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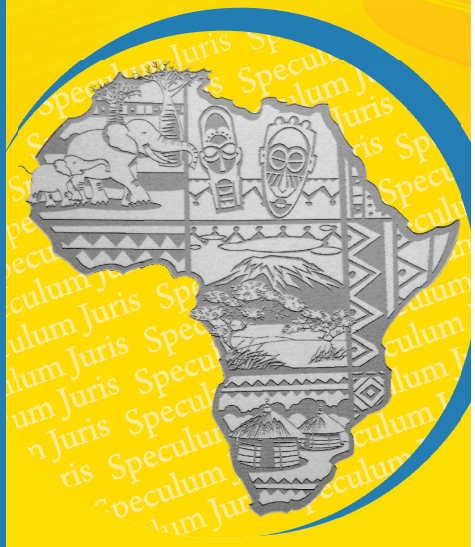

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Rights-Based Governance: the Need for Strong State Obligations to Protect Human Rights in an Era of Globalisation

Professor Fons Coomans,
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University of Fort Hare, 16 October 2018

Ladies and Gentlemen,

States do not exist in isolation. As members of the community of States they are dependent on international cooperation in dealing with problems that go beyond national borders. The need for international cooperation as a key principle of present-day life comes very much to the fore in the era of globalisation in which we live. The process of globalisation is crucial for a proper understanding of the international dimensions of the realisation of human rights. Globalisation as an economic and social phenomenon is characterised by an increase in international transactions between a growing number of actors, such as companies, individuals (patterns of worldwide migration), international governmental organisations, non-governmental organisations and States. Also the nature of involvement of actors in this process is changing: we witness an increase in the role and responsibilities of private actors in economic life, a diminishing role of the State (trends towards privatisation), and a stronger involvement of international governmental organisations and international market forces in the economic and financial policy of states (financial and economic austerity and adjustment programmes propagated by governments and the IMF). In Africa this often goes together with a combination of small economies and a rather weak state infrastructure. All these developments raise important questions about the democratic nature of the creation of legal rules.

In my address I will discuss what type of challenges processes of globalization pose for international human rights law, how the law has responded to these challenges and

in which direction the law should develop to meet these challenges. I will argue that strong state obligations are needed to make sure that governance is rights-based.

Let me illustrate my topic with an example that is probably well-known to you. The Chinese One Belt, One Road Initiative entails a massive expansion of Chinese state and private economic activities in other countries. Mining activities and huge infrastructural projects have caused economic growth in African countries, often to the detriment of respect for the human rights of the local population. Pollution and other forms of environmental degradation are the result of these activities, but also unsafe and unfair labour conditions in subsidiaries of Chinese companies, and cases of land acquisition by Chinese state companies have put the enjoyment of several human rights at risk. These include the right to land, health, work, safe and decent labour conditions and housing. Such projects are often not subject to democratic scrutiny and accountability.

What then is the relationship between developments towards globalisation and the universal protection of human rights? The UN Committee on Economic, Social and Cultural Rights has noted that in itself globalisation as a social phenomenon is not incompatible with the idea of social, economic and cultural rights. However, 'taken together, ... and if not complemented by appropriate additional policies, globalisation risks downgrading the central place accorded to human rights by the Charter of the United Nations and the International Bill of Human Rights in particular'.[1] In other words, the changed (and changing) nature and pattern of economic and financial transactions worldwide may jeopardise the enjoyment of human rights in many countries. The challenge then is to make human rights fit the era of globalisation: to reach beyond traditional concepts of state sovereignty in order to provide for international solidarity and achieve global justice.

At the time the UDHR was drafted only States were the principal actors on the international plane. The role of the State as the principal actor responsible and accountable for the realisation of human rights is still paramount, but other actors (international organisations, companies) may also have an impact on the actual enjoyment or lack of enjoyment of these rights. Also, the State itself is an actor that increasingly acts outside its own territory through its trade and investment policies and agreements. Such conduct may have human rights effects in another country. Does the State have human rights obligations beyond its borders due to an extraterritorial application of human rights law?

On December 10 of this year, we celebrate the 70th anniversary of the Universal Declaration of Human Rights. In 1948 the focus was very much on the role of the State as the principal actor, both protector and violator. This image has changed dramatically.

The angle from which I will hold my presentation today is the evolution of international human rights law. Has it adjusted to changed economic, political and social developments in the world, especially international developments in matters of trade and foreign investments?

For a proper understanding of these developments it is important to emphasize that States, when they ratified or acceded to human treaties, accepted obligations to respect human rights for the citizens of their own State. In other words, the scope of application of human rights law has traditionally been territorial, which means limited to the territory of a State Party. This basic idea has been subject to erosion as a result of processes of globalization. The consequence has been that two types of gaps have emerged:

1. A normative gap: is the State bound by its human rights obligations when acting itself, or non-state actors that it can influence, beyond national borders?
2. An accountability gap: who is to be held accountable for conduct which has effects on human rights in another country, and which accountability mechanisms and remedies can be used to denounce negative effects on the enjoyment of human rights?

The interesting thing is that these questions relate to processes of political globalization (global fight against terrorism) and military actions of States abroad, processes of economic globalization and patterns of migration. In other words, both the protection of civil and political rights and of economic, social and cultural rights is at stake.

1 Statement by the Committee on Economic, Social and Cultural Rights on Globalisation and its Impact on the Enjoyment of Economic, Social and Cultural Rights, May 1998, UN Doc. E/1999/22, 92.

The first cases of addressing the legal question of the protection of human rights in a globalized context emerged in the late 1990s as a result of military interventions of European states and the USA in other countries. Examples include the intervention in the former Yugoslavia by NATO States, the military operations and occupation of the USA and the UK in Iraq, but also the ongoing occupation of the Palestinian Territories by Israel. These situations led to a vacuum in the protection of human rights, or put differently, legal black holes which needed to be filled. The key question in this respect was: can the victims of actions by foreign states claim protection of their human rights against these States? The legal answer to this question is that everyone who is within the ***jurisdiction*** of a State can claim protection in the enjoyment of these rights, even when this is a foreign state. Courts were the actors whiich have filled this normative gap, because victims turned to them to seek a remedy. This is interesting from a democracy perspective: bodies that lack democratic legitimacy create law that States have to comply with on a global scale. Today there are quite a number of cases where the European Court of Human Rights has held that the term 'jurisdiction' must be interpreted as the exercise of effective control or authority over territory and/or persons. If this can be determined in a specific case, the victim is within the jurisdiction of the foreign State. In its third General Comment on the right to life the African Commission on Human and Peoples' Rights took a similar position. What about economic, social and cultural rights? It is less easy to determine whether persons abroad are within the jurisdiction of another state as a result of actions or omissions in the social, economic or cultural sphere. Take the example of a development cooperation project in an African country which entails funding by the Netherlands Government for the construction of a dam in a river. The project will be carried out by a consortium of different governmental-, non-governmental and private partners. As a result of the project local residents have to be evicted from their land and homes. They claim a violation of their right to property and the right to housing. Can we say that these local residents as victims are within the jurisdiction of The Netherlands? From a traditional interpretation of the jurisdiction concept this will be problematic, because The Netherlands does not exercise effective control over persons or territory as a result of its decision to provide funding for the construction of the dam. With a view to preventing that foreign States escape from being accountable for the effects of such extraterritorial conduct, there is a need to adjust or broaden the concept of jurisdiction to include 'situations over which State acts or omissions bring about foreseeable effects on the enjoyments of social, economic and cultural rights outside its territory'. This suggestion has been made in the Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (principle 9), a legal expert opinion adopted in 2011.

In addition to legal reasons and arguments that explain why there is an extraterritorial scope of international human rights law, a moral justification also applies. Namely, States cannot do abroad what they are prohibited from doing at home, or allow non-state actors to do abroad what is prohibited at home, for example toxic waste dumping which is detrimental to health.

As already mentioned, non-state actors have become more important in a global economy, especially corporations. Their role is sometimes more powerful than that of the State. Compare the role of the oil-company SHELL in Nigeria where practices of corruption and collusion have resulted in a situation which may be qualified as corporate capture. Are these non-state actors / private actors within the jurisdiction of a State when acting in another country? This is an interesting question which has given rise to a lot of debate among scholars, representatives of NGOs and UN representatives. The very least that can be said is that a State where such a multinational company is registered or domiciled or its headquarters has (**the home state**) is in a position to exercise influence over such a company. This indicates exactly the scope of the obligation to protect of States in an extraterritorial context. It is important to emphasize here that this is not an extraterritorial obligation, but rather a domestic one of the State where the parent company is registered. This obligation entails the duty for the home State to regulate, monitor, investigate and sanction the conduct of the parent company and its foreign subsidiaries to make sure that corporations act with due diligence. The Maastricht Principles (principles 24 and 25) provide the framework for such an interpretation of the obligation to protect. This dynamic interpretation has been further developed in the recent General Comment No. 24 on State Obligations in the Context of Business Activities of the UN Committee on Economic, Social and Cultural Rights (2017). This Comment goes much further than the Ruggie Principles on Business and Human Rights. According to the Ruggie Principles

there is no obligation for States to regulate the activities abroad of companies domiciled in their countries. This discussion of the nature and scope of the State obligation to protect shows how expert opinions and soft law documents can help in adjusting the law to changing economic realities in an era of globalization.

Attention for obligations of home States of corporations should not divert from the obligations of **host States** to adopt a legal framework prescribing business entities to exercise human rights due diligence in order to identify, prevent and mitigate the risks of abuses of human rights. This requires a strong State bound by the rule of law and a willingness to assess the conduct of business in a neutral and impartial way. It also requires political and democratic accountability mechanisms at the domestic level to monitor whether state institutions are complying with these obligations. This implies a strong parliament and a strong judiciary who are not afraid of taking independent positions.

However, from the perspective of globalization and the extraterritorial scope of human rights law, **the home State** must take the lead in regulating the activities of business abroad. The Ruggie Principles constitute a good basis for regulating the conduct of business domestically, but fall short in relation to the activities of corporations in other countries. Other soft-law instruments may also play a role in this respect, such as the Guidelines for Multinational Enterprises of the Organization for Economic Cooperation and Development. Personally I do not expect much from Voluntary Guidelines or Codes of Conduct agreed upon by stakeholders, for example in the garment industry with its complex web of subsidiaries and sweatshops, to ensure fair and safe labour conditions and decent work, without a strong monitoring State. These are private arrangements without an enforcement mechanism and democratic control.

More promising are current negotiations within the framework of the United Nations Human Rights Council to conclude a treaty aimed at regulating the activities of transnational corporations and other business enterprises. Ecuador, together with South Africa, has taken the initiative for such a process. This should be welcomed. Again the role of the state is paramount in regulating the operations of business. One of the draft treaty provisions provides that:

> State Parties shall ensure through their domestic law that natural and legal persons may be held criminally, civil or administratively liable for violations of human rights undertaken in the context of business activities of transnational character.

The negotiations in Geneva are difficult, will take a long time, and have led to strong opposing views between governments from the North and South, and between NGOs and the business sector. It is therefore questionable whether such a treaty will ever become a reality.

A related, but more narrow obligation can be found in the Malabo Court Protocol on the Statute of the African Court of Justice and Human Rights which incorporates the principle of corporate criminal liability (Article 46C). Wherever a company is registered or domiciled in a AU or non-AU member State, if it commits a crime such as trafficking in hazardous wastes, or corruption, it can be held criminally accountable before this Court. This Protocol, however, is not yet in force.

A final example concerns a 2017 French Law which provides for a duty of care for companies which entails a legal obligation to adhere to a standard of reasonable care, while performing acts that could foreseeably abuse human rights or harm the environment. It creates civil liability for a company's failure to act with due diligence and a civil tort action and a remedy for victims. The law applies to the activities of the parent company, its subsidiaries, subcontractors and suppliers, also abroad. It is a promising example of piercing the corporate veil and regulating business in a globalized world. With this Law France has, through a democratic process, implemented its state obligation to protect human rights against abuses by third parties.

Concluding this address, I think it is fair to say that the law is currently trying to catch up with the ongoing process of globalization. The normative and protection gaps that have been created are now slowly being filled. This does not occur through a well-designed process, but rather through a piecemeal approach in which various actors play a role, such as courts, governments, parliaments and civil society at different levels and fora. Different types of legal sources, hard ones and soft ones, currently contribute to clarifying which human rights obligations states have and which human rights responsibilities can be imposed on non-state actors. It is clear that states still play a key role in this process because they are duty-holders and can create new duties for other actors. Generally speaking, States do not like the idea

that they have human rights obligations beyond borders, because these set limits to their operational freedom abroad and that of transnational corporations. Some States are openly opposed to it, but most of them remain silent. Nevertheless, rights-based governance requires that states are strong in the sense of capacity, political will and determination. They are bound by the rule of law and human rights which they have accepted voluntarily, and must be held accountable through an independent judiciary and democratic institutions and processes.

Legal scholars can play a role by selecting, analyzing and interpreting African cases and examples from an international human rights law perspective and defining territorial and extraterritorial obligations of different actors.

We have started an ambitious journey, but there is still a long way to go!

Thank you for your attention.