Conclusions

The future of extraterritorial human rights obligations

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As this is being written, the worldwide COVID-19 pandemic continues to rage, and some important extraterritorial lessons – some good and some bad – have emerged from this pandemic. The first and perhaps most obvious is that communicable diseases do not respect national borders. What began in Wuhan, China soon spread to every corner of the globe, even as states quickly responded by attempting to close themselves off from the rest of the world. If the pandemic teaches us nothing else, it should teach us that each one of us is potentially far more connected with the rest of humanity than we had ever imagined.

There is, however, another lesson from the response to the pandemic and it relates to the development of a COVID vaccine and its distribution. Of particular concern is whether the states of the Global North will only recognize an obligation to protect their own citizens, thereby leaving large swaths of humanity to fend for themselves. If this is the case, the pandemic will most assuredly take the lives of that many more individuals. Yet, what we seem to be witnessing is that in the face of a global vaccine shortage combined with desperate domestic demand, few seem to think in terms of states having human rights obligations to people in other lands.

The present crisis will pass, sooner or later. But what remain are many other political, social, economic and ecological events that will continue to have a comparable global impact. The most notable of these events is climate change. In the case of climate change, as with the pandemic, the human rights consequences will not – and cannot – be restricted by national borders. However, and continuing with the pandemic analogy, some states will be better positioned to cope with the devastating crises that will ensue than others. In blunter terms, people will either live or die depending on where they happen to be born. Yet, is this kind of situation all that much different from the world as it exists today?

What has propelled the push to recognize extraterritorial obligations (or to use different terminology, human rights beyond borders) is the understanding that an exclusively or predominantly territorial approach to human rights has left large parts of humanity unprotected. And what has always been difficult, if not impossible, to reconcile is the self-proclaimed “universality” of human rights with a system of protection that is the antithesis of universality, one where a state’s human rights obligations end suddenly and, in our view, rather arbitrarily at its own

domestic borders, while at the same time, giving states license to operate under a completely different set of human rights standards depending on whether they were operating at home or abroad.

Perhaps these crises, and others, will be used to further question the utility and even the legitimacy of human rights (Moyn 2010; Hopgood 2013; Posner 2014). The charge that most assuredly will be made by these critics is that all the international human rights law in the world could do little in the face of the most tragic and devastating cataclysms facing us. Our answer is that what has attempted to pass itself off as human rights is not truly “human rights,” but rather, reflects the biases and interests of a small segment of states and a small segment of the world’s population.

As climate change and the COVID-19 pandemic remind us, human rights protections must be effective and available to individuals and communities also when individuals and communities are faced with border-defying political, social, economic or ecological problems that render the very idea of territorially bound human rights obligations obsolete. In order to realize the emancipatory potential of human rights, we also need a reckoning within international law that concedes the shortcomings of state-centricity and of legal straitjackets such as predominantly territorially based understandings of jurisdiction and primarily causality-based conceptualizations of legal responsibility. To that end, we see the need to critically re-engage with the fundamentals of the debate around both primary and secondary norms. The key axes of that reengagement should centre on moving beyond territorial jurisdiction, recognizing global obligations and conceptualizing a more expansive understanding of responsibility.

Moving beyond Territorial Jurisdiction

The ‘state-centricity of traditional human rights mechanisms and the near obsession to link human rights obligations to jurisdiction in its narrowest conception’ (Erdem Türkelli 2020, p. 36) is a core impediment to the idea of universal availability of human rights protections to each and every rights-holder (Roxtrom and Gibney 2017). Many human rights treaties, even when they have a jurisdiction clause, do not solely limit jurisdiction to a state party’s territory, for instance, by referring not only to a state ensuring relevant rights *within its territory* but also rights *subject to its jurisdiction* (Milanovic 2013).

The enforcement of human rights obligations beyond borders, as the contributions to the Enforcement section highlight, has not followed a uniform approach across different systems. The work of the UN Treaty Bodies have been pivotal in establishing a narrative around operational ETOs and global obligations of states, in pushing further for human rights-based international assistance and in clarifying how states ought to interact with private actors and international institutions (Pribytkova in this volume).

The European regional human rights enforcement system under the European Court of Human Rights (ECtHR), on the other hand, has been particularly reluctant to concede a reading of jurisdiction beyond borders in (what it deems “exceptional”) circumstances of effective control (Haeck, Burbano-Herrera and Ghulam Farag in this volume). Nonetheless, the ECtHR has allowed for an extraterritorial exercise of jurisdiction in such cases, having recognized that not doing so would create ‘a regrettable vacuum in the system of human-rights protection’ as it would ‘remov[e] from individuals ... the benefit of the Convention’s fundamental safeguards and their right to call a High Contracting Party to account for violation of their rights in proceedings before the Court’ (ECtHR 2001, para. 78). ECtHR’s own reasoning that has motivated this overture is an important reminder about the purpose of human rights law and of enforcement mechanisms that should seek to make human rights entitlements available to

rights-holders in practice. In order to do so, human rights enforcement mechanisms should focus on ‘enabling outsiders’ access to domestic and international courts by removing formal and practical barriers or equipping judicial bodies with the adequate means to analyse situations that occurred far away’ (Müller in this volume).

The Inter-American system has in fact been a pioneer in providing extraterritorial human rights protections (Wilde in this volume) and recognizing state obligations to rights-holders beyond territorial borders. As the Inter-American Court of Human Rights reminds in its Advisory Opinion 23 on environment and human rights, “jurisdiction” is not circumscribed by the territorial borders of a state. In fact, each time a state engages in conduct with human rights impacts (within or outside of its territorial borders), it also exercises its jurisdiction (para. 78). States’ obligations may include preventing third parties within their territory from causing environmental harm or damage within and outside of their territory as well as themselves avoiding activities within their territory or control that may impact rights-holders within or outside of their territory.

The African Charter on Human and Peoples’ Rights does not delimit the application of the Charter to a specific territory, geography or legal space. While the African Commission has previously accepted both the spatial and the personal models of jurisdiction, the Court and the Committee have yet to build jurisprudence on the matter (Oloo and Vandenhoe in this volume).

The necessary de-coupling of territory and jurisdiction would overcome a binary narrative as regards human rights obligations being territorial versus extraterritorial (Seck in this volume).

Towards Obligations beyond borders: Recognition of “global obligations”

The cross-boundary nature of some of the most pressing global problems and the global nature of harms necessitates moving past constructed binaries when conceptualizing human rights obligations. At this juncture, the notion of global obligations, distributed in a differentiated fashion, becomes critical to addressing gaps in human rights protection.

Global obligations, as several authors in this volume including Skogly, Müller and Seck note, are a means through which human rights obligations may be conceptualized more broadly and in ways that fill current protection gaps. Global obligations are not constrained by territorial boundaries and will be particularly helpful in addressing not only truly global problems such as climate change or pandemics, but the transboundary impacts on human rights of various issues and themes tackled in this volume: digitalization (Dentico) and cyber technologies (Milanovic; Kettemann and Tiedeke), migration (Gammeltoft-Hansen; Gombeer and Smis; Jegede), finance and financial assistance (Herre and Backes; de Moerloose, Erdem Türkelli and Curtis; Khulekani; Scali; Chenwi), investment (Augenstein; Van Ho), trade (Sellin; Aksenova) or tax systems (Michelmores), pollution and environmental degradation (Berkes; Seufert and Molsave Suarez).

A widespread recognition of global obligations necessitates the evolution of international law in general and human rights law in particular. As Skogly astutely points out in her contribution to this volume, the legal basis for recognizing global obligations is already found in the United Nations Charter, which protects the fundamental rights of the person and subsequent treaties that elaborate on the obligations contained therein. Recognizing that states have global human rights obligations does not in and of itself preclude the differentiated attribution of these global obligations based on capacity or historical contributions to global political, social, economic or ecological problems with adverse human rights impacts, with a view to contributing to global justice and equity (Skogly in this volume; Seck in this volume; Salomon 2007; Shelton 2009; Vandenhoe 2018).

A More Expansive Understanding of Responsibility

Global obligations attributed on a differentiated basis and obligations borne by ‘plural and diverse duty-bearer[s]’ (Vandenhoe 2015) naturally necessitate an international legal responsibility regime that allows for the attribution and distribution of shared responsibility for wrongful acts or omissions resulting in human rights violations among different states (as well as other international legal actors, including international organizations, non-state actors and hybrid public-private actors). Both the existing international responsibility frameworks under the Articles of Responsibility of States for Internationally Wrongful Acts (ARSIWA) and the Articles of Responsibility of International Organizations (ARIO), and the *Maastricht Principles* fall short of formulating adequate responses in this regard (Vandenhoe 2018).

The reformulation of responsibility under international law and particularly in reference to human rights law should overcome the main shortcomings of existing responsibility frameworks. These include:

- 1 The use of international legal personality as the single benchmark for duty-bearing and consequently being legally responsible for the breaches of these duties;
- 2 The constrained scope of responsibility determined by the restrictive attribution of conduct to an international actor (defined as a state or an international organization or a combination thereof) either through its agents or organs, requiring a direct relationship between acts or omissions on the one hand and breaches of international obligations on the other (putting into question whether responsibility may be applied to less direct or indirect relationships, as noted by both Schechla and Todeschini in this volume or through a broader designation of attribution beyond the conduct of agents or organs);
- 3 The attribution of shared responsibility limited to situations of “aiding and abetting” or more colloquially put, complicity (which, as Guild points out in this volume, may require a high burden of proof by the rights-holders, rendering human rights protections moot);
- 4 A lack of recognition of how responsibility should be attributed and distributed for differentiated human rights obligations;
- 5 A liability-based (ex post facto) outlook that ties international legal responsibility to specific harms and does not factor in “forward-looking” perspectives of responsibility (echoing Young 2006).

Recent developments in the domain of shared responsibility that have culminated in scholarly attention respond to some of these shortcomings, for instance, by proposing to expand the scope of responsibility (Erdem Türkelli in this volume). While welcome, these developments do not push the boundaries of the law enough to accommodate the differentiated attribution and distribution of responsibility for differentiated obligations, to challenge the constraints of international legal personality or to conceptualize responsibility in forward-looking ways.

Promise may be found in alternative understandings of responsibility, inspired by both legal and non-legal approaches. In this regard, expanding the boundaries of legal responsibility to incorporate relationships beyond causality is the first step. Salomon (2007), for instance, links responsibility for systemic or structural violations to failing to act with due diligence and with an adequate standard of care. Similarly, Young’s (2006) forward-looking model of political responsibility does not delimit responsibility to causality or to liability for harms but to actions or lack thereof in the face of foreseeable harms or injustices.

The second step is to recognize the various bases for the differentiated attribution of responsibility to various duty-bearers that also determines the distribution of responsibility among

these duty-bearers. For Young (2006), these included power and influence, relative privilege gained due to structural injustice, vested interests and collective ability to prevent, resolve or contribute to the harms. For Salomon (2007), likewise, the bases for a differentiated attribution of responsibility should comprise power and influence over and benefits resulting from global processes leading to violations and the capability to assist. Additionally, Salomon invokes differentiation on the basis of a given actor's contribution 'to the emergence of the problem' (2007, p. 193).

In the third step of operationalizing, a more expansive understanding of responsibility, the idea of a polycentric governance framework for responsibility may function to offer rights-holders a multiplicity of venues for holding various state and non-state duty-bearers to account for their human rights impacts by overcoming obstacles linked to international legal personality and by bypassing causality based and liability-focused responsibility regimes (Erdem Türkelli 2020). The polycentric governance of responsibility also calls for legal, political and social responsibility mechanisms to be developed – when found to be lacking – to respond to the needs of rights-holders (Erdem Türkelli in this volume).

The state-centric myopia of international law on the one hand and the roots of an international legal system that has favoured the politically, economically and militarily more powerful states on the other have created obstacles to realizing the transformative potential of human rights. International law's legal fictions that obscure asymmetric power relations between different states informed by historical extraction patterns have prevented both less powerful states and individuals and communities living outside of these powerful states from claiming the same level of protection that is accorded to powerful states and even private actors such as companies under international legal regimes such as through investment law. We have a choice. We can continue to view human rights as we have in the past and live in a world where there is human rights protection for a few but little for the many. Or we could think of human rights as they should be: as the means of protecting all of us – by all of us.

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