

Some Preliminaries to Global Law and Human Rights

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Abstract

The article considers the relationship between economic globalisation and the universalisation of legal human rights obligations.

Keywords

human rights; globalisation; economic; obligation; multi-national; corporation

1. Delineating Global Law and Approximating Global Legal Studies

Rather than attempting a positive definition of ‘global law’, it may be more fruitful – and less controversial – to set out by noting what it is not. Such a ‘negative’ approach that delineates the boundaries of the concept appears particularly appropriate if the ‘intimations’ of global law¹ are considered piece and parcel of a legal paradigm shift that draws its transformative power from a present diagnosis of crisis but that will only be fully comprehended after its completion, that is, with historical hindsight.² Accordingly, after some reflection on the negativity of global law and the thrust of global legal studies, I shall sketch out three symptoms of crises of the Westphalian state-based paradigm of human rights protection brought about by

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¹ N Walker, ‘Intimations of Global Law’ (June 2012) Tilburg Law Lectures Series, Montesquieu Seminars.

² On the notion of ‘paradigm shift’ see T Kuhn, *The Structure of Scientific Revolutions* (3rd edn, University of Chicago Press 1996).

patterns of (economic) globalisation. In line with the not-yet-realised nature of the paradigm shift, the final section places human rights in the context of transformations of statehood in globalising economies.

Global law is not, and will not be for the time being, a law of planetary extensions that aspires to regulate all human beings in all places at all times. More specifically, global law is neither constituted as a national legal order of global scale, nor is it congruent with an international legal order that populates the entirety of the globe with sovereign state entities. As regards the former, it is tempting to invert William Twining's call to revive 'general jurisprudence' in and for an age of globalisation in order to shed light on the negativity of global law:³ global law lacks comprehensive legal authority, that is, it does not 'claim authority to regulate all forms of behaviour' within a unified and all-encompassing global legal order.⁴ As regards the latter, at least in its 'thin' positivist, contractual and functionalist variations, the global ambitions of international law are limited to ensuring the peaceful co-existence of territorially localised state entities.

The important point of this crude description of the Westphalian state-of-affairs is that what may be called 'public' approaches to global law⁵ have to come to terms with the segmentation of legal and political authority in the global realm. The national/international divide dissects authority into, on the one hand, a constitutional relationship between rulers and ruled within the sovereign state and, on the other hand, an international relationship between sovereign states.⁶ Hence, while the attraction of appeals to global public law stems from the shortcomings of the international

³ William Twining discards global jurisprudence (that is, 'looking at law solely or mainly from a global perspective') in favour of a general jurisprudence that inquires whether and to what extent 'it is meaningful, feasible and desirable to generalise – conceptually, normatively, empirically, legally – across legal traditions and cultures', see W Twining, *General Jurisprudence* (Cambridge University Press 2009).

⁴ See J Raz, *The Authority of Law* (Oxford University Press 2009) 117.

⁵ Which includes global constitutional and global administrative law, as well as cosmopolitan readings of international law, see, e.g., A Rosas, 'State Sovereignty and Human Rights: towards a Global Constitutional Project' (1995) 18 *Political Studies* 61; A Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 *Leiden Journal of International Law* 579; A Peters, 'The Merits of Global Constitutionalism' (2009) 16 *Indiana Journal of Global Legal Studies* 397; J Habermas, *The Postnational Constellation* (Polity Press 2001); and B Kingsbury N Krisch & R Stewart, 'The Emergence of Global Administrative Law' (2005) 68(15) *Law and Contemporary Problems* 15.

⁶ See, e.g., R Jackson, 'Sovereignty in World Politics: A Glance at the Conceptual and Historical Landscape' (1993) 43 *Leiden Journal of International Law* 431, 433.

compartmentalisation of the globe into territorial state entities, it cannot lay claim to a global political community akin to that of the nation that would render its authority legitimate in the light of a global public good.

If ‘public’ approaches to global law strive to transform the international legal order into a global *ordre public*, a prominent variation of ‘private’ global law postulates the development of a new ‘conflicts of laws’ approach to mediate the tensions between the partial rationalities of functionally differentiated global regimes.⁷ Arguably, the segmentation of ‘public’ authority in the global realm correlates with a sectoral differentiation of ‘private’ transnational regimes that claim global validity.⁸ The mismatch between a highly globalised economy and weakly globalised politics leads to a privatisation of political power and presses ‘for the emergence of a global law that has no legislation, no political constitution and no politically ordered hierarchy of norms.’⁹ However, far from positing a unitary legal order of planetary extensions, Gunther Teubner’s ‘global law without a state’ is intrinsically heterarchical and pluralistic. While global regimes claim worldwide validity unconstrained by the territorial national/international divide, they are delimited by virtue of their functional logic in a socially fragmented world:

In the place of an illusory integration of a differentiated global society, law can only, at the very best, offer a kind of damage limitation. Legal instruments cannot overcome contradictions between different social rationalities. The

⁷ See G Teubner’s seminal contribution “Global Bukovina”: Legal Pluralism in the World Society’, in G Teubner (ed), *Global Law Without a State* (Dartmouth 1997); A Fischer-Lescano & G Teubner, ‘Regime Collisions: The Vein Search for Legal Unity in the Fragmentation of Global Law’ (2004) 25 Michigan Journal of International Law 999; C Joerges work in the EU and WTO contexts represents a different ‘global’ approach to conflicts of law, see e.g. his edited collection *After Globalisation. New Patterns of Conflict and their Sociological and Legal Re-construction* (RECON Report No 15 2011).

⁸ Whether one considers these global developments as co-evolutionary or incommensurable may ultimately depend on one’s view of the relationship between political integration and social fragmentation in the state legal order. As Hans Lindahl perceptively notes, ‘if the emergence of the nation-state both inaugurates and arrests social differentiation, the constitutionalisation of [global] social subsystems heralds the completion of *das unvollendete Projekt der Moderne*. Not the realisation of individual and collective autonomy through the foundation of a global polity, as Habermas would have it, but rather the autonomisation of systems, that is, the “worldwide realization of functional differentiation” marks the historical completion of modernity’, see H Lindahl, ‘Societal Constitutionalism as Political Constitutionalism: Reconsidering the Relation between Politics and Global Legal Orders’ (2011) 20(2) Social & Legal Studies 230, FN 2.

⁹ G Teubner, ‘Foreword: Legal Regimes of Global Non-state Actors’, in G Teubner (ed), *Global Law Without a State* (Dartmouth 1997).

best law can offer – to use a variation upon [Martti Koskenniemi's] apt description of international law – is to act as a 'gentle civilizer of social systems'.¹⁰

Hence, and contrary to what the label may suggest, global law does not encompass the globe in any holistic sense but remains embedded in its (trans-) national, (trans-) territorial, and (trans-) sectoral contexts. At the same time, it may be this very moment of *transition* on a continuum from the national and international to the global and the local that best captures the essence of global approaches to law. In this vein, global legal studies could be said to concern itself with ways in which law positions itself in relation to globalisation. Yet different from variations of intra-, inter-, trans-, and post-national law whose primary concern remains with conceptualising law's extension and escape from the state (whether spatial, structural, or normative), global legal studies also inquires law's re-contraction and re-capture in the local context of the global.

On the national/international continuum, global legal studies comprises approaches that broaden the analytical tool-box of traditional state-centred jurisprudence,¹¹ as well as normative approaches that strive to compensate for negative externalities on the territorial state and its citizens created by global interdependencies.¹² On a global/local continuum, it comprises approaches that reconstruct law along the complementary lines of 'globalised localisms' and 'localised globalisms'¹³, for example, by tracing out trajectories from intra-state to global legal pluralism,¹⁴ or by vesting

¹⁰ Fischer-Lescano & Teubner, (n 7) 1045, with reference to M Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge University Press 2001).

¹¹ See for example, W Twining's *General Jurisprudence* (n 3) and his earlier *Globalisation and Legal Theory* (Cambridge University Press 2000); B Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press 2001).

¹² For example, Jürgen Habermas' call for the development of a *Weltinnenpolitik* or Anne Peters compensatory global constitutionalism, n (5).

¹³ The distinction between 'globalised localisms' and 'localised globalisms' is taken from B de Sousa Santos' *Toward a New Legal Common Sense* (2nd edn, Butterworths: 2002). While 'globalised localisms' refer to local phenomena that are successfully globalised, 'localised globalisms' occur when local conditions change in response to global influences.

¹⁴ See, e.g., the works of R Cotterrell and P Zumbansen on 'legal transnationalism' and 'transnational legal pluralism': R Cotterrell, 'Transnational Communities and the Concept of Law' (2008) 21(1) *Ratio Juris* 1; R Cotterrell, 'Spectres of Transnationalism: Changing Terrains of Sociology of Law' (2009) 36(4) *Journal of Law and Society* 481; P Zumbansen, 'Transnational Legal Pluralism' (2010) 1(2) *Transnational Legal Theory* 141.

legal authority in the regulatory spaces of (global) governance without (territorial) government.¹⁵

2. Moments of Crises: Human Rights and Economic Globalisation

For my present and rather limited purposes, global law may thus be understood as comprising *legal* responses to the crises of the Westphalian state-based paradigm of human rights protection brought about by patterns of (economic) *globalisation*. In a nutshell, the Westphalian distinction between national-constitutional and international law compartmentalises human rights within and between sovereign states. On the one hand, the universal ‘rights of man’ of the Declarations – the human being endowed with inalienable rights by virtue of being human – translate into a political relationship between the state and its people and are legally institutionalised in the national-constitutional order.¹⁶ On the other hand, human rights increasingly feature as international standards of political legitimacy to which states strive to (pretend to) live up to in their dealings with each other.¹⁷

In both dimensions, the principal concern remains with obligations of public authorities to protect human rights in relation to their own citizens and on their own territory. This leads to what Gibney, Tomaševski and Vedsted-Hansen, in an early seminal contribution to the debate, have labelled a ‘paradox’ of human rights law: ‘human rights are declared to be universal, yet state responsibility for their violations is limited by territoriality as well as citizenship’.¹⁸ Moreover, it explains how a state’s legal human rights obligations within its constitutional polity are transformed into mere human rights policies in its international relations with other states.

The descriptive accuracy and normative appeal of the ensuing divide between a state’s ‘internal’ human rights obligations and its ‘external’

¹⁵ L Cata Backer, ‘Governance without Government: An Overview’, Draft Paper presented at the Tilburg Centre for Transboundary Legal Development (May 2012), on file with the author; instructive on the OECD Guidelines for Multinational Corporations; L Cata Backer, ‘Small steps towards an autonomous transnational legal system for the regulation of multinational corporations’ (2009) 10(1) *Melbourne Journal of International Law* 258.

¹⁶ See, e.g. J Habermas, ‘On the Internal Relation between the Rule of Law and Democracy’ in C Cronin & P De Greiff (eds), *The Inclusion of the Other* (MIT Press 2000).

¹⁷ See, e.g., J Donnelly, *Universal Human Rights in Theory and Practice* (2nd edn, Cornell University Press 2003).

¹⁸ M Gibney, K Tomaševski & J Vedsted-Hansen, ‘Transnational State Responsibility for Violations of Human Rights’ (1999) 12 *Harvard Human Rights Journal* 267.

human rights policies is increasingly put under strain by patterns of economic globalisation,¹⁹ particularly in the context of operations of multinational corporations. Put crudely, the progressive emancipation of globalising economies from the state blurs the boundaries between domestic politics and foreign policies constitutive of the Westphalian conception of state sovereignty.²⁰ Yet this has not been accompanied by a parallel process of universalising the state's human rights obligations that remain vested in its territorial legal order. An often noted consequence of these developments is that human rights law fails where it is most needed: for the benefit of individuals in 'weak' host states of corporate investment that lack the capacity (and at times also the willingness) to protect human rights against business operations conducted with the (active) support or (passive) connivance of 'strong' home state governments.²¹

Let me briefly sketch out three related moments of this crisis. First, and from within the state-based paradigm, patterns of economic globalisation challenge the adequacy of the Westphalian reading of the distinctions between public and private, and between territorial and extraterritorial, in allocating human rights obligations within and between sovereign states. Economic globalisation has created increasing gaps between the operational capacities of global business entities and the regulatory capacities of territorial states. At the same time, the privatisation of state functions has shifted powers and responsibilities from governments to the market. Hence while – as a default rule – human rights are protected against public emanations of the state for the benefit of rights-holders physically located on the state's territory, creating a level playing field between states and globally operating business entities requires their extraterritorial protection in relation to private actors.

Secondly, and in transition from the state-based paradigm, the widening gap between globalised economies and state politics has given rise to alternative legal regimes to account for the human rights impacts of

¹⁹ Understood in a broad sense of connoting the increased interdependency of states and private actors across national-territorial borders brought about by economic cooperation and competition; see e.g. the numerous United Nations communications on globalisation and human rights published over the past decade, most recently the Report of the Secretary General, 'Globalisation and its impact on the full enjoyment of all human rights' (26 July 2010) UN Doc A/65/171.

²⁰ See J Habermas (n 16).

²¹ See further D Augenstein & D Kinley, 'Beyond the 100 Acre Wood: Navigating the Jurisdictional Jungle of Extraterritoriality, Multinational Corporations and Human Rights Violations' in S Deva & D Bilchitz (eds) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013) forthcoming.

multinational corporations which, in turn, further undermine the hegemony of the state and its (constitutional and international) human rights law. In a memorable lecture, Neil Walker has captured this tendential connection between the rise of the global and the fall of the state very well.²² At one end of the national-international continuum, state law 'is increasingly rivalled by law otherwise spatially extended, including sub-state law, regional supranational law, transnational domain-specific private ordering, hybrid public-private ordering and, increasingly, new forms of global legal regime that neither claim universality nor obviously emanate from or respect the aggregative sovereign will'. At the other end of the continuum, the emergence of functionally differentiated transnational regimes and new forms of private and hybrid ordering threatens to undermine 'the idea of a shared "public" concern joining the various elements of international law'.²³ It may thus be that the complementary role of global law writ large is but a harbinger of its displacement of the Westphalian paradigm of human rights protection with, somewhat ironically, states becoming a driving force of their own marginalisation.

The third moment of crises I would like to draw attention to is perhaps the most critical from a human rights perspective. Whether or not one conceives – with Habermas²⁴ – of human rights as co-original with popular sovereignty, they certainly carry a significant part of the burden of transforming manifestations of state power into legitimate forms of political authority. The impact of economic globalisation on the statist distinction between constitutional human rights politics and international human rights policies gives rise to two as complementary as problematic developments. What we are arguably witnessing is an increasing bifurcation between territory-based forms of political authority that lose their regulatory grasp over global developments, and a de-territorialisation of legally unfettered state power in the coattails and service of the market.

For all the talk about the demise of state-based law, one should not underestimate the power that states still wield over the enjoyment of human rights in globalising economies. Examples abound:²⁵ states

²² N Walker, 'Out of Place and Out of Time: Law's Fading Co-ordinates' (2010) 14(1) *Edinburgh Law Review* 13.

²³ *ibid* 36, 37.

²⁴ See Habermas (n 16).

²⁵ For a recent and instructive collection of concrete case-studies see F Coomans & R Künnemann (eds) *Cases and Concepts on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights* (Intersentia 2012).

authorizing, or not preventing, the operation of dangerous industrial and mining facilities by business entities that result in serious human rights violations; states delegating public functions to business entities in human rights sensitive areas such as the running of immigration and detention centres or the provision of security services; states' negligence of human rights impacts when contracting with business entities, such as in the context of investments by state-owned banks and pension funds in large-scale private construction projects; and states licensing or otherwise supporting the import or export of goods by business entities that have been produced, or will be used, in violation of international human rights standards.

3. The Transformations of Statehood in an Age of Globalisation

If the above analysis can lay some claim to empirical plausibility, one of the pressing questions for global law scholarship is how manifestations of institutionalised forms of power – whether public or private – can be re-channelled into legitimate forms of political authority. A related question from a human rights perspective is whether, in the absence of a global public good, all that can still mobilise individual empowerment towards collective self-restraint is a global *colère public* that validates human rights by means of scandalisation.²⁶ Arguably, and perhaps with a pinch of over-generalisation, many approaches to global law sketched out in section one can be read as attempting answers to these questions. While 'public' approaches to global human rights aim to counteract the hollowing out of the state by recovering the public and political nature of law at the global stage, 'private' global law without a state reinstates human rights as (self-)limitative constitutional norms of functionally differentiated global regimes that tame the destructive forces of their partial social rationalities.²⁷

Instead of discussing the relative merits of these approaches, let me conclude my brief preliminaries to global law and human rights with a few words on my own research in this area that inquires the dissociation of the public and territorial nature of human rights from the Westphalian conception of statehood. In a nutshell, I am interested in transformations

²⁶ This position is attributed to N Luhmann, *Das Recht der Gesellschaft* (Suhrkamp 1993) ch 12.

²⁷ See especially Gunther Teubner's more recent work on global law and fundamental rights: G Teubner, 'Contextualising Polycontexturality' (2011) 20(2) *Social & Legal Studies* 210; and G Teubner, 'Transnational fundamental rights: horizontal effect?' (2011) 40(3) *Rechtsphilosophie & Rechtslehre* 191.

of the public/private divide and the territoriality/extraterritoriality divide in globalising economies. As regards the former, the aim is to recover the political nature of the attribution of acts and actors to the public and the private that is concealed by the Westphalian re-interpretation of private human rights ‘abuses’ as violations of negative and positive state obligations. A good example is the discussion triggered in the United Kingdom some years back by an unduly restrictive judicial interpretation of section 6 of the Human Rights Act that imposes human rights obligations on private entities fulfilling public functions. The central political concern of the ensuing report of the UK Joint Committee on Human Rights is highlighted in its executive summary:

As a result of the combined effects of a restrictive judicial interpretation of one particular subsection of the Act on the one hand, and the changing nature of private and voluntary sector involvement in public services on the other, a central provision of the Act has been compromised in a way which reduces the protection it was intended to give to people at some of the most vulnerable moments in their lives. The concern addressed by this report is that a narrow judicial view of the meaning of ‘public authority’ in section 6 of the Human Rights Act means that many private and voluntary sector providers of public services are considered to fall outside the scope of the Act, with no obligation to comply with the rights and freedoms it incorporated into domestic law.²⁸

To conceptualise the territorial extension of political authority beyond the confines of the Westphalian state is a more intricate task, although the slogan of ‘power entails responsibility’ carried by both ‘public’ and ‘private’ approaches to human rights protection beyond the state²⁹ sums it up fairly well. A crucial element of this task is to disperse the epistemic bias against extraterritorial human rights obligations that is but the counter-part of the methodological nationalism of cruder versions of the doctrine of state sovereignty.³⁰ The common approach – that has also informed the work of the UN Special Representative on business and human rights³¹ – is to

²⁸ House of Lords & House of Commons Joint Committee on Human Rights, ‘The Meaning of Public Authority under the Human Rights Act’ (3 March 2004) Seventh Report of Session 2003–04, HL Paper 39 / HC 382.

²⁹ See, respectively, R Lawson, ‘Life after Banković: On the Extraterritorial Application of the European Convention on Human Rights’ in F Coomans & M. T. Kamminga (eds) *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004); and D Kinley & J Tadaki, ‘From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law’ (2004) 44(4) *Virginia Journal of International Law* 931.

³⁰ I use methodological nationalism in Beck’s sense here, see U Beck, ‘Toward a New Critical Theory with a Cosmopolitan Extent’ (2003) 10(4) *Constellations* 453.

³¹ See Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, ‘Guiding

assimilate extraterritorial human rights obligations to (prescriptive) extra-territorial jurisdiction under public international law, only to discard them as incompatible with the principles of sovereign equality and territorial integrity that reign over the international state community. However, while public international law is concerned with the legal competence of states to assert extraterritorial authority, extraterritorial human rights obligations are grounded in the facticity of the exercise of state power over individuals outside the state's territory.³² This is paralleled by a distinction between an (state-territory based) 'all-or-nothing' approach and a (subject-based) 'gradual' approach to jurisdiction that determines the scope of the state's extraterritorial human rights obligations in proportionality to the level of control exercised over the person of the rights holder.³³

The relationship between jurisdiction under public international law and international human rights treaties is admittedly more complex than that, yet it is worth pointing out that the traditional state-centred approach reifies the empirically less and less tenable distinction between 'internal' human rights politics and 'external' human rights policies by shifting the focus of debate from extraterritorial obligations imposed on states by virtue of human rights law to states' policy rationales to protect human rights in their foreign relations.

Let's just assume for a moment that there is some merit in what (among others) the UN Committee on Economic, Social and Cultural Rights has been preaching for over a decade now, namely that states are under an obligation to respect the human rights of individuals in third countries, and to prevent third parties from violating these rights in these countries by way of legal and political means in accordance with international law.³⁴ The question that arises on the eve of the Westphalian age is to whom such obligations would be owed. While an international lawyer may point to the

Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, Remedy" Framework' (21 March 2011) UN Doc A/HRC/17/31.

³² For a review of the relevant case-law see Augenstein & Kinley (n 21); one of the clearest expressions of this principle is still the early dictum of the Human Rights Committee in *López Burgos*: what matters is 'not the place where the violation occurred, but rather (...) the relationship between the individual and the state in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred'; see HRC, *López Burgos v Uruguay*, Communication No. 52/1979 (29 July 1981) UN Doc CCPR/C/OP/1 para 12.1.

³³ See M Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia 2009) for further references.

³⁴ See for all CESCR, 'General Comment 14: The right to the highest attainable standard of health' (11 August 2000) UN Doc E/C.12/2000/4 para 39.

other state, and a constitutional lawyer to the state's own people,³⁵ a global approach to human rights should press for the recognition that these obligations are owed to the individual subjected to the power of the state, anywhere and anywhen. Perhaps needless to add, the ensuing 'global' relationship between the state and the individual that rejoins power and authority beyond the national/international divide is bounded by the multiple sites of the state – and therefore does not constitute a unified global law of planetary extensions, either.

³⁵ I owe this insight to a discussion with Martin Loughlin.