CASES AND CONCEPTS ON EXTRATERRITORIAL OBLIGATIONS IN THE AREA OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

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FOREWORD

This volume is the result of over ten years of research conducted jointly by non-governmental organisations and universities. It presents a range of cases in which the actions or omissions of States have impacts on the enjoyment of human rights outside their national territory, raising the question of whether, and under which conditions, such conduct may engage the international responsibility of the States concerned. When the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights were adopted on 28 September 2011, it is these cases, among others, that the experts who developed these principles had in mind.

As such, the series of case studies presented by Fons Coomans and Rolf Künnemann is at the cutting edge both of human rights activism and of human rights doctrine. This volume provides clear evidence both that the Maastricht Principles are useful and important, and that if we accept to build on the extraterritorial obligations of States, the accountability gap that economic globalization has created can be closed. Economic globalization results in a mismatch between the scope of influence of States and the way the scope of their legal responsibility is defined: it is one of the objectives of the Maastricht Principles to align human rights better with the realities of an interdependent world.

Yet, a paradox of this area is that this seminal contribution in fact calls for little more than for human rights to be re-established in the position they were occupying more than sixty years ago, when the Charter of the United Nations and the Universal Declaration of Human Rights were adopted. Under the UN Charter, all Members of the United Nations pledge to 'take joint and separate action in cooperation with the Organization' to achieve the purposes set out in Article 55 of the Charter, which include 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.' When it was adopted three years later, the Universal Declaration of Human Rights not only provided a catalogue of rights concretizing the requirements of the United Nations Charter. It also set out a duty of international cooperation in Article 22 for the realization of economic, social and cultural right: this objective, it states, must be achieved 'through national effort and international co-operation and in accordance with the

organization and resources of each State.' And Article 28 of the Universal Declaration of Human Rights also stipulates that 'Everyone is entitled to a social and international order in which the rights and freedoms in this Declaration can be fully realized'. Today, it is these promises that are finally being revived.

But, as the cases collected in this volume illustrate, the challenges are considerable. It will not do to simply resurrect forgotten pledges, that the Cold War, the imposition of the neoliberal agenda, and the fragmentation of international law and governance, in that order, have led governments to ignore for so many years. The problem is not merely of ensuring that States comply with the human rights they have undertaken to comply with. It is not only political; it is also theoretical and conceptual.

A first difficulty we confront is that the notion of extraterritorial human rights has been approached by courts and human rights expert bodies in a purely *ad hoc* fashion. There was no script to begin with, and we are left with no theory at the end. There are cases, but the principles remain vague and unarticulated. Human rights expert bodies and courts have affirmed the duty for a State to comply with its human rights obligations when it occupies foreign territory or when its agents hold a person or a situation under their effective control. They have asserted a need to take human rights into account in the negotiation and conclusion of international agreements. They have stated an obligation to regulate the conduct of private actors, particularly transnational corporations, on which they could exercise an influence. They have acknowledged that international organisations, as subjects of international law, were bound by the general rules of international law, but they have also noted that when they establish such organisations or influence their decision-making processes, States, as members of these organisations, could not circumvent their human rights obligations.

Yet, while there is broad agreement on these various consequences, there is much less agreement on the overarching principles. In attempting to restate the principles defining the extraterritorial obligations of States in the area of economic, social and cultural rights, the authors of the Maastricht Principles were like grammarians seeking to uncover the logic of a natural language: they discovered that agreement on specific outcomes, or even on the need to close certain accountability gaps, did not necessarily mean agreement on how the rules dictating such outcomes should be defined.

A second difficulty goes beyond the doctrinal challenge. It stems, rather, from the fact of the increased interdependency of States. States in effect have become semi-sovereigns. The transboundary flows of goods, services, information and capital, have grown in significant proportions, and if we discount the social and

environmental externalities, they have also become much cheaper following technological advances and cultural homogenisation. Global public goods, such as technology, water, biodiversity and the atmosphere, and the ability for States to tackle transnational crimes, are now seen to have a direct relationship to the realization of human rights. The result is that the full realization of human rights increasingly shall require joint action between States. It shall not be enough to impose on each State considered *individually* a duty to respect, protect and fulfil human rights: it shall be required, in addition, to ensure that States *cooperate* with one another, and that the international environment itself is reshaped in accordance with the requirements of human rights.

That is what Article 28 of the Universal Declaration of Human Rights envisaged. It shall not be easy to achieve however, because of the current fragmentation of international law and governance, and because some areas, trade and investment in particular, have deliberately been placed out of the remit of human rights.

Yet, we need to bring them back in. It is now high time to move from human rights imposing duties on States towards their populations to human rights reshaping the international regimes. This means identifying which human rights duties can be imposed on international organisations, both within and outside the United Nations system, and developing mechanisms that can hold them accountable. It means developing tools to ensure that transnational corporations are aware of their human rights duties, and that remedies are available to victims either in the State where the prejudice occurred, or in the home State of the corporate body. And it means taking seriously the two components of the extraterritorial human rights obligations of States, to include not only these obligations as they relate to their conduct that produces effects on the enjoyment of human rights outside of the States' territories, but also as they relate to the so-called 'global obligations', that the Maastricht Principles define as 'obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately, *and jointly through international cooperation*, to realize human rights universally.'

Over the past ten years, significant progress has been made on all these fronts. International organisations are increasingly developing mechanisms to ensure their accountability towards human rights. Transnational corporations are aware that they are now expected to respect human rights, and to ensure that they have a positive impact on their realization: the OECD Guidelines on Multinational Enterprises have been revised in 2000, and again in 2011, in order to refer to human rights, which they now dedicate a detailed section to; the Human Rights Council has adopted the set of Principles implementing the 'Protect, Respect and Remedy' Framework proposed by the Special Representative of the Secretary-General on the issue of human rights and

transnational corporations and other business enterprises. It is also to this enterprise that the Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements, presented to the Human Rights Council in 2011, seek to contribute: while human rights treaty bodies as well as special procedures of the Human Rights Council have regularly called upon States to prepare human rights impact assessments of the trade and investment agreements that they conclude, emphasizing that States should take into account their human rights obligations when negotiating or ratifying such agreements, the Guiding Principles aim at providing guidance as to how to go about preparing such assessments, focusing on the methodological and procedural aspects.

The Maastricht Principles also contribute to this renewal of human rights: they invite us to see human rights as global public goods, and a guide for the reshaping of the international legal order. As these norms and procedures develop, human rights gradually can turn into what Buchanan and Keohane call a 'global public standard' to assess the normative legitimacy of global governance institutions – i.e., the 'right to rule' of these institutions, which cannot ensure compliance with their decisions unless they are perceived as legitimate by those, including States, whom such decisions are addressed to.

Even apart from the preeminent position that they occupy in the original project of the United Nations, human rights possess three features that make them particularly suited to this goal. First, they are *relatively incomplete*. They are sufficiently precise to provide a focal point for deliberations as to how to build international regimes – how to regulate trade, how much to protect foreign investors, or how to allocate the responsibilities in combating climate change – yet they are vague enough not to pre-empt the result of these deliberations. They thus allow true ownership by the actors, primarily States, who contribute to the establishment of international regimes.

A second advantage of human rights is that they are both *legal rules*, binding upon States and, in some respects, on non-State actors, and *ideals*. The legitimacy that human rights confer therefore includes the element of legality, without being reducible to that element. Human rights are violated or they are complied with, but that simple dichotomy, which is the language of lawyers, never exhausts their significance: for human rights can always be improved upon. Our quest for the full realization of human rights is one in which we permanently learn and test the means we use against the ends that human rights are supposed to define.

A third advantage of human rights is that they effectively correspond to the requirements of moral cosmopolitanism, the idea that citizens in rich countries owe duties to those living in poor countries. Human rights are not simply norms

that regulate the relationships between States, built on States' interests. Rather, they are the legal embodiment of the idea that, as Thomas Pogge writes, 'every human being has a global stature as the ultimate unit of moral concern'. Human rights are held by each individual, wherever he or she finds him- or herself to be, and all States are duty-bound to refrain from conduct that might lead to a violation of the rights of that individual. That relationship, between one State A and individuals in State B, is generally conceived of as based on considerations of humanity, or on charity, for the fulfilment of basic needs. By preconceiving them in human rights terms, we transform that relationship into one linking rights-holders to duty-bearers: it is also this essential shift of perspective that extraterritorial obligations in the area of human rights serve to achieve.

I am grateful to Fons Coomans and Rolf Künnemann for having put together this remarkable collection of cases. They speak for themselves: they are the clearest expression I can think of for the need to improve our understanding of the extraterritorial human rights obligations of States and to develop tools and accountability mechanisms that will ensure that these obligations are enforced.

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LIST OF ACRONYMS

ACHPR	African Charter of Human and Peoples' Rights
ACP	Africa – Caribbean – Pacific
AfDB	African Development Bank
AO	Advisory Opinion
AP-ACHPR	Additional Protocol to the African Charter on Human and Peoples' Rights
AU	African Union
BIT	Bilateral Investment Treaty
CAO	Compliance Office of the Ombudsman at IFC and MIGA
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	UN Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
CSO	Civil Society Organisation
CSR	Corporate Social Responsibility
CTP	Cash Transfer Programme
EC	European Community
ECHR	European Convention on Human Rights
ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights
EDP	Environmentally Displaced Person
EIA	Environmental Impact Assessment
ENP	European Neighbourhood Policy
EPA	Economic Partnership Agreement
ESC	European Social Charter
ESCR	Economic, Social and Cultural Rights
ET	Extraterritorial
ETO	Extraterritorial Obligation
FAO	Food and Agriculture Organisation of the United Nations
GA	General Assembly of the United Nations
GC	General Comment
GDP	Gross Domestic Product
GNP	Gross National Product
IAC	International Assistance and Cooperation

ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IDA	International Development Association
IDB	Inter-American Development Bank
IFC	International Finance Corporation
IFI	International Financial Institution
IGO	Intergovernmental Organisation
ILO	International Labor Organisation
IMF	International Monetary Fund
LDC	Least Developed Country
MDB	Multilateral Development Bank
MDG	Millennium Development Goal
MIGA	Multilateral Investment Guarantee Agency of the World Bank Group
NCP	National Contact Point
OAS	Organisation of American States
ODA	Official Development Assistance
OECD	Organisation for Economic Co-operation and Development
OECD DAC	OECD Development Assistance Committee
OHCHR	Office of the High Commissioner for Human Rights
SAP	Structural Adjustment Programme
SIA	Social Impact Assessment
SR	Special Rapporteur
SWF	Sovereign Wealth Fund
TNC	Transnational Corporation
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN Charter	Charter of the United Nations
UN HRC	United Nations Human Rights Council
UN SC	United Nations Security Council
UNCHS	United Nations Centre for Human Settlement
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UNDAF	United Nations Development Assistance Framework
UNFPA	United Nations Population Fund

UPOV	International Union for the Protection of New Varieties of Plants
UPR	Universal Periodic Review
WBG	World Bank Group
WHO	World Health Organization
WTO	World Trade Organization

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