are framed in universal terms. Other treaties are limited by jurisdiction, such as the European

[6] These persistent demands are well captured in the singular aim of the G77, the largest intergovernmental organization of 131 Southern countries. Established in 1964, the group's mandate is to "articulate and promote their collective economic interests and enhance their joint negotiating capacity on all major international economic issues within the United Nations system, and promote South-South cooperation for development". Available at http://www.g77.org/doc/, accessed 22 June 2012.

[7] S. Skogly, *Beyond National Borders: States' Human Rights Obligations in their International Cooperation* (Antwerp: Intersentia, 2006).

[8] Universal Declaration of Human Rights (adopted 10 December 1948), 217A (III), UN Doc. A/810 at 71.

[9] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976), 993 UNTS 3, UN Doc. A/6316 (1966).

Convention on Human Rights,[10] or the complaint mechanism is limited by jurisdiction, as in the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women.[11] This begs the following questions. What is this concept of jurisdiction? When is it broader than territory?

The second development is the use of international courts and treaty bodies to test extraterritorial claims. There is a long history of international diagonal litigation – for instance, in the form of arbitration panels established between States. However, such procedures are often *ad hoc*. Contemporary human rights mechanisms do not require ongoing State consent, which means they are open in principle to extraterritorial litigation. The result has been a rise in claims submitted to permanent regional courts for extraterritorial violations and the growing attention of United Nations (UN) treaty bodies to the issue in their periodic reviews and general comments.

The third shift is the growth of 'global administrative law' or simply global law in which responsibility is placed directly on non-State and multilateral actors.[12] Prominent examples within the socio-economic arena include the creation of an Ombudsperson for International Finance Corporation and the establishment of complaint mechanisms, such as the World Bank's Inspection Panel or the contact point procedure under the Organisation for Economic Cooperation and Development's Guidelines on Multinational Enterprises.

2. EXTRATERRITORIAL ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The extraterritorial reach of human rights within international law has been most examined and tested in the field of civil and political rights. Gibney and Skogly claim that this is "because the direct causation between government action or inaction and human rights violations are very clear and easy to document" and "most people have a better grasp of civil and political rights than economic, social, and cultural rights".[13] A lively body of research now focuses on legal strategies that have attempted to make extraterritorial States liable, through regional and international adjudication. This has included arrest by foreign security agents, military operations and tolerance of religiously sensitive cartoons.[14] Torture has been particularly implicated in

[10] European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953), ETS No. 5 213 UNTS 222, as amended by Protocols 3, 5, 8, 11 and 14, which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, 1 November 1998 and 1 June 2010, respectively.

[11] Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 22 December 2000), 1249 UNTS 13, UN Doc. A/54/49 (Vol. I) (2000).

[12] B. Kingsbury, N. Krisch and R. Stewart, 'The Emergence of Global Administrative Law', *Law and Contemporary Problems*, Vol. 68 (2005), pp. 15–61.

[13] M. Gibney and S. Skogly, *Universal Human Rights and Extraterritorial Obligations* (Philadelphia: University of Pennsylvania Press, 2010), p. 6.

[14] These cases are discussed in Chapter 4 by Gibney and Chapter 5 by den Heijer and Lawson in this volume.

extraterritorial actions, whether in international armed conflict, counterterrorism efforts, security operations and practices such as renditions.

However, Gibney's and Skogly's assertion is less defensible on closer inspection. It is not clear that causation provides a bright line or clear distinction between the two sets of rights in an extraterritorial context. Proving causation for extraterritorial violations of civil and political rights may be extremely challenging. For example, do transnational shipments of small arms to parties in armed conflict amount to a denial of the right to life or to an attempt to ensure the right to life? The answer might depend on who receives the arms and what their methods of warfare are. Is a State complicit in torture if its official happens to observe torture during interrogation in a police cell in a foreign country? In contrast, the causation element may be easy to prove for some violations of economic, social and cultural (ESC) rights. Examples include forcible evictions in multilateral infrastructure projects or donor conditionalities for the charging of fees in primary education. In practice, many cases may implicate both sets of rights, as was clear in the International Court of Justice's (ICJ's) *Advisory Opinion on Legal Construction of a Wall in the Occupied Palestinian Territory*.[15] In the literature, actors such as transnational corporations (TNCs), armed groups, international financial institutions (IFIs) and UN agencies, equal weight is often given to both sets of rights, particularly labour, housing and environmental rights.

Moreover, ESC rights have gained increased acceptance in international law and comparative jurisprudence. This is evident in an array of new treaties and resolutions and the adoption of international complaint mechanisms that cover ESC rights, such as the Optional Protocols to ICESCR, Convention on the Rights of the Child and Convention on the Rights of Persons with Disabilities (see Chapter 3). This has been accompanied by a rise in regional and national adjudication of ESC rights, and many general comments and concluding observations from UN treaty body committees and the International Labor Organisation (ILO) bodies have shed greater light on the respective obligations.[16] In addition, the arguments for viewing ESC rights, or

[15] *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice, 9 July 2004.

[16] See also M. Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, 2008); C. Mahon, 'Progress at the Front: The Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights', *Human Rights Law Review*, Vol. 8, No. 4 (2008), pp. 617–46; M. Stein and J. Lord, 'Future Prospects for the United Nations Convention on the Rights of Persons with Disabilities', in O. Arnardóttir and G. Quinn, *The UN Convention on the Rights of the Person with Disabilities: European and Scandinavian Perspectives* (Leiden: Martinus Nijhoff, 2009); M. Langford and S. Clark, 'The New Kid on the Block: A Complaints Procedure for the Convention on the Rights of the Child', *Nordic Journal of Human Rights*, Vol. 28, No. 3 (2010), pp. 371–400; F. Coomans (ed.), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Antwerp: Intersentia and Maastricht Centre for Human Rights, 2006); and R. Gargarella, P. Domingo and T. Roux (eds.), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Aldershot/Burlington: Ashgate, 2006).

at least the minimum core of all human rights, within international customary law have strengthened considerably.[17]

Nonetheless, there is a certain ring of truth to the assertion. Thus far, there has been less extraterritorial litigation of ESC rights, and less attention has been paid to the different types of scenarios that may attract extraterritorial responsibility. We are yet to witness a fully visible global jurisprudential practice on extraterritorial obligations concerning ESC rights. The question is whether it is a matter of time before the law catches up. We have seen this occur at the domestic level where concepts and doctrines have been borrowed from civil and political rights or autonomously developed to address the particularities of ESC rights. But does the supposed complexity of ESC rights together with extraterritorial application mean that such jurisprudence is likely to be insignificant or peripheral?

Given that international treaty *law* pertaining to ESC rights is generally less territorially constrained, it may be just a matter of time. Alternatively, the law may be developed through other means through treaties, declarations, interpretive opinions and various practices. Nonetheless, many issues deserve consideration on a systemic basis. How far do these obligations actually stretch? Do wealthier States have *legal* and not just moral obligations to address poverty beyond their borders? How far should these States go in cooperating internationally to fulfil ESC rights, from provision of access to intellectual property for medicines through to development assistance? Andrew Heard put this classical challenge in the following way:

> [A] complication arises when a government either is incapable of providing a benefit protected by human rights – such as the Ethiopian government's inability to provide food during the worst of the famines – or when a government simply fails to respect human rights. If an individual's government is the central duty-holder, then the rest of the world can shake their heads saying "tut-tut" without feeling any sense of duty to intervene. Other governments may feel bound to act, but that feeling of obligation may simply come from their own sense of altruism rather than a belief that human rights bind all governments to help if the government most directly responsible fails to fulfill its duties.[18]

However, this is not the only relevant question for the extraterritorial application of ESC rights. We are also interested in the degree to which States must regulate the extraterritorial activities of multinational corporations registered in their jurisdiction or influence the activities of international organisations such as the World Bank, International Monetary Fund (IMF) or World Health Organisation (WHO). When must they intervene to control the extraterritorial impacts generated by these actors?

In addition, there are a range of typical legal questions. As regards *jurisdiction*, is there a different departure point for ESC rights? The limits of a State's jurisdiction

[17] See discussion in Section 2.3 of Chapter 4 of this volume.

[18] A. Heard, 'Human Rights: Chimeras in Sheep's Clothing?' (1997), available at http://www.sfu.ca/~aheard/intro.html accessed 22 June 2012.

regarding civil rights violations have often, but not always, been constructed on the concept of some sort of 'physicalised' relationship – for example, armed occupation or an arrest by agents. In the case of ESC rights, however, the element of direct physical control or effect is often not required for a State to produce a negative impact.[19] For instance, subsidies for domestic production or incentives for production of certain crops such as biofuels may have global effects on livelihood and environmental rights. Does this make the establishment of jurisdiction (and also causation and calculation of remedies) more difficult or easier?

As to *causation*, how does one determine complicity or deal with many links in the chain of causality? If States require that unaffordable user fees be imposed for primary health care as a condition of their international aid programme, is the right to health violated? If a State's export credit agency provides support to companies involved in major infrastructure projects or production of goods that leads to violations of ESC rights, is that State responsible? Moreover, how is responsibility to be *apportioned* amongst multiple State actors? If a dam built with international support leads to various rights violations, which State is responsible? Is it the State in which the dam is constructed, the Executive Directors (i.e., States) of the World Bank and/or the State whose export credit agency backed corporations involved in the project? Can international human rights law, at least in theory, act as a corrective to failures of both States and the market and provide a system of accountability?[20]

3. RESEARCH QUESTIONS AND PERSPECTIVES

This book sets out to answer such questions. In other words, what is the applicable content of extraterritorial State obligations in the field of ESC rights in international law? In the corpus of international law, can we discern obligations that are both clear and relevant to current realities? Are the common demands of law – duty, jurisdiction, causation, division of responsibility and remedies – satisfied? The focus of this book is principally on the scope of the ICESCR, but consideration is also given to other treaties and standards relevant to ESC rights, particularly those concerned with the rights of women, children and persons with disabilities; racial discrimination; and rights of indigenous peoples. Given the importance that regional instruments have so far played in the field of extraterritorial obligations, these regimes are also considered.

The primary aim of this book is not to articulate a moral or normative basis for extraterritorial obligations: A rich and developing literature already exists on that point.[21] Nor is there an express reformist agenda that seeks to articulate how existing

[19] Although this is sometimes the case for civil and political rights, the potential for some acts to have widespread socio-economic consequences means that the concept of jurisdiction requires close interrogation.

[20] See K. De Feyter, *Human Rights: Social Justice in the Age of the Market* (London, Zed Books, 2005), p. 15. Compare to Narula in this volume.

[21] See review of the literature in Chapter 2.

treaties or mechanisms could be improved or supplemented. Rather, this book seeks principally to interpret existing international law, in light of existing legal doctrine and the questions raised by practical application. It is for this reason that a range of international law scholars and practitioners, who have investigated these questions in the domain of human rights, were invited to contribute. In doing so, each author probes and interrogates a range of sources in international law relevant to his or her question, although the interpretive orientation is sometimes different.[22]

However, moral or reformist perspectives are partly addressed in different ways. At times, the chapter authors draw on them as a departure point for some of the analysis or as a basis for recommending improvements to the current international architecture. In an afterword, Malcolm Langford and Mac Darrow go further and examine the current state of international law in light of a range of moral theories (from communitarianism to cosmopolitanism) that address the question of global justice. This is done to not only provide an external perspective on the legal findings but also because moral norms influence perceptions of the legitimacy of international human rights law.

This book is unique in three respects. First, it is the only academic publication to exclusively focus on the extraterritorial application of ESC rights. Whereas the analysis of the extraterritorial application of human rights treaties on civil and political rights has reached a certain level of sophistication, discussions in relation to ESC rights are still at an embryonic stage. A volume that specifically addresses extraterritorial ESC rights is therefore needed.[23]

Second, the topic is approached from the perspective of cross-cutting issues that shape any standard legal conversation or analysis rather than by proceeding on a right-by-right basis. We focus on five particular legal issues, which also structure the publication:

[22] For example, different weight is given to the wording of a relevant legal provision, the object or purpose of a legal standard, the *travaux préparatoires*, jurisprudence from international courts and tribunals or doctrines from other fields of law that would resolve a particular legal problem. It should also be said that even though legal method does provide a constraint on reasoning, it is somewhat fruitless to assert that it is hermetically sealed off from broader normative or subjective perspectives. See the critical but nuanced discussion in K. Klare, 'Legal Culture and Transformative Constitutionalism', *South African Journal on Human Rights*, Vol. 14 (1998), pp. 146–72.

[23] There has been considerable debate in discrete journal articles, but no coherent collection has been published so far. In 2004, a book on extraterritorial human rights obligations was edited by Fons Coomans and Menno Kamminga, *Extraterritorial Application of Human Rights Treaties* (Antwerp: Intersentia), which focused almost exclusively on civil and political rights. A more recent volume is that edited by Mark Gibney and Sigrun Skogly, *Universal Human Rights and Extraterritorial Obligations* (Philadelphia: University of Pennsylvania Press, 2010), but it takes a right-by-right approach, and neither addresses underlying cross-cutting issues nor focuses exclusively on economic, social and cultural rights. The closest is *Casting the Net Wider: Human Rights, Development and New Duty-Bearers*, edited by W. Vandenhole, M. Salomon and A. Tostensen (Antwerp: Intersentia, 2007), but this book seeks to raise the issues rather than address the legal questions systematically.