31

FILLING GAPS IN INTERNATIONAL HUMAN RIGHTS LAW TO ADDRESS GLOBAL LAND AND RESOURCE GRABBING

Extraterritorial Human Rights Law Obligations of States and the Rights of Future Generations

Fons Coomans, Rolf Künnemann, and Andreas Neef

Introduction

Many of the issues and problems discussed in this book about the exploitation and grabbing of land and other natural resources imply that the lives, livelihoods and human rights of people are adversely affected. Economic activities by domestic and foreign (corporate) actors are often only subject to national laws and policies which are usually quite permissive. One of the questions posed in this chapter is whether international human rights law has developed over the years to provide protection to people who experience the negative consequences of economic and financial globalisation in the context of the use and abuse of resources. Traditionally, human rights law (treaties in particular) applies only to the territories of states that have ratified such treaties, and only states are legally bound by these agreements. Yet, as a result of processes of globalisation, the conduct of states, corporate actors and international organisations increasingly has effects beyond national borders. Does international human rights law also apply in such circumstances? This has been defined as the extraterritorial scope of international human rights law. Over the last 20 years, several developments have taken place to fill in the normative and accountability gaps that have arisen in international human rights law aimed at providing protection to victims of foreign economic activities. The legal basis for such developments can be found in existing human rights treaties, such as the International Covenant on Economic, Social and Cultural Rights. However, the legal framework has been further clarified and interpreted by soft law documents and legal expert opinions, such as the Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2011).[1]

Meanwhile, the rights of future generations remain a blind spot in international human rights law to date. Yet illegitimate appropriation and exploitation of different types of

DOI: 10.4324/9781003080916-40

resources does not only affect the human rights of members of present generations. It is clear that the long-term depletion of natural resources, loss of biodiversity and global warming through global land and resource grabbing have a negative cumulative impact on the human rights of future generations. This chapter will therefore also discuss the question what the contribution of international human rights law can be in protecting the human rights of future generations. It will analyse the role of the precautionary principle and the different types of domestic and extraterritorial human rights obligations states currently and in the future have to guarantee a sustainable and dignified life for members of future generations.

The Human Rights Legal Framework and Extraterritorial Obligations of States

Which human rights are affected by grabbing of resources? The right to land is affected when farmers lose farmland or when forests of Indigenous communities are cut for soya or biofuel plantations. More fundamentally, the right to food of farmers and their families is at stake when deprivation of land leads to hunger or food insecurity. Forced evictions may occur when local communities have to move for mining activities: their right to adequate housing will be at risk, and they may lose access to water. More generally, land and resource grabbing may lead to an erosion of the right to an adequate standard of living, as the livelihood of local communities and their subsistence may be in jeopardy. In many cases, land and resource grabbing compromises the rights of Indigenous peoples as enshrined in the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP), including their rights to territorial integrity and self-determination (e.g., Watson, 2018; Mutu, Chapter 3 in this volume).

Box 31.1 Key human rights principles affected by land and resource grabbing

- The right to own property, including land
- The right to adequate housing
- The right to protection from forced displacement
- The right to food
- The right to water and sanitation
- The right to an adequate standard of living
- The rights of Indigenous peoples

Source: Adapted from Neef, 2021

Traditionally, human rights only apply on the territory of states which have ratified human rights treaties (territorial scope). Effects of processes of (economic) globalization compel to reconsider this view: states have human rights obligations beyond national borders relating to their own conduct and that of (transnational) corporations (extra-territorial scope). There is thus a need to fill gaps in human rights protection as a result of processes of economic globalization. This is particularly relevant with respect to:

- the lack of human rights regulation (normative standards) and accountability of transnational corporations;
- the absence of human rights accountability of international organizations, in particular international financial institutions (IMF, World Bank, IFC);
- the ineffective application of human rights law to investment and trade laws, policies and disputes;
- the lack of recognition of duties to fulfil economic, social and cultural rights abroad, through obligations of international assistance and cooperation.

In light of these challenges, it is crucial to expand and apply legal concepts and notions which were developed traditionally for a domestic framework (protection of human rights on the territory of States Parties to a treaty) to a context beyond national borders in order to adjust to changed and changing economic, social and political realities. In the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, extraterritorial human rights obligations have been defined as:

a obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State's territory; and
b 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.[2]

Extraterritorial obligations can be found in different sources of international human rights law (cf. Dhanarajan, 2015; Skogly, 2021). The legal basis can be derived from treaty law which is legally binding (hard law) and an increasing number of soft law sources which are not as such legally binding, but authoritative (for an overview and discussion, see Langford, Coomans, & Gómez Isa, 2013). Treaty law includes the United Nations Charter (Arts. 55 + 56) and Article 2(1) ICESCR. The latter provision stipulates that each state undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means. This implies that states have voluntarily accepted a positive obligation to cooperate to help realize social, economic and cultural human rights beyond borders. Condoning grabbing of resources or failure to regulate the activities of multinational corporations abroad is contrary to such an obligation.

Soft law sources are of increasing importance: they set normative standards and give authoritative guidance to states for the practical implementation of these norms, however these are not legally binding. An example is the FAO Voluntary Guidelines on the Responsible Governance of Land, Fisheries and Forests in the Context of National Food Security (2012) (for discussions on the effectiveness of the Voluntary Guidelines in mitigating land grabs, see, e.g., Cotula, 2012; Paoloni & Onorati, 2014; Brüntrup et al., 2014; Neef, 2019). Another important soft law source is General Comment No. 24 adopted by the UN Committee on Economic, Social and Cultural Rights on State Obligations under the ICESCR in the Context of Business Activities.[3] A General Comment provides for an authoritative interpretation and explanation of a treaty. It also gives guidance to states on how to implement their treaty obligations.

Finally, international customary law provides that a state may not allow its territory to be used to cause damage on the territory of another state, such as dumping wastewater of mining activities in a border river which may pollute the soil in a neighbouring country. The responsibility of a state is particularly at stake when the negative impact on the enjoyment of human rights abroad was foreseeable.

International human rights law confers obligations and responsibilities on different actors in an extraterritorial context. First of all, the host state, that is the state where the grabbing of resources occurs, has an obligation to regulate the activities of transnational corporations on its territory.[4] The home state where the (transnational) company, or its parent, is registered or domiciled has an obligation to regulate, oversee and sanction the conduct of the company abroad.[5] In this context, General Comment 24 mentioned earlier is important. The Committee has stated that it would be contrary to the principle of international cooperation and assistance

> to allow a State to remain passive where an actor domiciled in its territory and/or jurisdiction, and thus under its control or authority, harms the rights of others in other States, or where conduct by such an actor may lead to foreseeable harm being caused.[6]

As a consequence, the extraterritorial obligation to protect requires states to prevent and redress infringements of human rights that occur outside their territories as a result of activities of corporations over which they exercise control. This applies in particular when violations are reasonably foreseeable, such as in projects in the oil and mining industry.[7] In addition, the FAO Guidelines stipulate that where transnational corporations are involved, their home states have roles to play in assisting both those corporations and host states to ensure that businesses are not involved in abuse of human rights and legitimate tenure rights (FAO, 2012).

Finally, the foreign private actor (parent company or foreign subsidiary) has a responsibility to respect human rights in its business activities. The well-known Ruggie Guidelines on Business and Human Rights, adopted by the UN Human Rights Council, provide for normative standards for states and (foreign) business operations.[8] These contain recommendations for companies, not legally binding standards. A serious weakness of the Ruggie Principles is that these do not provide for an obligation for states to regulate activities abroad of companies domiciled in their countries.[9] In 2014, the UN Human Rights Council decided to establish an open-ended intergovernmental working group on business corporations with respect to human rights, whose task is to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.[10] Its mandate is to agree on a set of state obligations to regulate the conduct of corporations with a view to preventing human rights abuses, act with due diligence in their business activities and provide remedies to victims. The negotiations on such a treaty are politically sensitive with opposing views from different stakeholders (states, corporations, nongovernmental organizations (NGOs), Indigenous groups and civil society). At the time of writing, the process of drafting and negotiating is still ongoing.[11]

The human rights legal framework that is applicable in an extraterritorial context is still in need of strengthening and further development. According to some states, extraterritorial human rights obligations do not exist because they have not explicitly agreed upon by states. In their view, the current legal basis for extraterritorial obligations is absent or weak. In addition, states do not want to limit the operational freedom of corporations abroad by setting standards (for a discussion, see Langford, Coomans & Gómez Isa, 2013, p. 62–65).

Home states only refer to the responsibility of corporations, while host states are unable or unwilling to regulate the conduct of corporations. Full recognition and observance of extraterritorial human rights obligations in law, policy and practice presupposes and requires political will and determination by states.

The Human Rights of Future Generations

For many Indigenous peoples, their societal view of obligations towards human beings included everybody in the past, present and future of their communities. An example is the reference to future generations in the Iroquois constitution. Iroquois Chief Oren Lyons relates this provision as follows:

> When you sit and you council for the welfare of the people, think not of yourself nor of your family nor even your generation. Make your decisions on behalf of the seventh generation coming. Those faces looking up from the earth, layer upon layer waiting their time. Defend them, protect them, they're helpless, they're in your hands. That's your duty, your responsibility.[12]
>
> *(cf. Lyons, 1980)*

Indigenous concepts of land ownership and their underlying notion of intergenerational justice are probably best expressed by the quote of a Yoruba chief who famously declared "I conceive that land belongs to a vast family, of which many are dead, few are living, and countless numbers are yet to be born" (quoted in Berry, 1992, p. 342).

Contemporary land and resource grabbing and the exploitation of the planet's natural resources associated with it encroach on the lives and livelihoods of future generations. Never before in history has a generation burdened and threatened future generations in such an existential way. Presently, dominant laws regulating political and economic life are part of this plot, creating a situation where future generations will have substantially fewer resources to enjoy. The more than 35-year-old definition by the World Commission on Environment and Development (Brundlandt Commission) of "sustainable development" as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs" (WCED, 1987) seems increasingly unattainable, unless radical shifts occur in the manner our resources are governed by the current generation and protected for future ones.

Between the late 18th and the mid-20th centuries, human rights law was mainly national, enshrined in constitutions. With the founding of the UN, human rights entered international law: their purpose to serve the human needs and dignity of all now includes the community of states. Human needs have been defined in detail in human rights law and include not only such basic needs as adequate food, water and housing but also political participation and freedom from torture, slavery and various forms of economic and cultural exploitation. Nowhere in human rights law, it is stated that the "human needs of all" refer only to the human needs of those who are alive. On the contrary: the whole program of human rights in the context of the UN and elsewhere is future-oriented. The UN Charter wants to shape the community of states in a way that meets the needs of the future. Its preamble starts: "We the people of the UN determined to save succeeding generations from the scourge of war, … and to reaffirm our faith in fundamental human rights and the dignity and worth of the human person".

The Current Gap

While philosophers have pondered about present society's ethical obligations to future people for a long time (see, e.g., Parfit, 1984; Mulgan, 2006, 2014), legal scholars have had difficulties in providing the legal basis for protecting the rights of future persons. The Universal Declaration of Human Rights Art. 1 enshrines that "all human beings are born free and equal in dignity and rights". As this is true in general ("are born"), it is also true for the births to come: future persons are equal in rights to the present generations. This envisages a long chain of equal rights into the future. From their start, human rights have suffered reductionism despite their enshrined universality: slaves were excluded until the 19th century, women and Indigenous peoples well into the 20th century. Future persons (and to some extent stateless people) are still excluded today.

In many judgements, positive reference has been made to the human and/or constitutional rights of future generations. Yet when plaintiffs seek standing on behalf of future generations, judges become reluctant: only in three cases to date has such standing been explicitly granted. There are gaps when it comes to dealing with the human rights of future people. Not only in court – but in general. The common practice of discounting future harms of current forms of resource exploitation and environmental destruction – often associated with land and resource grabbing – remains a major obstacle to closing the gap (cf. Mulgan, 2014).

Future Persons

Future persons are persons who will exist in the future only. They are "will-be-persons", not "could-be-persons". And they are not negligible in quantity. Already in 20 years from now, they will have outnumbered present children and youth. The identities and opportunities of future persons strongly depend on the conduct of present generations. For human rights purposes, this is no obstacle: we deal with present conduct only and need to apply the data available now. Future persons cannot be named now, but they can be specified, for example, "the oldest person in Mumbai by the end of 2180". We know that the human rights of this future person are the same as ours. And we need not deal with her interests beyond these rights.

There are present states' obligations to act on this person's human rights. While other citizens of Mumbai in 2180 may face a similar breach of human rights obligations, bringing a case on behalf of an individual is the normal legal procedure to address such issues. "Persons in Mumbai at the end of 2180" specifies a class of future persons, each with individual human rights. Besides bringing individual cases, it could also make sense to bring a case on behalf of this class. The future class most often referred to in current litigation is "the future generations of country X". It includes all future persons without specification other than the place of residence.

States' Obligations

States bear the obligation to ensure that everybody enjoys their human rights. The identity of everybody is not important, but the specifications are – and they inform the states' obligations. States have to minimize risks that the specified future person will fail to enjoy human rights and will have to face a situation of deficiency. This can imply extraterritorial obligations of states.

Future states should be considered *bona fide*: It has to be assumed that they will meet their human rights obligations towards the specified person – within the context set for them by present states. The efforts needed by future states, for example in terms of their fulfil-obligations, may depend on present states' conduct. If there are various courses available for present states, the one must be chosen that places minimum reliance on fulfil-provide-obligations of future states: Future persons (as much as persons today) must not be forced to rely on their states' fulfil-provide-obligations.

An important principle for human rights obligations in situations of uncertainty is the precautionary principle. In the 1980s (in the context of the sustainable environment discourse), it began to achieve a degree of consensus as the basic approach to uncertainty. At the 1992 UN Conference on Environment and Development, it was incorporated into the final resolutions (the 2030 Agenda for Sustainable Development and the SDGs).[13] Since then it has gained general acceptance and increased importance.

The precautionary principle recognizes that uncertainty is an intrinsic element of nature. Against this background, the principle then says that states (and societies) have to be risk-averse: they must not put future people at risk of deficiencies and compromised rights. There are two types of uncertainties here: our understanding and observations of nature, and the impact of contemplated policy measures, for example on people in Mumbai in the year 2180.

States have to base their conduct towards future persons not on the respective future situation that is most likely, but on the situation with highest possible harm (worst-case scenario), even if this situation is currently unlikely. In a second step, the least risk choice has to be made among those current policies that will avoid future deficiencies or harm. If severe future harm is expected, and if there seems to be more than sufficient time to avert that harm, the respective measures nevertheless have to be taken as soon as possible.

Remedy and Representation

A remedy is a crucial ingredient of a right. In private law, "remedy" refers to repairing harm or damage suffered – usually via compensation. In human rights law, however, remedy has a different meaning: the key term here is not harm, but violation. The historic role and permanent purpose of human rights is to establish, obligate and control states and their communities so that the human needs of all (including future persons) are met. Remedies, to be effective, must be capable of leading to a prompt, thorough and impartial investigation, cessation of the breach of States obligations, if it is ongoing, and adequate reparation, including as necessary, restitution, compensation, satisfaction, rehabilitation and guarantees of non-repetition.

Remedial action has to correct present states when they breach their obligations. Hence, taking remedial human rights action is not concerned with the question of "damage or harm suffered". Compensation (as part of reparation) appears instead in a different form: "fulfilment funds" have been suggested to be set aside by current states to support future states when those (under their fulfil-obligations) have to overcome future persons' human rights deficiencies resulting from present violations. Providing such funds does not make the violation undone, nor does it relieve.

A major gap exists in the representation of future persons and their human rights in current political and legal systems. The World Commission on Environment and Development noted in 1987 (in para 25) "We act as we do because we can get away with it … [future generations] cannot challenge our decisions". For children, mentally disabled

persons, many elderly, who seem to be in a similar situation, ways have been found to safeguard their human rights – by representation. Representation therefore is not unusual in law, even if the rights-holders are not in a position to mandate their representatives.

Political representatives must be able to wield the power necessary to defend future generations. In the Iroquois context mentioned earlier, for example, the representation of future generations is vested with the clan mothers. They have powers to propose and remove the chiefs. As far as legal representation is concerned, plaintiffs in courts increasingly seek standing on behalf of future generations.[14] In the Dutch *Urgenda Case,* an *action popularis* opened up the possibility of representing future generations.[15]

A strong system of legal representatives (trustees, guardians and others) is needed. They should be duty-bound to seek legal remedy for future persons and groups against violations of their human rights. Systems are discussed combining natural guardians and institutional trustees. Guardians are naturally related to the threatened future persons, for example, because those are likely to be the offspring of their extended families and communities. Trustees are institutional entities who step in to assist the guardians or who take action themselves. Moreover legal standing should be granted to organisations with a special competence on the matters of the affected future person(s), even though they are not guardians or trustees.

Closing the gaps on future generations' human rights will help to address the grabbing and destruction of those resources that will have to be used by future generations to meet their human needs. The Maastricht Initiative on the Human Rights of Future Generations is a group of legal experts, academics, representatives of NGOs and civil society organizations. Its aim is to lay down a legal expert opinion on the human rights of future generations defined in terms of right holders and duty bearers. This expert opinion intends to fill the normative gap existing in international human rights on this issue. It is evident that a number of state obligations in this area will have an extraterritorial dimension, such as on climate change in relation to the right to a healthy environment and the right to life. But also the future depletion of natural resources can be defined in terms of the right to land, water and an adequate standard of living of members of future generations which give rise to extraterritorial human rights obligations of present states.

The basics of a legal framework to protect the human rights of members of future generations already exists. However, it needs to be progressively developed. The challenge is to extend its scope and apply it to human beings that do not exist yet. States need to be conscious of and contribute to this development which is the common concern of humankind. This requires political will, determination and courage. The Maastricht Initiative will adopt in February 2023 a legal expert opinion consisting of some 30 "Maastricht Principles on the Human Rights of Future Generations" with an extensive legal commentary to overcome the discrimination of future persons in human rights law.

Notes

1 http://www.etoconsortium.org. The Preamble of the Principles stipulates that the Principles are drawn from international law and aim to clarify the content of extraterritorial State obligations to realize economic, social and cultural rights.
2 Maastricht Principle 8.
3 UN Doc. E/C.12/GC/24 (2017).
4 Maastricht Principle 24.
5 Maastricht Principle 25.

6 General Comment No. 24, para. 27.
7 General Comment No. 24, para. 30, 32.
8 Guiding Principles on Business and Human Rights (2011), UN Doc. A/HRC/17/31.
9 Commentary to Guiding Principle I.A.2, The State Duty to Protect Human Rights.
10 UN Human Rights Council Resolution 26/9 (2014).
11 https://www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgontnc.aspx
12 https://nnigovernance.arizona.edu/oren-lyons-looking-toward-seventh-generation
13 UN Doc. A/RES/70/1 (2015).
14 See the Judgment of the Colombian Constitutional Court in Case STC 4360–2018 (5 April 2018).
15 Urgenda Case, The Hague Court of Appeal, 9 October 2018, ECLI:NL:GHDHA:2018:2610.

References

Berry, S. (1992). Hegemony on a shoestring: Indirect rule and access to agricultural land. *Africa: Journal of the International African Institute*, *62*(3), 327–355.

Brüntrup, M., Scheumann, W., Berger, A., Christmann, L., & Brandi, C. (2014). What can be expected from international frameworks to regulate large-scale land and water acquisition in sub-Saharan Africa? *Law and Development Review*, *7*(2), 433–471.

Cotula, L. (2012). Land grabbing' in the shadow of the law: Legal frameworks regulating the global land rush. In R. Rayfuse & N. Weisfeld (eds), *The Challenge of Food Security: International Policy and Regulatory Frameworks*. Edward Elgar: Cheltenham, pp. 206–228.

Dhanarajan, S. (2015). Transnational state responsibility for human rights violations resulting from global land grabs. In C. Carter, & A. Harding (eds), *Land Grabs in Asia: What Role for the Law?*. Routledge: London & New York, pp. 167–186.

FAO (2012). *Voluntary Guidelines for Responsible Governance of Tenure of Land, Forestry and Fisheries*. Food and Agricultural Organization of the United Nations (FAO): Rome.

Langford, M., Coomans, F., & Gómez Isa, F. (2013). Extraterritorial duties in international law. In: M. Langford, W. Vandenhole, M. Scheinin, & W. van Genugten (eds.), *Global Justice, State Duties*. Cambridge University Press: Cambridge, pp. 51–113.

Lyons, O. (1980). An Iroquois perspective. In: C. Vecsey, & R. W. Venables (eds.), *American Indian Environments: Ecological Issues in Native American History*. Syracuse University Press: New York, pp. 173–174.

Mulgan, T. (2006). *Future People: A Moderate Consequentialist Account of Our Obligations to Future Generations*. Oxford University Press: Oxford.

Mulgan, T. (2014). Utilitarianism and our obligations to future people. In: B. Eggleston, & D. Miller (eds.), *The Cambridge Companion to Utilitarianism*. Cambridge University Press: Cambridge, pp. 325–347.

Neef, A. (2019). Can national and international legal frameworks mitigate land grabbing and dispossession in South-East Asia? In S. Price, & J. Singer (eds.), *Country Frameworks for Development Displacement and Resettlement Reducing Risk, Building Resilience*. Routledge: London and New York, pp. 52–70.

Neef, A. (2021). *Tourism, Land Grabs and Displacement: The Darker Side of the Feel-Good Industry*. Routledge: London & New York.

Paoloni, L., & Onorati, A. (2014). Regulations of large-scale acquisitions of land: The case of the Voluntary Guidelines on the Responsible Governance of Land, Fisheries and Forests. *Law and Development Review*, *7*(2), 369–400.

Parfit, D. (1984). *Reasons and Persons*. Oxford University Press: Oxford.

Skogly, S. (2021). Global human rights obligations. In: M. Gibney, G. E. Türkelli, M. Krajewski, & W. Vandenhole (eds.), *The Routledge Handbook on Extraterritorial Human Rights Obligations*. Routledge: London & New York, pp. 25–39.

Watson, I. (2018). Aboriginal relationships to the natural world: Colonial 'protection' of human rights and the environment. *Journal of Human Rights and the Environment*, *9*(2), 119–140.

WCED (1987). *Our Common Future*. World Commission on Environment and Development. Oxford University Press: Oxford.