Introduction

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The *Maastricht Principles* ten years on

The year 2021 marked the tenth anniversary of the adoption of the *Maastricht Principles* on Extraterritorial Obligations in the Area of Economic, Social, and Cultural Rights (*Maastricht Principles*). The *Maastricht Principles* is a landmark document that seeks to set out legal principles on extraterritorial human rights obligations (ETOs). This Handbook is testament to how the notion of extraterritorial human rights obligations has challenged and fundamentally changed our understanding of human rights.

Human rights have traditionally been framed in a vertical perspective (state-individual), with the duties of states confined to individuals on their territory. Obligations beyond this ‘territorial space’ have been viewed as either non-existent or at best, minimalistic. This territorial paradigm has achieved particular prominence in the interpretation of international human rights conventions, although there is language in many of these treaties that would provide a broader scope of application (Gibney and Vandenhole 2014; Skogly 2006). As the cover image of this volume suggests, territorially conceptualised human rights obligations often act as an arbitrary wall, beyond which new threats to human rights arise in extraterritoriality (as symbolised by the bird of prey). ETOs provide a window through which to see, assess, and deal with these new threats and, also a window to a more expansive understanding of human rights, as depicted by blue skies.

Today, however, the territorial paradigm is seriously challenged. For one thing, the ability of states and other actors to impact human rights far from home – both positively and negatively – has never been clearer. Perhaps the most direct means by which states act extraterritorially is by placing their own troops on the ground in another state, especially in a conflict situation. Likewise, states may use surveillance beyond their borders. States may intercept migrants in international waters before these migrants arrive at their borders. States may pollute the land, water, or air with cross-boundary impacts or contribute to climate change through high levels of carbon emissions. In addition, the regulatory role of states may be invoked when businesses domiciled in their territory undertake transnational operations or when states need to take measures to fight and prevent corruption and bribery.

When the four editors of this volume convened a meeting at the Raoul Wallenberg Institute in the spring of 2016, our initial goal was to bring together a group of like-minded human rights

scholars to analyse actual state practice. This was five years after the signing of the Maastricht ETO Principles and the foremost question was how states acted in the world. Quite simply, do they follow the same kinds of human rights standards as they do at home? Or, instead, do they act in a way that would be viewed as both immoral and illegal if performed within their own domestic realm? At the outset, this group focused on a relatively small number of topics where one state's ability to affect the human rights protection of individuals in other countries was seemingly incontrovertible – e.g., arms sales or economic sanctions. However, it soon became clear that the importance, but also the challenge, of this extraterritorial dimension could be found in a wide array of topics, which, at least to some extent, are reflected in this Handbook. Of course, a systematic survey of state practice remains on the ETO research agenda.

This research Handbook seeks to take stock of progress made over the last decade, since the adoption of the *Maastricht Principles*, in applying the principles, and proposes ways forward. We have identified five thematic clusters in which extraterritorial human rights obligations have become most pertinent: migration; financial assistance and sanctions; investment, finance, and trade; peace and security; and environment. These thematic parts are preceded by two introductory parts, which cover the conceptualisation and theoretical foundations as well as the enforcement of ETOs at the global and regional level.

Each chapter combines a thorough analysis of a particular issue area as it now stands, but it also provides a forward-looking perspective of how ETOs might come to be more fully recognised. Where appropriate, the authors engage with the *Maastricht Principles* and critically evaluate their value ten years after their adoption in various areas of the law and policy, both with respect to and beyond economic, social, and cultural rights. The chapters also seek to address state practice, outlining shortcomings but also best practices.

The Handbook's outline

Part I – Conceptualization and theoretical foundations

This opening section is intended to introduce what extraterritorial obligations are, how (and why) the concept arose, and to provide some sense of how recognition of such obligations changes our entire understanding of “human rights”. In his chapter the “Historical Development of Extraterritorial Obligations,” Mark Gibney explains how a little more than two decades ago, human rights scholars first began to push against the dominant “territorial” interpretation of international human rights law, mainly due to the enormous gaps in protection this approach often resulted in. Following this, in 2007 the Extraterritorial Obligations Consortium (ETOC) was formed, and although it initially focused on economic, social, and cultural rights (ESCR), the notion that states have human rights obligations beyond their own territorial borders soon was applied to all human rights, as evidenced by the array of chapters in this Handbook. At the present time, ETO Principles generally – and the Maastricht ETO Principles in particular – are now commonly referenced in United Nations and in various other international law fora, and there is even some evidence of a growing recognition of these principles by states (Heupel 2018).

Sigrun Skogly explores the foundation and the scope of “Global Obligations,” and catalogs how such obligations are firmly grounded in international law. The starting point is the UN Charter, which lists as one of its purposes: “To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms ...” Similarly, the Universal Declaration of Human Rights (UDHR) underscored this principle of state

cooperation, while other international conventions, most notably the International Covenant on Economic, Social, and Cultural Rights (ICESCR), demands that states engage in “international assistance and cooperation.” Although the legal foundation for “global obligations” is quite solid, a more challenging problem involves determining the means of implementing cooperative measures.

Gamze Erdem Türkelli analyses state responsibility within the context of extraterritorial human rights obligations, and she makes the argument that in this particular area of international law there is a pressing need for going beyond strict causation. Erdem Türkelli focuses on three different situations of possible state responsibility: a state’s own acts; the conduct of international organisations that the state is a member of; and finally, the conduct of some other entity the state is associated with, including non-state actors. After surveying various approaches to state responsibility, she proposes a polycentric model that would not only reflect contributions to the commission of an internationally wrongful act, but also the ability and interest in addressing structural injustices moving forward.

The debate on whether states have extraterritorial human rights obligations has in large part been confined to the legal realm. Angela Müller brings a much-needed ethical perspective to this issue, taking the reader through the various strands of international relations theory as a way of testing the obligations that one state might have to individuals in some other state.

Almost by definition, the term “extraterritorial” indicates an area outside a state’s own territorial borders. In a fascinating twist to this, Pauline Maillet examines the converse, namely, when a state treats a certain part of its land mass – the Charles de Gaulle airport in her case study – as being extraterritorial as a way of restricting certain legal protections. The final chapter in [Part I](#) looks at “digitalization,” a phenomenon that, one could argue, has seemingly taken over the world, and if not that, at least the lives of so many of us. While human beings are vastly more “connected” to one another than at any time in history, the downside is the inability of an individual state – or even the international community – to undertake any form of meaningful regulation, and the problems this poses for the protection of human rights.

Part II – Enforcement

This part maps the extent to which extraterritorial human rights obligations (ETOs) have been recognised by global and regional human rights monitoring bodies. There are four chapters. Pribytkova’s chapter focuses on some of the UN human rights treaty bodies. She distinguishes between what she calls remedial ETOs and global obligations, and applies her typology of global obligations to the work of the treaty bodies. This chapter shows how the UN human right treaty bodies have made an important contribution to the conceptualisation and enforcement of ETOs, while there are also areas in which further progress could be made, such as strengthening individual complaints procedures and expanding ETOs to transnational obligations, that is, direct human rights obligations for international organisations and non-state actors. The other three chapters in this part cover the European, Inter-American, and African regional systems of human rights protection. Each of these three regional chapters follows a similar pathway of analysis: they look both into the attribution of extraterritorial human rights obligations (in most cases through the prism of jurisdiction) and into the nature and scope of these obligations.

Haack, Burbano Herrera, and Ghulam Farag map the case law of the European Court of Human Rights along the lines of the personal and spatial model of jurisdiction, and look into the question of concurrent jurisdiction in instances in which both the territorial state and a foreign state exercise jurisdiction simultaneously. They conclude that the Court has given an expansive reading to jurisdiction in its rich jurisprudence on the topic, extending extraterritorial

jurisdiction beyond the legal space of the Council of Europe. Nonetheless, the expansion has been situated mainly within the personal model of jurisdiction. Also, critics have proposed a third model – that of functional jurisdiction. The authors wonder how much traction – if any – that third model can be given by the European Court, given strong opposition from states parties to a further expansion of extraterritorial jurisdiction.

As Haeck and Burbano Herrera explain in their chapter on the Inter-American system, the Inter-American Commission and Court have gone beyond the personal and spatial model of jurisdiction, to recognise a new extraterritorial jurisdictional link based on control over domestic activities with extraterritorial effect (functional or cause-and-effect jurisdiction). The latter model of jurisdiction has so far been applied to environmental pollution, but could be extended to home state's responsibility for the extraterritorial human rights violations by one of its (transnational) companies, the authors contend. Oloo and Vandenhoe in their chapter on the African human rights system scrutinise whether a unique African perspective has been adopted on ETOs. The cases available do not allow for any definitive conclusion, but it looks like the African Commission on Human and Peoples' Rights is willing to endorse the three models of jurisdiction mentioned before.

Oloo and Vandenhoe suggest that regional obligations, that is, global obligations as defined in Principle 8 of the Maastricht Guidelines but applied to the African context, would give a unique African touch to ETOs. These regional obligations would take on particular meaning with regard to the collective human rights to free disposal of wealth and natural resources and to development. The lack of explicit jurisdiction clause in the ACHPR additionally provides an opportunity to move beyond existing approaches to extraterritoriality.

In sum, three models of jurisdiction have taken shape, that is, the personal, spatial, and cause-and-effect model, although the amount of case law on the latter is more limited and the notion is yet to be fully clarified. Beyond these extraterritorial obligations in a strict sense, based on a notion of causality, global and regional obligations may be the next frontier for ETOs. Such global and regional obligations do not draw on causation of harm, but on notions of true universality of human rights, regardless of territorial location.

Part III – Migration and refugee protection

Migration and refugee protection is a key area in which extraterritorial human rights obligations are of utmost relevance. Migration and refugee protection is by definition about boundaries, sovereignty, and the crossing of borders. With the growth of policies that seek to exercise transnational migration control, the extraterritorial human rights obligations of states that set up or support such transnational migration control have been foregrounded too. This part contains four chapters.

Gammeltoft-Hansen introduces in a general review of the field the initial 'human rights turn' in transnational migration control and current challenges to reframe and redirect extraterritorial human rights claims. Somewhat surprisingly perhaps, the inclusion of migration issues in ETO case law happened rather late in the gradual development of ETOs. But the effect of being fairly late has been positive, since migrant and refugee cases have been able to benefit from precedents in other areas. On the other hand, migration cases are now at the forefront of new challenges for extraterritorial jurisdiction and shared responsibility. Gammeltoft-Hansen proposes two new turns. The first is to reframe existing approaches to ETOs to move beyond the status quo of current human rights jurisprudence. The second is to redirect accountability claims towards other legal regimes (such as international criminal law) and institutional settings (such as national courts in the Global South). The second chapter hovers in on externalisation

and outsourcing of migration control in particular. It explains the practices, maps state practice, and examines which role ETOs have played so far. Gombeer and Smis argue that the second wave of externalisation of migration control is more difficult to tackle, which leads them to plea for innovative understandings of jurisdiction so as to capture the actual relations of power. They too suggest that ETOs may not be sufficient, and that we may have to look closer at questions of ancillary forms of state responsibility (like complicity) too, and the implications for standing of affected migrants.

Two other chapters look into specific topics, i.e. that of climate change displacement and that of diplomatic asylum. Oluborode Jegede seeks to articulate the extraterritorial link of climate change displacement and socio-economic rights of the child under key instruments of the African human rights system, and explores how ETOs may be of help in addressing the adverse effects of climate displacement. He points out how in addition to the acts and omissions of African states, the acts or omission of actors from the Global North in their territories and in states within Africa impact on the human rights of children in Africa. Oluborode Jegede submits that provisions in African human rights instruments that deal with international cooperation and assistance support the position that states in the Global North have a remedial role to play in climate induced displacement of children in Africa.

Wilde submits that diplomatic asylum should be seen as an invocation of the idea that states have extraterritorial obligations. He equates diplomatic asylum with the operation of the notion of *non-refoulement* as applied in a state's embassy in a foreign country, hence the extraterritorial nature of any human rights obligations that a state has in that context. More generally, he challenges the common understanding that the European region has led developments on extraterritoriality. He suggests that it was rather the Latin American region that laid the foundation for extraterritorial human rights obligations, exactly through its much earlier normative commitment to diplomatic asylum. In this light, Wilde's chapter is also a nice example of decolonising human rights law.

Part IV – Financial assistance and sanctions

The initial interest in extraterritorial human rights obligations, certainly from the UN human rights treaty bodies like the CESCR and the CRC Committee, was mainly visible in their comments on (the lack of) development cooperation. This part engages with what used to be considered North-South or development issues. Even if that terminology may meanwhile have become problematic, what the chapters in this part continue to have in common is the very unequal bargaining power and power imbalances that characterise so strongly the relationship between so-called first- and third-world countries, between the Global North and the Global South. Several framings of the relationship between human rights and development have been undertaken, such as that of a human right to development; a human rights-based approach to development (HRBAD); a right to development; human rights conditionality for development cooperation; and an obligation under human rights law to provide development cooperation. In this part, some of these framings are revisited from an overall perspective of extraterritorial obligations: a HRBAD; sovereign debt; financialisation of development cooperation; and sanctions.

Chenwi looks into a HRBA in the context of development assistance, while also pointing out the need to address power inequalities to avert the risks of conditionalities and neocolonialism. In her chapter, she explores the nature and scope of ETOs in the context of development assistance across the spectrum of obligations to respect, protect, and fulfill rights. Chenwi concludes that a HRBAD provides a framework for consideration of ETOs in development assistance, so that states abide more operationally with their ETOs in the context of development aid.

Herre and Backes look into development finance in particular and apply an ETO lens to two aspects of the financialisation of public development cooperation, that is, its impact on substantive and procedural ETOs. They strongly argue in favour of assigning human rights obligations to private financiers as well as of strengthening state accountability for human rights violations related to development finance.

In her chapter on sovereign debt, Luce Scali focuses on another aspect of finance, i.e. sovereign financing. Sovereign financing has evolved into a primarily debt- and market-based practice. She examines the nature and relevance of ETOs in relation to sovereign debt as well as the usefulness of jurisdictional models developed so far. Luce Scali concludes that the cause-and-effect jurisdictional test may be relevant for sovereign debt, although the ETO framework shows some persistent limitations due to its focus on states as duty-bearers; difficulties in attributing conduct in complex multilateral activities; a difficult relationship with the public international law notion of jurisdiction; and the necessity and proximity of harm requirements.

Schechla's chapter moves away from finance and takes us to the question of economic sanctions. ETOs are relevant in the context of sanctions, in particular for states imposing sanctions, collectively or individually. Collective sanctions regimes raise the difficult question how to attribute obligations (and responsibility in case of violations) to all actors involved.

Part V – Finance, investment, and trade

The regulation of international trade, investment, and financial regulations as well as rules addressing the accountability of transnational corporations are of a genuine extraterritorial character as they concern policy fields which are, by definition, transnational. Therefore, one could assume that integrating extraterritorial human rights obligations into these policy fields would seem natural. However, it must also be noted that international human rights law and international economic law have always been considered as antagonistic, sometimes even, directly opposite fields of law – the former aiming at protecting and promoting human rights and other humanitarian aspirations, but the latter focusing on economic efficiency, transnational business expectations, and a general support of the global market.

The section starts with a fresh look at extraterritorial human rights obligations and International Financial Institutions (IFIs) by Stéphanie de Moerloose, Gamze Erdem Türkelli, and Joshua Curtis. As these institutions finance and support development projects or macroeconomic policy reforms, they have a significant impact on the realisation of human rights. While this has been subject to public and academic debates for more than three decades, the discussion increasingly employs the language of extraterritorial obligations. The authors identify two axes in this context: obligations of states as members and owners of IFIs on the one side and obligations of IFIs themselves on the other. Regarding the first axis, the authors suggest that despite the separate legal personality of IFIs, member states retain responsibility for their involvement in the IFIs decision-making processes. Concerning direct human rights obligations of IFIs, the chapter shows that the scholarly literature remains divided, but treaty bodies started to formulate direct expectations of IFIs. After an analysis of internal and external accountability mechanisms, the authors conclude with a number of proposals for further research and political development, including the modification of the charters of IFIs to restrict their immunity in case of human rights violations.

In the following chapter, Daniel Augenstein focuses on home-state regulation of corporations as a possible indication of the home state's extraterritorial human rights obligations. The chapter reviews current legislative trends in the area of home-state regulation of corporations in light of states' international legal obligations to prevent and redress business-related human

rights violations outside their borders. Augenstein finds the basis for these obligations in the UN Guiding Principles on Business and Human Rights (UNGPs) and assesses both transparency regulations such as the UK Modern Slavery Act as well as due diligence legislation including the French *Loi de Vigilance* and the Dutch *Wet Zorgplicht Kinderarbeid*. The chapter traces a convergence between these regulatory models arguing that it suggests the emergence of a new legal consensus on business and human rights, according to which states' regulation of the impacts of business enterprises on human rights should be anchored in international legal obligations towards foreign victims of business-related human rights violations.

While the human rights impact of IFIs and transnational corporations constitute classic topics of the debate on extraterritorial human rights obligations, the next two chapters on tax transparency and corruption address more recent elements of the discourse. Rod Michelmore argues that tax-related illicit financial flows from Least Developed Countries (LDCs) are a fundamentally important human rights issue in particular due to the impact of this loss on poverty. The chapter shows that many LDCs face systemic barriers in accessing the international tax cooperation needed to administer and enforce revenue laws against those who illicitly transfer income and capital offshore. Michelmore claims that states implicated in the regulation of offshore wealth management are required by extraterritorial human rights obligations to take the necessary steps to prevent domestic private actors from concealing tax-related illicit financial flows as these drain scarce public revenues from the most vulnerable countries.

Subsequently, Khulekani Moyo explores the developments of extraterritorial human rights obligations in the field of anti-corruption and anti-bribery laws. He examines international and regional treaties and instruments adopted to curb corruption and assesses the extent to which these instruments impose obligations on states beyond their territorial borders to adopt legislative, investigative, adjudicatory, and other measures combatting bribery and corruption. Although corruption impedes the realisation of human rights, human rights instruments do not address corruption directly and monitoring bodies have failed to bring conceptual clarity to the question of how corruption can potentially be construed as a human rights violation. However, such an approach would, as Moyo argues, improve enforcement of anti-corruption regulations at national and international levels.

Moving to international investment law as a traditional topic of international economic law, but a new topic for human rights law, Tara Van Ho develops an innovative argument which not only places a duty to respect and protect human rights on the parties of a specific international investment agreement, but also on third states. While there is a general agreement in academia shared by many treaty bodies and human rights experts that international investment agreements reduce the regulatory space for states to fulfill their human rights obligations and that states should reform or abandon their investment agreements, Van Ho argues that also states which are not parties to the respective agreements have an obligation to assist and cooperate with the treaty parties to ensure that investment agreements do not lead to negative impacts on human rights. Such third states obligations can be built on the obligation to international assistance and corporation enshrined in Article 2 (1) ICESCR and would be applicable in the context of World Bank policies towards investment protection or UNCTAD activities aimed at developing new model treaty language which would avoid or at least reduce the negative impact of investment agreements on human rights.

The final chapter in this section turns to a much-debated issue – access to medicines and the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) – which became a current topic again in light of the controversies about access to COVID-19 medication and vaccines. Jennifer Sellin argues that access to essential medicines is a global and shared responsibility and that states have extraterritorial human rights obligations

to respect, protect, and fulfill access to medicines. However, international intellectual property regimes, particularly TRIPS, may impede access to medicines and negatively impact states' ability to comply with their human rights obligations. The chapter demonstrates the value and importance of health-related extraterritorial obligations to facilitate and contribute to achieving universal access to medicines. Selin shows that it is possible to identify specific reform options with regards to access to medicines concerning TRIPS as well as so-called TRIP+ measures in free trade agreements based on the extraterritorial dimension of health-related human rights.

Part VI – Peace and security

One of the great ironies involving extraterritorial obligations is that at the same time that the “territorial” approach first began to be challenged and ETO principles developed, the “war on terror” was announced, and one of the most disturbing policies of this was the practice of extraordinary rendition, where a suspected terrorist is abducted in one country and then sent to some other state for detention and “enhanced interrogation” (torture). As Elspeth Guild examines in her chapter, extraordinary rendition was essentially a blueprint for how states (and particularly the United States) made use of the blind spots of a “territorial” interpretation of international human rights law as a way of avoiding responsibility for the human rights violations that were carried out, but almost always in another country and at the hands of foreign actors.

Another component of the “war on terror” was the greatly increased capacities of states to engage in both domestic and extraterritorial surveillance. Yet, absent Edward Snowden's shocking revelations, the full extent of these practices would never have become known, and arguably, are still not known to the fullest extent. Marko Milanovic's chapter explores the tension between state surveillance practices that truly know no national boundaries against a regulatory and enforcement regime that has been slow to escape the confines of the territorial paradigm it has placed itself in.

The world's booming arms trade is certainly international in scope as Western sellers are continually on the lookout for purchasers of these wares in all corners of the globe. Like some of the other practices under scrutiny in this section, arms sales also make profit (literally) when the selling state can use the sovereign of the receiving state as a way of avoiding any responsibility for its own actions. The common rationale is that the seller merely provides the weapons, and how the recipient makes use of these weapons is determined by this other sovereign state. Of course, this gives arms-selling states – mainly comprised of Western states, particularly the United States – license to sell to even the most horrible and notorious regimes. One central question addressed by Marina Aksenova in her chapter ‘Arms Trade and Weapons Export Control’ is whether the Arms Trade Treaty, which went into effect in late December 2014, will change any of this.

One of the enduring questions raised by the recognition of extraterritorial human rights obligations is the relationship between international human rights and international human rights law, a topic that Vito Todeschini provides extensive treatment to in his chapter ‘Extraterritorial Military Action.’ While Todeschini deals with traditional forms of warfare, Matthias Kettemann and Ana Sophia Tiedeke address the specter of a new form of warfare: cyberwarfare. Although it is widely, if not universally, recognised that cybersecurity is in the interests of all, what has in large part prevented this is the complete mismatch between an extraterritorial phenomenon of cyberwarfare, on the one hand, and enforcement mechanisms that remain tethered to national borders.

Part VII – Environment

The section on Environment and Extraterritorial Human Rights Obligations (ETOs) features three chapters on climate justice, cross-border pollution, and biodiversity. These three issue areas are at the forefront of the ETO debate with respect to the environment. Another chapter on ETOs and the use of common waterways was envisaged but did not materialise. The section of course has limitations in terms of the topics covered. For instance, although the biodiversity chapter links to the importance of ecosystems, ecosystems conservation is not directly addressed. Similarly, though climate change and cross-border pollution indirectly address the right to a healthy and sustainable environment and clean air and water resources, these topics do not have their own chapters.

Sara Seck's chapter on climate justice inquires whether the *Maastricht Principles* have contributed to clarifying human rights obligations beyond borders in relation to climate change and takes issue with the use of "extraterritoriality" as a concept when referring to human rights, which may reinforce territorial boundaries in ways detrimental to human rights protection. Seck points to overtures being made through the recognition of substantive environmental rights such as an autonomous right to a safe, clean, healthy, and sustainable environment with implications for human rights related to climate change and corresponding obligations. Finally, Seck argues for a relational conceptualisation of human rights obligations related to climate change coupled with international cooperation duties and concludes on a positive note, reminding that we are all 'ecologically embedded relational individuals.'

Antal Berkes tackles ETOs and cross-border pollution, namely the direct or indirect trans-boundary introduction of hazardous substances into the components of the environment, air, land, water, and the atmosphere. Berkes credits the *Maastricht Principles* for setting a good baseline for ETOs for human rights harms linked to cross-border pollution and surveys the obligations to respect, protect, and fulfill. Berkes argues that the progressive development of international law that prescribes more punctual threshold criteria for harm in cross-border pollution will enhance human rights protections.

Philip Seufert and Sofia Monsalve Suárez evoke the close relationship between biodiversity and the realisation of human rights. They focus on the right to food as a gateway to their discussion on the need for "cross-fertilization" between environmental law and human rights law. In this cross-fertilization, Seufert and Monsalve Suárez call on states to prioritise the rights of marginalised and disadvantaged individuals and groups. They also argue for the recognition of biodiversity as a global commons to be protected as a common concern for mankind in order to realise human rights related to biodiversity.