Beyond Territoriality: Symposium on Jurisdictional "Hooks" for (Extraterritorial) Human Rights Obligations – Reflecting on the Regulation of Global Value Chains and the Duties of States and Private Actors

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Striding Towards Responsible Business Conduct in The Age of Due Diligence Laws

Mandatory human rights due diligence (mHRDD) laws are in vogue.

After the completion of the trilogues in December 2023, where inter-institutional negotiations were carried out among the European Commission, the European Parliament and the European Council it was taken for granted that an EU-wide Corporate Sustainability Due Diligence Directive (CSDDD) would be adopted some time in 2024. However, the last minute reluctance of countries such as Germany, France and Italy threw a spanner into the works, and threatened the adoption of the Directive. Nevertheless, thanks in large part, to the Belgian Presidency of the EU Council and the tireless efforts of numerous other actors, a compromise text of the CSDDD was agreed to on the 15th of March 2024 by a qualified majority during the meeting of the Committee of Permanent Representatives. Subsequently, a few days later, the EU Parliament's Committee on Legal Affairs (JURI) also endorsed the Directive. The CSDDD will now be subjected to a final vote in the EU Parliament before it can finally become law.

The latest compromise diluted the hard earned gains of earlier negotiation rounds. E.g., the Directive will now apply only to very large companies as the threshold has been increased from companies with 500 employees to 1,000 and turnover of €450 million up from €150 million. But, despite these hurdles the CSDDD is still a significant development that will compel all EU countries to adopt a mHRDD law. Notably, France, Germany and Norway are ahead of the game, having already enacted such a law.

Outside of Europe, due diligence laws are being contemplated in diverse countries such as Brazil, the United Kingdom and South Korea. Geared towards enhancing more responsible business conduct in our globalized world, due diligence laws are fundamentally reshaping the global governance of Business and Human Rights (BHR), by imposing hard, rather than soft, obligations on covered companies. Unlike earlier tools such as the UN Guiding Principles on Business Rights (UNGPs) and the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (OECD Guidelines), mHRDD laws impose binding obligations on covered companies and their violation may attract diverse consequences such as civil liability and administrative sanctions.

It may be too early to tell how effective mHRDD laws will be in taming errant companies by compelling them to internalize the human rights and environmental costs of their business activities – costs that such companies have previously externalized to the detriment of (primarily Global South) rightsholders. Nevertheless, there is cause for optimism that these laws will contribute to the lessening of the corporate accountability gap by ushering in a new era of extraterritorial obligations for private actors such as Transnational Corporations (TNCs). However, as subsequent sections of this contribution illuminate, mHRDD laws do not directly impose human rights and environmental obligations on covered companies. Rather, they do so only indirectly, through the use of due diligence obligations as proxy.

Nuancing Extraterritorial Obligations: From Obligations of States to Obligations of Private Actors?

Is it a misnomer to speak of the extraterritorial obligations of TNCs?

Implicit in the term extraterritorial is the idea of a (particular) territory and an undefined penumbra beyond this territory – the extra. International human rights law has traditionally favored a conception of extraterritorial obligations fixated on territorial states as duty bearers. As Elif Durmuş points out in her contribution, within this context, it is necessary to have a trigger in order to extraterritorialize the human rights obligations of a state. This is a sentiment echoed by Wouter Vandenhole who astutely observes that extraterritorial obligations are only grudgingly accepted as an exception to the default territorial-state-centric paradigm.

Crucially however, these state-bound conceptions of extraterritorial obligations make it difficult to account for human rights and environmental violations by private actors such as TNCs operating through global value chains (GVCs). This concern is amplified by international law's failure to impose direct obligations on corporations, with the UNGPs opting for a direct obligation to protect for states and an indirect obligation to respect for business entities. Within this context, in attempting to reconcile these traditional state-centric conceptions of extraterritorial human rights obligations with the human rights and environmental obligations of TNCs in their GVCs, questions have arisen about whether home states have a duty to regulate the extraterritorial actions of TNCs that fall within their territory and/or jurisdiction. Scholars such as Olivier De Schutter have argued that home states of TNCs have an extraterritorial duty to regulate TNCs. De Schutter has gone as far as proposing an 'International Convention on Combating Human Rights Violations by TNCs' wherein home states would be obliged to regulate TNCs extraterritorially. In the same vein, Daniel Augenstein and David Kinley posit that 'in so far as states are under extraterritorial obligations to protect human rights, such obligations extend to the extraterritorial regulation and control of corporate actors' (page 275). Relatedly, in its General Comment 24 on state obligations in the context of business activities, the Committee on Economic, Social and Cultural Rights (CESCR) has averred that the extraterritorial obligation of states to protect requires steps to prevent and redress infringements of rights that occur outside the territories of state parties due to the activities of business entities over which they exercise control (para. 30). This includes by adopting 'a legal framework requiring business entities to exercise human rights due diligence (para. 16). These sentiments are echoed by the Committee on the Rights of the Child which stated, in its General Comment 16 on state obligations regarding the impact of business on children's rights, that states must ensure that all business enterprises operating within their borders are adequately regulated within a legal and institutional framework that ensures that such entities do not impact the rights of children and/or aid and abet violations in foreign jurisdictions (para. 42).

On the other hand, scholars such as Claire O'Brien have rebutted these claims that there exists a duty incumbent upon (home) states to extraterritorially regulate the activities of TNCs, arguing that such a duty 'which can only be based on home state jurisdiction, appears to lack a basis in current law' (page 61). Consequently, home states may regulate the extraterritorial conduct of TNCs through the use of legislative tools such as mHRDD laws but cannot be said to have an obligation to do so. This latter position finds support in Guiding Principle 2 of the UNGPs which provides that 'states should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.' The commentary to this principle confirms that 'at present states are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis.'

Regardless of whichever side of this debate one falls on, there is a clear need to nuance contemporary understandings of extraterritorial obligations, or even depart from the idea of extraterritoriality in this context (as argued by some of the contributors to this symposium), in order to more robustly regulate private actors such as TNCs. For instance, Sara Seck poignantly illuminates the inadequacy of conceptualizing human rights obligations across borders in relation to environmental harms as extraterritorial and calls for a relational approach to understand transnational corporate environmental human rights accountability. Similarly, Gamze Erdem Türkelli paints a grim picture of international (human rights) law's failure to reckon with 'the growing number of business-related human rights harms causing ever wider human rights protection gaps across borders.'

This contribution argues that due diligence laws offer a novel way to inject some nuance into the debate on extraterritorial obligations by redirecting our attention. Rather than focusing on the extraterritorial human rights obligations of home states which may only be triggered in exceptional circumstances, due diligence laws turn our attention to the TNCs who impact human rights and the environment in their GVCs to the detriment of workers, local communities and other 'distant strangers' (Angela Müller). Going beyond the traditional state-centric paradigm, mHRDD laws circumvent international law's lingering incapacity to impose direct human rights obligations on TNCs. Thus, mHRDD laws make it possible for due diligence obligations to function as an acceptable proxy for the realization of human rights and the protection of the environment in GVCs.

To the extent that mHRDD laws compel covered companies to implement HRDD throughout their GVCs, failing which certain repercussions could follow, these laws can be said to force companies to internalize the human rights and environmental costs of their business operations. Crucially, unlike extraterritorial human rights obligations in classical international law, due diligence obligations apply 'extraterritorially' throughout the GVCs of covered companies and such extraterritoriality need not be triggered as is the case for states. As long as a company falls within the scope of the law it immediately bears HRDD obligations. Notably however, the question how far due diligence should go as relates to the different tiers of production/supply will depend on the particular mHRDD law in question. For instance, the German law imposes due diligence obligations only on covered companies and their direct suppliers in the first instance. In order for such due diligence to extend to indirect suppliers there must be 'substantiated knowledge' of violations. Ultimately, like the relational approach discussed more fully in Sara Seck's contribution to this symposium, rather than drawing a hard line between territorial and extraterritorial obligations, due diligence terminology instead draws attention to the relationships that are at issue in the transnational regulation of corporate conduct.

The Regulation of Global Value Chains as a Jurisdictional Hook?

In the introduction to this Symposium, Elif Durmuş points out that jurisdictional hooks can be understood by dissecting the 'supply side' of human rights. The regulation of GVCs can be conceptualized as a jurisdictional hook that allows actors (such as states or the EU acting as a bloc) to extraterritorialize their governance powers beyond territorial borders. Using GVCs as a regulatory proxy, it is now possible to indirectly impose human rights and environmental obligations on TNCs using due diligence obligations as proxy. Crucially, these due diligence obligations in question require covered companies to: incorporate responsible business conduct into their operations; identify and assess actual and potential adverse impacts associated with the company's operations; take actions to stop, prevent and mitigate adverse impacts; communicate on their performance; and remediate adverse impacts. To be clear, due diligence obligations are not synonymous with human rights obligations, even though in complying with the former obligations covered companies could have positive human rights and environmental outcomes.

That said, due diligence obligations share some similarities with the traditional respect-protect-fulfil typology that is canonical in human rights law. In relation to the human rights duties of states, the obligation to respect means that states must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires states to protect individuals and groups against human rights abuses. The obligation to fulfil means that states must take positive action to facilitate the enjoyment of basic human rights. In comparison, due diligence obligations could also be argued to encompass elements of the respect-protect-fulfil paradigm, albeit indirectly. By incorporating responsible business conduct into their operations and implementing risk management systems covered companies could be said to be taking positive actions to facilitate the enjoyment of human rights. Through remediation and taking actions to stop, prevent and mitigate adverse impacts of business operations including in the operations of suppliers (through cascading of due diligence obligations) covered companies could be said to be fulfilling both obligations to respect as well as to protect. Understood in this sense, whereas due diligence obligations are not human rights obligations, genuine compliance with due diligence obligations is likely to lead to better protection of human rights in reality.

Arguably therefore, in the age of due diligence obligations, TNCs may be said to finally, albeit indirectly, have binding obligations geared towards safeguarding of human rights and the environment. Only time will tell whether such due diligence is in fact an effective proxy for positive human rights and environmental outcomes.

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