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Justifying extraterritorial human rights obligations
An ethical perspective

Angela Müller

Introduction

Today, opportunities for states to affect human rights abroad abound: Global phenomena like climate change, migration, trade, or terrorism multiply the scope of individuals a state can affect—at home as well as abroad. New technologies such as automated weapon systems open up novel ways to infringe human rights without even setting foot on a territory, and intelligence strategies like extraordinary renditions, or ‘terror by proxy’ that intend to exploit ‘legal black holes’ abroad are on the rise.

In light of these developments, spotlighting the obligations states are subject to when affecting people on foreign territories is an urgent and timely task. So far, such extraterritorial human rights obligations (ETOs) have mostly been discussed within legal scholarship. In philosophy, only little attention has been paid to the analysis of normative reasons for such obligations, i.e. for the assumption that human rights law should oblige states with respect to individuals abroad.

Given the level of sophistication the legal ETO debate has achieved over the last two decades, one might suggest that it can reasonably proceed on the presumption that such conceptual work is no longer required and move on to focus on technical legal details in concrete cases. However, this move might be not only premature but also ill-timed: In scholarship, critiques of the general idea of universal human rights are on the rise, stemming from a variety of theoretical outlooks (e.g., Posner 2014; Moyn 2018). In the political realm, nationalist agendas are gaining grounds all over the world, and many of them are openly critical of the idea of duties to strangers abroad. Most importantly, to a certain extent, such a move conflicts with state practice: Many states still—generally and/or in concrete cases—oppose the extraterritorial applicability of human rights law.

Against this background, this contribution starts from the assumptions: (i) That establishing a firmer normative basis of ETOs could ultimately improve their standing in practice, too, and (ii) that this requires a systematic analysis of the grounds on which the persistent opposition to ETOs rests: The concerns behind this opposition must be discerned and engaged with. The chapter begins by, first, pointing to two common threads in legal practice: Courts’ struggle for consistency when extraterritorially applying human rights law and the territorial paradigm that continues to underlie this legal field. Second, it presents selected theories—associated with moral, political,
and legal philosophy and related fields—that could stand behind skeptic positions on ETOs, and it reconstructs the arguments they could provide for such skepticism. Based on a critique of these arguments in its third section, it then, fourth, turns to the normative justification of ETOs and, lastly, indicates how these ethically oriented reflections could be considered at the legal level.

As a last preliminary remark, it is important to clarify that, while the following reflections focus on international human rights law (IHRL), the basic assumption is that the moral foundation of fundamental rights enshrined in domestic law (or in European supranational law) does not essentially differ from the former's.

Two tendencies in legal practice

Due to its normative focus, this chapter will not include a legal analysis of ETOs (for such analyses, see other contributions in this volume). The following section limits itself to asserting two tendencies that can be observed across a range of legal regimes, and it does so by way of an illustrative example: The case law on the European Convention of Human Rights (ECHR).

First, courts struggle with developing consistent approaches to how and when states are bound by human rights norms when their acts or omissions have effects abroad. In IHRL, where jurisdiction functions as the key threshold for the applicability of many treaties (e.g., ECHR, art. 1), this typically boils down to the question of how and when states exercise jurisdiction abroad. The European Court of Human Rights denied jurisdiction in cases in which individuals abroad had been severely affected by the actions of Member states (e.g., ECtHR 2001, paras. 54–82), while confirming it without any (or any thorough) discussion in other extraterritorial situations where the link between the applicant and the foreign state appeared, at least prima facie, to be less direct (e.g., ECtHR 2014). In still other cases, it applied the Convention abroad, but still emphasized the ‘essentially territorial’ nature of jurisdiction (e.g., ECtHR 2012, paras. 71–72). So far, it has failed to settle on a principled approach to what jurisdiction means in situations abroad. It has tried to develop such principles in some cases (e.g., ECtHR 2011, paras. 133–142), while at the same time referring to the need to decide the issue on a case-by-case basis (e.g., ECtHR 2019, para. 190; 2012, para. 74).

Second, the Court reveals its skeptic stance on extraterritorial applicability of the Convention, by including the above-cited dictum on the territorial nature of jurisdiction and the exceptionality of its extraterritorial exercise in almost all relevant case law (e.g., ECtHR 2020, paras. 98–100). This illustrates the territorial paradigm that continues to underlie IHRL: It stems not only from the fact that IHRL forms part of public international law, which was built on Westphalian-inspired conceptions of territorial sovereignty, but also from the central role assigned to jurisdiction and its potential for ambiguity. In IHRL, the question must be whether jurisdiction was de facto exercised, deviating from its de jure understanding in general public international law (e.g., Milanović 2013, p. 26). Its ambiguous nature contributes to the difficulties judicial bodies seem to have in addressing this central concept (cf. ECtHR 2001, paras. 59–61).

These tendencies are epitomized by, but not limited to the jurisprudential body on the ECHR. While other IHRL courts and treaty bodies—such as the Inter-American Court of Human Rights or the Human Rights Committee (HRC)—have recognized a wider scope of extraterritorial applicability, controversies continue and claims about the essentially territorial nature of human rights obligations persist. Moreover, while this chapter spotlights IHRL, and while the applicability of domestic protection regimes is not regulated by the threshold of jurisdiction, it is informative that the two tendencies can also be observed in domestic contexts: For example, they are mirrored by the jurisprudence of the US Supreme Court, which takes a restrictive approach to the extraterritorial reach of constitutional protection (US Supreme Court 1990, 494 US 259), struggles with providing coherent principles on it, and tends to avoid
this ‘sensitive’ and ‘far reaching’ question (US Supreme Court 2017, 582 US ___, slip. op. at 5). Lastly, and most importantly, ETOs continue to face resistance on the part of duty-bearers at stake, i.e., states (cf. illustratively HRC 2018 and there e.g., the statements of The Netherlands, para. 29; or United States, paras. 13 and 15; also, France 2019, para. 18).

These two common threads point to the need for further research on the normative background of ETOs. If the territorial paradigm shall be won over, and if coherent approaches to extraterritorial applicability shall be developed, they need firmer grounding.

Concerns behind skepticism towards extraterritorial human rights obligations

In the philosophical debate on global justice, two strands of theories stand for contrary perspectives on the reach of duties to individuals. Cosmopolitan theories typically take a universalist starting point, assuming that any limitations to the universal reach of such duties need to be justified. In contrast, statist theories diagnose an elemental difference between the domestic and the global sphere, asserting that the burden of proof lies with those that aim at expanding obligations beyond national boundaries. The next section provides a (non-exhaustive) list of statist theories and suggests how they could be deployed for developing arguments against ETOs. Even though, so far, many of these theories have not explicitly been linked to the ETO debate, and even though more moderate exponents associated with them often refrain from thoroughly denying any obligations to outsiders, their skeptical views on the general moral idea of universal human rights and on their legal codification contain premises that could furnish such arguments against ETOs—at least in their more radical versions. Hence, they provide clues to the concerns that may stand behind the persistence of the territorial paradigm.

First, the legitimacy of ETOs could be denied from a perspective of International Relations (IR) Realism—a theory that, as its name says, is typically associated with the field of IR but that has had important reverberations in political philosophy. It goes back to authors like Morgenthau (1949) or Waltz (1979) and has recently been revived as an alternative to the liberalist picture (e.g., Williams 2005; Geuss 2008). According to the realist, the international sphere—strictly differing from the domestic one—is marked by constant threat and prone to conflicts. In this anarchical setting, the state functions as the central agent and power as its main instrument. States primarily (or exclusively) pursue national self-interest and the relations among them are not governed by morality but by standards of rationality and effectiveness. In contemporary versions, liberal universalist ideas like human rights, the triumph of which had marked the years after the Cold War, are said to have arrived at their end point.

Realists tend to reject the moral idea of universal human rights and their legal codification in general, which they declare incompatible with the setup of the international sphere. Adopting this perspective, the mere idea of ETOs—i.e., of legally introducing diagonal obligations of a state to individuals abroad—must be regarded as naïve, given that states’ motives simply do not depend on the content of international norms but on national interest. Respect for the former is always conditional upon its congruency with the latter. Direct duties to persons abroad would illegitimately limit states’ pursuit of self-interest in foreign affairs (Morgenthau 1949, p. 210; see also US Supreme Court 1990, 494 US 259, 273–275).

Second, in this view, it is hypocritical to incorporate moral concerns—like the one behind human rights—into transnational relations and international law, considering that states would only hide their real motivation behind such efforts—their self-interests—behind the façade of the former (e.g., Morgenthau 1979, pp. 4–7). Applying this view to the issue of ETOs, realists could thus assert that if there was a general system positing norms on other states’ territories
that do not stem from the latter’s sovereign decision, this would increase the opportunities to imperialistically inflict standards of hegemonic states onto others.

Communitarianism—a theory rooted in moral philosophy but often applied to political theory—provides a second potential strand of skepticism. Communitarians oppose the liberalist individualistic perspective, asserting that individual identity is essentially determined by social bonds (e.g., Taylor 1985, pp. 187 ff.). Humans attach great significance to similarity and otherness, they are naturally partial to the near and dear and motivationally incapable of expanding solidarity to distant strangers. Particularity—the fact that someone is my sister or my compatriot—is of intrinsic importance to us, generating sui generis moral reasons that are not reducible to impartial and universalist moral concerns, the source of which would lie outside the community. Applied to national or political communities, it is the mutual sharing of values, history, culture, and traditions that makes membership of them such an essential value for individuals, their identity, socialization, moral education, and flourishing (e.g., MacIntyre 1984; Walzer 1983, pp. 31–63 and p. 314). They are perceived as essentially involving a network of exclusive obligations to co-members (or at least special obligations to prioritize them). From a hard communitarian position, it could be derived that there are no grounds for subjecting the state to obligations that are based on universalist ideas and that expand beyond its own community—thus, that there are no grounds for ETOs.

Related concerns stand behind neo-republicanism, a prominent approach in political theory, which assigns central value to freedom from others’ control. Freedom can be defined as non-domination, i.e., the guarantee of not being subject to the arbitrary will of others (Pettit 1997). As a prerequisite for realizing freedom, collective self-determination is of particular significance: Individual freedom requires internal freedom of one’s political community, i.e., collective self-determination—and the latter requires freedom of the state from external agents: It must only act upon standards on which its members have autonomously agreed and that reflect the will of the community (Pettit 2016).

With respect to individual rights protection, the neo-republican must generally hold that if such norms exist, they can only result from the activity and the consent of the community. Based on this perspective, she could add that extraterritorially applying IHRL norms in order to protect non-members cannot reflect the will of members but rather mirrors external and universal standards. Accepting such standards would be equal to subjecting the state to the arbitrary will of outside agents and thus result in domination. This can be combined with a voluntarist view on the authorization of international law, which describes participation in the latter as a fully voluntary undertaking, rooted in sovereign consent that reflects members’ will.

From a similar perspective, Nagel promotes a specific version of a political theory of justice, arguing that justice is not a pre-institutional concept but only (and necessarily) arises within the context of institutions and among members of the corresponding community (2005). In his account, it only pertains within ‘thick’ institutional frameworks characterized by, first, coerciveness over members and, second, the fact that members at the same time participate as co-authors of the coercive structure, i.e., the state acts in their names. According to Nagel, it is this unique combination that generates duties of justice (pp. 128–130)—and that, at least as of today, only exists in the context of the domestic state. He regards the international order as categorically different: Neither is it structured by coercion (but by consent of its subjects, i.e., states), nor can individuals act as co-authors (as its norms are not enacted by them but by the state) (pp. 137–143). Hence, justice obligations do not apply here. Thus, on condition that human rights duties can be classified as duties of justice, Nagel’s approach entails that they only hold within the domestic context, obliging the state vis-à-vis insiders but not vis-à-vis outside non-members.

A further cluster of concerns springs from moral relativism—in particular, from the relativist critique of universal human rights. According to cultural relativism, values and principles—including
conceptions of individual rights—are defined relative to the particular historical, social, religious, and cultural context. To this descriptive thesis, the moral relativist adds the normative premise that, given this fact, all sets of values and principles deserve equal respect.

According to the relativist critique, what is today referred to as ‘human rights’ does not flow from a universally shared but from a specific modern, Western, and liberal value set (e.g., Brown 1997), which is incompatible with, for example, Asian values that attach great significance to collectivity. Declaring the former universally valid results in an ethnocentric, parochial, imperialistic, neo-colonialist, or neo-liberalist imposition of values onto others who do not share them (from a postcolonial perspective, e.g., Mutua 2002; Koskenniemi 2018; for the neo-liberalist critique, Hardt and Negri 2000; from the perspective of pragmatism, Rorty 1989). When applying their general critique of human rights to the question at issue, relativists could argue that equipping human rights law with extraterritorial reach would introduce a system that adds to the illegitimate nature of the enterprise. The duties a state has must be derived from its particular context-specific conceptions and only hold vis-à-vis its members. When states act abroad, the norms they are subject to must stem from the territorial context on which they are acting. Other societies have ‘wholly dissimilar traditions and institutions’ (US Supreme Court 1990, 494 US 259, 278 (Kennedy J., concurring)), and a political community cannot simply inflict its way of fundamental rights protection on territories abroad.

Why skepticism is unfounded

After this summarized listing of several concerns that could motivate the persistence of the territorial paradigm, this section focuses on the weaknesses of these objections—an analysis that in turn will help identify aspects relevant to the normative justification of ETOs.

The empirical analysis of IR Realism certainly points to important features of the international sphere. At the same time, there is reason to doubt that states only act on self-interest, that human rights law does not make any difference, and that a firm judicial recognition of ETOs would not influence states’ conduct at all. Of course, some states notoriously fail to comply with IHRL, and its introduction has not resulted in the global demolition of injustices. However, it has certainly had some—and not only minor—achievements, be it at the level of compliance, adjudication, or awareness-raising. Furthermore, the empirical realist analysis does not by itself have implications for the normative legitimacy of extraterritorially applying human rights norms: There is a gap between Is and Ought. If some states tend to ignore human rights when affecting people abroad, this does not yet mean they are justified in doing so. Morality applies whenever human-controlled actions have effects on other sentient beings, regardless of the acceptance of its applicability by its subjects, the confrontative and decentralized nature of the setting, and the territorial location of these effects (Caney 2006, p. 276).

Second, the concept of national interest—vague as it is—need not be in contradiction with a concern for human rights. On the one hand, compliance with human rights both at home and abroad can contribute to international stability and thereby promote domestic interests, too. On the other hand, states also have non-instrumental interests in taking human rights, as common concerns of humankind, seriously (Ryngaert 2015, pp. 102–111). This is what basic constitutional principles routinely assert by declaring human rights constitutive parts of the national value set (e.g., Grundgesetz für die Bundesrepublik Deutschland, art. 1). But if this is the case, then their value cannot simply evaporate when this very state’s acts have effects beyond its national borders.

A nationalist argument against ETOs based on a hard communitarian position is equally unconvincing. First, if one’s personal and moral identity develops within a specific context, that does not yet mean that moral norms only apply within this context. For example, to see how one’s
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... communal structure treats non-members and to learn that the latter also have legitimate claims form central parts of moral education. Moreover, various real-life counterexamples prove that humans are not virtually incapable of solidarity to strangers. Likewise, one should avoid overstating the uniformity within and the differences among communities (Langford and Darrow 2013, pp. 422–423). It has always been the case—and today’s globalized world just more evidently illustrates it—that values and interests are shared across territorial boundaries, and so are the social bonds that individuals hold dear. What co-members of anonymous political communities share is unlikely as thick and uniform as nationalist communitarians portray it. This indicates that the general strategy of drawing normative implications from the analogy between personal and political relationships is mistaken: These are two very distinct phenomena. While the latter may be instrumentally valuable for realizing individual goods, their value is not of an intrinsic kind. Moreover, individuals are doubtlessly social animals, but they are not reducible to their social bonds—and it is this very idea that human rights as rights of human beings that do not depend on membership (except for membership of humanity) reflect.

Second, partiality is certainly not something that states, in the area of human rights, cannot overcome. Second-level impartiality, which applies to institutions like the state and is ensured by law, might precisely define and enable legitimate degrees of first-order partiality, i.e., for individuals to act partial to their personal concerns. The discussion at issue concerns the principles by which international law should oblige states when it comes to actions that affect individuals’ human rights. At least in this area and for this actor, being mine does not make a foundational difference.

Again, members factually perceiving the state as having exclusive obligations to its members does not mean that such obligations are normatively justified. If insiders always get priority (or exclusive concern), outsiders get at least less (or no) concern. This raises justification conditions of such prioritizing considerably, especially if what is at stake for the outsider is of a fundamental nature—such as in the case of human rights. This is especially problematic in situations where states are acting abroad: Downplaying or denying the duty of a state agent located abroad not to violate human rights of local residents by referring to its special duties to compatriots at home comes close to denying human rights at all.

The neo-republican concerns toward ETOs are, first, in tension with contemporary reality: In today’s world, where threats to individual goods are increasingly of a global nature—be it climate change, transnational crime, or cyber attacks—maximizing states’ external freedom is unlikely to guarantee internal freedom for their members. Rather, securing the latter often depends on states’ participation in cooperative global efforts to tackle these challenges. Plus, a voluntarist take on international law opens the door to unpredictable unilateralism (Criddle and Fox-Decent 2019, p. 291), whereas the reliable application of norms like those of IHRL to all domains and locations of state conduct fosters predictability—and thereby precisely reduces the risks of insecurity and arbitrariness.

Second, within the community, collective freedom does not guarantee individual freedom. Individuals, especially those belonging to minorities, precisely rely on protections in the form of constitutional or—as a backstop—international rights, should the will of the majority threaten to undermine their freedom. Moreover, while it is certainly crucial for individuals to participate in some exercise of autonomy at the collective level, it is not crucial for them that this collective autonomy includes being free from duties to non-members and disregarding non-members’ claims to freedom and autonomy. If individual freedom is so significant, then it must be significant for all human beings, regardless of their territorial location.

The pertinence of Nagel’s account to the issue of ETOs depends on the adequacy of defining human rights duties as a category of justice obligations. This is a substantial assumption that will need to be explicated when the discussion turns to the normative justification of ETOs. At this
point, the critique proceeds from this assumption, spotlighting two main problems of employing Nagel’s approach as an argument against ETOs.

First, institutional obligations—i.e., obligations of institutions—do not have to be associative obligations: They are not only directed at those who formally classify as the respective institutions’ members but at everyone affected by this institutional structure. If institutions are essentially charged with the protection of justice concerns, then these concerns do not become irrelevant when institutional conduct affects non-members. Justice regulates institutions, not vice versa: It is not the particular institutional community that defines what justice demands. Justice principles—including human rights—set substantive constraints on institutions that are not contingent, neither on domestic decision-making nor on geographical facts. As Kumm puts it, if state conduct has negative externalities abroad that touch upon justice-relevant concerns—such as human rights—they cannot be left to states’ sovereign decision but must be regulated by international law, whether states have explicitly consented or not (2013, p. 613).

Moreover, outsiders typically do not have the judicial, political, and societal means paradigmatically available to insiders, to defend themselves against infringements of basic rights. In other words, while they can be exposed to coercive acts of foreign states, they lack the means to participate as co-authors. Human rights—especially internationally guaranteed rights—exactly provide crucial means of protection for whom it is more difficult or impossible to rely on domestic mechanisms.

What stands behind both the neo-republican and the institutionalist skepticism toward universal human rights is the worry of an unresolvable tension between genuine popular sovereignty and being constrained by such universal norms, assuming that the latter reflect standards that do not derive from the will of those subjected. This suspicion is mistaken. Subjugation to regimes of basic rights protection (at domestic or international levels) does not undermine popular sovereignty but, on the contrary, likely increases its legitimacy. The idea of democratic self-determination is not only a procedural but also a substantive one, including preconditions that cannot be made the objects of the decision-making process—such as, centrally, fundamental rights. These are not external standards that compromise popular sovereignty; rather, they enhance individuals’ capacity for autonomy, freedom, and living a life in dignity. Their source is not the arbitrary will of an outside agent but lies in each and every individual, within or beyond borders.

Second, it is empirically questionable whether Nagel is correct in asserting that ‘thin’ international institutions categorically differ from domestic ones. For example, contemporary international law amounts to an expansive (even if not yet fully comprehensive) legal system with at least some coercive structures, which recognizes individuals as direct legal subjects, enables at least indirect participation (even if mediated by individuals’ ability to participate domestically), and is increasingly accompanied by the evolution of a global civil society. International norms, politics, and agents have actual and potential, direct and indirect impacts on individuals’ lives. As of today, some international institutions might be gradually thinner but not all of them are categorically distinct to domestic ones (the EU being a paradigmatic example).

On closer inspection, the general relativist critique of universal human rights itself takes a universalist moral position: It relies on the implicit premise that it is—universally—wrong to impose own norms to others, implying a universal principle of tolerance and ascribing normative superiority to cultural diversity. Moreover, its claim about the hypocrite nature of human rights efforts, which ETOs would multiply, is only valid insofar as the assumption of the universal justifiability of human rights is wrong. Only then could obeying them abroad mean illegitimately imposing foreign standards. In addition, it is important to underline that foundationally universally justified principles can still be formulated (e.g., in positive law) or applied (e.g., by judicial bodies) in context-sensitive ways.
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The relativist overstates the dichotomy between Western and non-Western values and ignores the wide convergence on values and principles across the globe—especially on core principles behind IHRL (Sen 1996). Moreover, the conception behind IHRL attaching significance to individual autonomy neither contradicts community concerns nor undermines cultural diversity: Autonomy-based norms can precisely serve as a means to protect diversity (cf. Coomaraswamy 2013, p. 53), and their extraterritorial extension could actually contribute to protecting the diverse needs and interests of outsiders.

Lastly, human rights have certainly been misused to conceal other (sometimes imperialist) motives—by both Western and non-Western regimes. However, this does not render the concept itself an illegitimate instrument of the powerful. It is precisely in extraterritorial settings, too, where human rights are crucial for protecting individuals who are exposed to foreign state acts and have only limited other means of protection available. At the very least, a firm legal recognition of ETOs would entail a common set of expectations that if foreign interventions are made, human rights must not be left behind.

**Normatively justifying extraterritorial human rights obligations**

The above discussion of the concerns that might motivate skepticism towards ETOs now allows for identifying aspects relevant to the normative justification of these obligations.

The first cluster of such aspects concerns the core idea behind human rights obligations, which correspond to rights assigned by virtue of being human. This ‘being human’ refers to a distinct core of human nature, which is universally shared. This conception of universally shared rights sketches the core idea behind human rights. If it is denied, it is not clear how one could still speak of human rights. And, as alluded to when discussing Nagel’s approach, human rights are foundationally a justice-relevant domain: It is the basic idea of justice to treat everyone equally who is equal with respect to the relevant aspects at issue. Consequently, it is a demand of justice to apply the foundational norms that are assigned by virtue of the universally shared core of human nature—human rights—to everyone equally as well (Mahlmann 2008, pp. 447–453 and pp. 518–519). And it is this basic moral idea that stands behind the legal protection of human rights—at the international level and, arguably, also at the domestic level.

However, as rights do not only consist of claims but also of obligations, the universality of rights suggests the universality of obligations (Skogly 2010, pp. 833–834). At the very least, the legitimate starting point is the general assumption that human rights obligations hold universally, too. In other words, the point of departure for the debate on their reach should be a universalist one, namely the assumption that states are, in principle, bound by them whenever and wherever they affect human beings. Thus, the burden of proof does not lie with those who wish to expand duties beyond states’ borders but with those who would want to constrain them to these very borders.

As it seems, it is already this basic moral idea behind human rights that is in tension with asserting that states are only bound with regard to part of their actions or omissions with effects on individuals, namely those the effects of which happen to materialize on their territory.

The second cluster of considerations relevant to the justification of states’ ETOs concerns the nature of the duty-bearer at stake here. As the paradigmatic human rights duty-bearer, the state is the actor that means the biggest threat to human rights and, at the same time, that can most reliably and effectively protect human rights. This ambiguity stems from the multifaceted nature of this institution, which can both positively and negatively affect people in major ways, not only through unique means of normative, legal authority but also through its enormous de facto power and resources. At the same time, states are institutions set up in the service of individuals (ICJ 2010, Separate Op. Cançado Trindade, para. 239; even if, evidently, not every factual state lives...
up to this demand). This ambiguity mirrors the basic insight behind human rights, namely that
human beings need to be protected from states’ extraordinary power (requiring states to respect
human rights) and at the same time must rely on this powerful agent set up for them (obliging
states to also protect and fulfil human rights). Accordingly, human rights obligations must nor-
matively delimit and define the space of legitimate state action.4 While statehood is not a necessary
condition for being a human rights duty-bearer, it certainly amounts to a sufficient condition.

This directly bears on the question of ETOs. It entails that human rights obligations bind
states by virtue of their mere statehood and, consequently, with regard to all their conduct that
affects human beings—at home or abroad. For these duty-bearers, being subject to human rights
obligations means being subject to substantive restrictions on their freedom of action (including
negative duties to refrain from acting as well as positive duties to act), which do not depend on
the location of the effects of their acts or on other contingencies—unless this can be justified.

It is true that, given the global status quo, it is often the domestic state on the protection
of which individuals most urgently depend: Typically, it is my state of residence that can most
easily violate my rights as well as most efficiently protect them. However, this does not make
membership a necessary condition for human rights obligations to apply. Today, people are rou-
tinely exposed to the effects of foreign states’ actions, too. While outsiders’ vulnerability is not
necessarily greater than that of insiders—typically, the opposite is the case—it evolves within a
special context, given that outsiders’ means to defend themselves tend to be more limited. It is
often more arduous for them to challenge a foreign state’s violations in its domestic courts, to
influence foreign state conduct by participating in decision-making, or to raise awareness on and
demand justifications for this conduct in public debate. In this diagonal relation, in which other
means of protection are often limited, ETOs provide critical protection. If human rights stand-
ards essentially regulate relationships between states and individuals, then they must also govern
diagonal relationships between states and foreign individuals (Müller 2020). In other words,
while membership of political communities, collective self-determination, or co-authorship can
certainly be of moral and legal relevance, what must be denied is that they serve as necessary
thresholds for the applicability of human rights duties.

Lastly, ETOs are certainly demanding requirements. Yet, the institution state, which comes
with a legal system, precisely has the intention of and capacity for discharging such demands.
One of the crucial points behind normative systems like morality and law is to ensure impar-
tiality as the foundational touchstone of regulating human interactions. They do so, inter alia, by
dividing moral labor and allocating demanding, impartial, and universal duties to institutions like
the state, leaving more leeway for individuals to act on personal concerns.

To sum up, foundationally, at least in this domain (human rights) and at least for this actor (the
institution state), the point of departure must be that obligations hold universally. Thus, it is not their
universal reach but, on the contrary, their limitation to territory that bears the burden of proof.

How to approach jurisdiction

Moral norms are not necessarily directly translatable to legal ones, but there are domains
in which ethical theory should crucially inform the content or interpretation of the lat-
er. This nexus is particularly strong in the area of human rights, the legalization of which
is based on their basic moral idea. At the same time, ethical reasoning cannot ignore legal
reality—inter alia, it must consider the content of positive law. Thus, the idea here is that the
normative idea behind human rights obligations should guide the interpretation of corre-
spending legal norms and their applicability conditions as enshrined in positive law—such
as, in IHRL, of jurisdiction.
That said, the universalist starting point argued for above can only serve as a first approximation to jurisdiction: It must be translated into legally workable criteria of how to interpret this central notion (e.g., promising guidelines based on a universalist starting point are provided by the *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social, and Cultural Rights*). The following limits itself to pointing to selected aspects the above reflections entail for a coherent interpretation of jurisdiction.

First, it must capture the ambiguous and multifaceted nature of states as human rights duty-bearers: They can exercise jurisdiction by acting as bearers of legal authority but also by making use of their factual power, whether in lawful or unlawful ways. That said, states cannot be obliged to do the impossible. The effects over which they can reasonably be said to exercise jurisdiction cannot include distant side-effects they could not have foreseen or altered by lawful and proportionate means.

Second, the multifaceted nature of states must also be mirrored in the multidimensionality of ETO. In this respect, it is important that jurisdiction and corresponding obligations can be divided and tailored, especially as in extraterritorial situations, it is often the case that many states are involved.

Third, the interpretation of jurisdiction must still account for the fact that it is—*not necessarily* but *typically*—the domestic state on the protection of which individuals most urgently depend, without thereby assigning foundational significance to relations of membership or territory. Rather, these relations serve as a mere ‘rule of coordination’ (Shany 2013, p. 69). Given the contemporary statist system, there might be *instrumental* reasons for allocating primary obligations to the domestic state: This then serves as an efficient instrument of realizing the overall universalist aim—but there is nothing more behind the domestic relation.

Fourth—and this point goes beyond the question of how to interpret jurisdiction—it must be ensured that human rights protection provides a reliable mechanism in light of outsiders’ limited means. *Inter alia*, ETOs must be accompanied by measures enabling or enhancing the enforceability and justiciability of these—doubtlessly complex—norms. This includes, among many other things, enabling outsiders’ access to domestic and international courts by removing formal and practical barriers, or equipping judicial bodies with the adequate means to analyze situations that occurred far away (cf. also *Maastricht Principles*, pp. 36–41).

In sum, a coherent model of how to interpret jurisdiction must translate the foundational moral insight—namely that states, as institutional tools for humans and in light of their multifaceted role, are universally bound by human rights norms—into a practicable criterion sensitive to legal reality. Such a criterion must be coherent and principled, but it is clear that it will, to a certain extent, remain an abstract standard that, eventually, has to be put into practice by judicial bodies—which is, however, a task such bodies are essentially and routinely entrusted with. And in undertaking this task, they should be guided by the universalist normative idea behind human rights obligations.

Moreover, while jurisdiction—so reinterpreted—might be able to cover ETOs *sensu stricto* (Vandenhole 2012, p. 5), it will still leave many transnational rights concerns unanswered. It is unlikely to capture what normative considerations also point to: That there are, in addition, obligations to the entire human community that do not depend on any underlying jurisdictional link. Such *global obligations to work toward the universal realization of human rights* (cf. *Maastricht Principle* 8b; Skogly in this volume) also have a firm normative standing, even if they cannot fully be captured by current positive human rights law, the applicability of which is, to a large extent, conditioned on the notion of jurisdiction. In this area, a comprehensive implementation of ETOs might not be achievable *exclusively* through *reinterpretation* of positive human rights law—even though some current regimes could account for such global obligations. Here, the normative idea behind human rights obligations suggests that positive law might also have to evolve.
Conclusion

The present chapter has concluded that, taking seriously the idea behind human rights, the legitimate starting point as to states’ human rights obligations is a universalist one. Thus, it is not their universal reach but rather any territorial limitations of such obligations that bear the burden of proof.

In times of globalization, the introduction of new technological means that allow for causing distant harm at the push of a button, the academic revival of statist and nationalist accounts, the success of their political derivatives all over the world, and the rising human rights critique in both academia and practice, the debate on ETOs is timelier than ever. The present contribution has sought to contribute to strengthening the justificatory basis of these duties, which, as state practice indicates, continues to be a major task. Such theoretically oriented background work can hope to contribute to greater coherence and ultimately to the growing acceptance of ETOs in scholarship, jurisprudence—and, ultimately, among the duty-bearers at stake, namely states.

Notes

1. This contribution formed part of a research project on «The Legal Philosophy of Extraterritorial Applications of Human Rights» (2018–2021), funded by the Swiss National Science Foundation and led by Prof. Matthias Mahlmann at the University of Zurich.

2. This gap in normative theorizing is not without notable exceptions on the part of legal scholars (inter alia Langford and Darrow 2013; Milanović 2013; Gibney 2016; Raible 2020).

3. Nagel might object that his theses only concern positive duties of socioeconomic justice, as he grants that a ‘minimal humanitarian morality’ could apply beyond the domestic context (2005, pp. 126–132). However, Nagel’s ‘minimal humanitarian morality’ is well below contemporary IHRL: It is restricted to negative duties not to commit atrocities and of an ethically humanitarian kind, differentiating it to stringent moral and legal human rights obligations (Cohen and Sabel 2006, p. 173).

4. Compliance with human rights is certainly not a sufficient condition of state conduct to be legitimate. Moreover, many state actions do not concern fundamental rights issues. Hence, it is only suggested that legitimate state conduct must not involve human rights violations.

References


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