

Book Review

Sigrun Skogly & Mark Gibney, eds.
Universal Human Rights and Extraterritorial Obligations.
Philadelphia: University of Pennsylvania Press, 2009.

Reviewed by Howard A. Doughty

Globalization is an essentially contested concept. To some it is historical, and reaches back at least as far as the beginning of the European colonial empires five centuries ago; to others it is a (post)modern phenomenon of only three decades' duration. To critics of imperialism, it is a matter of political economy; to technophiles and technophobes alike, it is the product of computers and communications technology which are frequently said to have destroyed both time and space at a keystroke, now that the New York Stock Exchange can instantaneously set off panic or sooth traders' emotions in Hong Kong (and *vice versa*). Meantime, culture watchers split between those who see the universal homogenization of values in the emerging "McWorld," and those who take note of eruptions of regionalism, nationalism and various *jihads* that mark the rise of what Samuel P. Huntington famously called the "clash of civilizations." To enthusiasts, globalization is an irresistible path to an idyllic cyberfuture; to sceptics it is already a spent force.

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Political optimists of a liberal persuasion have been saying for some time that the promise of the European Enlightenment—the achievement of prosperity and democracy combined with the demise of ignorance and disease—is nearing fulfillment. Whether seen as President George H. W. Bush's "thousand points of light" or President George W. Bush's "war on terror," this much is certain: a process of extraordinary technological, economic, environmental and political importance is taking place.

Sigrun Skogly and Mark Gibney have put together a very fine anthology that deals with the "political" side of the matter, though its economic and ecological implications are not far removed. By political, I do not mean chiefly to identify matters of governmental institutions, ideology and geopolitical influence, but mainly the legal ramifications of the realignment of individual rights and state obligations in a world in which borders have become porous and problematic.

Since the *Treaty of Westphalia* in 1648, the nation-state has been increasingly accepted as the primary political unit in human affairs. International law has come to govern some of the relations among states, even to the point of imposing "rules of war" on those countries that

choose to take up arms against one another (and which do not dismiss international conventions as “quaint”). Less dramatically, but no less significantly, international agreements with respect to trade, natural resources, pollution, human and even bird migration have grown in importance. Even granting that some countries mock and more betray their obligations under a variety of bilateral, multilateral and global agreements, it is fair to say that international regulation and the rule of law have become the standard according to which rogue states are judged and sometimes held to account. We, of course, do not have anything approaching world government, equipped with courts empowered to make enforceable rulings and an international policing agency, but total international disorder is—we may choose to hope—pretty much a thing of the past.

For Skogly and Gibney, it is at the intersection of the rules governing inter-state behaviour and the defining liberal principle of human rights that one of the most important practical issues of contemporary political life arises. It is also one of the most hotly disputed, for it casts a philosophical commitment to the inherent value of human life and a tradition of natural rights not only into a world-wide system of power politics, but also into a cultural divide between those who embrace liberal individualism and those who do not. Much as it might please advanced Western societies to believe that universal human rights are not only innately desirable, but are also actually desired by all societies, the fact is that not every nation-state holds individual freedom and the innate dignity of the person to be ultimate, transcendent human values.

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In their collection, written by contributors of impeccable reputation in their fields, Skogly and Gibney approach the question of rights from a perspective that might initially strike some as unusual. Much of the debate about extraterritorial application of law has concerned efforts by one state to impose its will on another by forcing the weaker power to accede to its demands to apply its own laws in a foreign state. An example might be the efforts of the United States to compel the compliance of Canada in the application of American laws concerning war resisters. On more than one occasion during the Vietnam era, Canadian authorities were compromised when US law enforcement sought out “draft dodgers” or “deserters,” who had made it to the safe haven that Canada was thought to represent at the time (no similar expectation of sanctuary, of course, is present with respect to contemporary Iraqi war resisters). Moreover, today the sharing of “intelligence” among law enforcement and security agencies makes it all the easier to apprehend, detain and remove persons believed to be “terrorists” in one country and transfer them to a second or a third location, often where the niceties of legal restraints on torture are not meticulously respected. The so-called “special rendition” policy is a case in point.

Such concerns focus on what philosophers like Isaiah Berlin have called “negative” freedoms, which is to say protections of citizens from intrusive interrogation, intervention and inappropriate detention by police, security or military personnel. What engages the contributors to *Universal Human Rights and Extraterritorial Obligations* is not so much the protection of

individuals against domestic state authority, but the duties which states owe to individuals across their borders or far away.

Skogly and Gibney begin by pointing out that universal human rights have traditionally been thought to be matters of contention between sovereign governments and their subjects. So, while we may abhor the denial of basic freedoms to subjects of a foreign government, and advocate obvious benefits such as the rule of law, natural justice and the curtailment of cruel punishments, few have felt that the international community had the right to intercede on behalf of the citizens in other nations against the power of their own governments. Moreover, even when suggestions that intervention in the affairs of another country were suggested on humanitarian grounds, chances were that some less than altruistic motive was in play. Even international human rights law was rarely held up as a legitimate foundation for action. At most, boycotts and diplomatic pressures might be applied, as in the case of South Africa during the apartheid era.

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In matters that are both controversial and complex, it is always helpful to begin with as much clarity as can be achieved. In this case, it is advantageous to quote at length:

The term “extraterritorial” effect/application/obligation in international law refers to acts that are taken by one actor (state) that have some kind of effect within another country's territory with or without this second country's implicit or explicit agreement. Extraterritoriality within international human rights law, then, concerns actions or omissions by one state that have an effect on the human rights of individuals in another state – with or without this other state's agreement. This effect may be positive or negative, in that such actions or omissions by foreign states may contribute positively to the enjoyment of human rights; or alternatively, they may result in a deteriorated human rights situation, and even human rights violations.

Specifically the essayists assembled by Skogly and Gibney address an inventory of human rights that includes “positive freedoms,” which involve the provision of the material and social supports that allow individuals to exercise meaningful control over their lives, live up to their personal potential and be free from sociological and economic obstacles to the enjoyment of their free will. So, in addition to freedom *from* torture and violence (including the menace created by an unfettered international arms trade), *Universal Human Rights and Extraterritorial Obligations* addresses the international obligation to provide people with health and housing, food and water, and what individual parents are obligated to provide their children, namely the “necessities of life.” It deals with labour and refugee laws. It is concerned with scarce natural and social resources and the duty of all nations to act in support of citizens of countries that do not provide the essentials.

Initiatives of this sort are now conceivable. The precedent has been set by a number of agencies that have accompanied the growth of globalization. From the World Health

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Organization and the International Labour Organization to the International Monetary Fund and the World Trade Organization, the principle that external authorities can influence and sometimes dictate domestic policy is now well-established. This is nothing more (nor less) than the recognition of unprecedented global interdependence, resulting in international agreements that can force nation-states to comply with regulations ranging from transportation and communications, through monetary and financial arrangements, to natural resource extraction and manufacturing standards.

As the grounding principles of international law evolve, it seems plain that we are not yet in a position to anticipate “world government” in any comprehensive sense, but we have also left behind the era of utter lawlessness. As a result, the realities of global trade and commerce alone have come to include demands for minimal state guarantees of the necessities of life for their citizens.

It is therefore opportune for this helpful volume to have appeared. As international corporations, advocacy groups and charities join with still-semi-sovereign nations and multinational regulatory agencies to play their part in the maintenance of a loose, often clumsy, but undeniably extant set of global institutions, all fumbling their way toward a more-or-less coherent, comprehensive and enforceable worldwide “social contract,” the definition and defence of human rights must not be omitted or marginalized as they have been in the past and too often remain in the present.

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Each chapter is praiseworthy for its analysis of a specific policy field. Opening the book, for example, Manfred Nowak shows how torture is no longer a matter to be resolved solely between governments and their citizens. The “rendition” program of the United States in its “war on terror” implicates other countries such as Egypt and Syria as well as “black sites” elsewhere. Mid-way through the book, John Knox links international environmental law to the human rights agenda. He urges the binding of the two to provide cross-national rights to people who are the victims of nature’s profound indifference to human boundaries, preferring to allow wind and water to move where they will, and carry the irresistible forces of nature as well as human toxic waste with them.

In each case and with each topic, two features stand out. One is the result of dissatisfaction with what are called the “vertical” and the “horizontal” approaches—the first seeking to improve the top-down policies within national borders, and the second trying to achieve progress through international government-to-government agreements. What this book recommends is a diagonal approach, combining the strengths of each in order to overcome the weaknesses of both. This builds on the popular anti-globalization sentiments that were largely set aside following the events of 11 September, 2001, but which may be reasserting themselves

in light of general populist pro-democracy, pro-justice and pro-environment agitation around the world. It is properly sceptical of an idealistic, rights-based movement that attempts to insert human rights issues into the so-called new world order of global capitalism (elastically defined), and includes both economies that tend more toward free-market determination and state-dominated experiments in private ownership, whether in Singapore or Shanghai.

Skogly and Gibney set out the framework in a manner worth quoting at length:

What the chapters in this book analyze is neither the “horizontal” nor the “vertical,” but rather, the “diagonal” relationship between outside actors (especially Western states) and citizens in other countries. This is not an attempt to take issue with the principle that it is the domestic state that has the primary responsibility for its own population’s human rights. What is added, however, is the notion that states should be held accountable wherever their actions may influence human rights enjoyment. The problem is that this idea runs smack into such established international law principles as “national sovereignty” and “jurisdiction.” In a wonderful analogy that he develops in his contribution to this volume, Thomas Gammeltoft-Hansen likens the need for new thinking in the realm of human rights to the emergence of quantum mechanics, which arose when classical physics theory was found to be incapable of explaining phenomena at the atomic level. For Gammeltoft-Hansen (and the other authors in this volume), international law is frequently unable to deal with a globalized world where states are increasingly interrelated. It is tempting to add to this that the intellectual appreciation of extraterritorial obligations may well require the development of legal principles that make a “quantum leap” from the traditional territorial confines of human rights law.

This is no small task, but it is a necessary one if individual human rights are to be taken seriously as a global policy priority, and not just as rhetorical cover for attitudes and actions that have no organic relationship to the liberties of living people.

The project demands very clear thinking. At issue are core concepts including “jurisdiction, responsibility and accountability,” as well as practical mechanisms and what they call “the applicability of the tripartite typology of obligations (to respect, protect and fulfill) in terms of foreign policy.” These entail difficult practical problems. No nation eagerly embraces a set of human rights obligations that threatens its sovereignty—a consideration that has kept a number of countries from accepting, in whole or in part, the jurisdiction of the International Court of Justice at the Hague. Other worrisome problems involve questions of culpability, especially when responsibility for violations of human rights cannot be set clearly and exclusively at the feet of one nation. Here again, the rendition program is a case in point. As well, there is the matter of enforcement. When the International Monetary Fund threatens to take action against a country in financial arrears, or compels domestic policy changes such as privatization of government assets and programs, the matter is fairly straightforward (though not entirely removed from the human rights agenda since access to clean water and essential social services may be jeopardized by the imposition of the neoliberal ideology that currently dominates international trade and financial institutions. Controlling third parties (e.g., private security

services and mercenaries used to augment armed forces occupying another country) is yet another matter.

In the end, each of the contributors offers insight and helps clarify the issues. The process of defining and applying human rights across borders is, however, quite obviously a “work in progress.” Although the *United Nations Universal Declaration of Human Rights* contains a range of positive and negative rights and liberties, no country on Earth lives up to them, and many do not even agree with them for reasons of traditional religious and social mores. So, for instance, even such an obvious idea as the protection of women’s health has become controversial because of differences of opinion over the legitimacy of birth control, abortion rights and so on. As a result, even advanced liberal democracies are seeing fit to terminate funding for organizations such as Planned Parenthood; this being so, effectively challenging violations of human rights in the case of the cultural custom of female genital mutilation becomes progressively more problematic.

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Skogly and Gibney have presented us with a worthy document. Accepting that globalization has put international law and human rights law in flux, they offer excellent preliminary discussions of the inescapable challenge of the very near future: how to bring human rights issues into the domain of international law in a way that will provide the necessary legal and governmental structures to make them relevant to the world as it is becoming.

Only when that is done will there be serious discussions of, for instance, how agricultural and trade policies in one country produce starvation in others, how people can be protected against transborder ecological degradation, and how each wealthy nation’s obligation to provide assistance to poor countries can be operationalized, applied and enforced. There is no shortage of documentary evidence that the problems are recognized and understood, and there is ample documentary proof that the nations of the world have committed themselves to the amelioration of suffering, the implementation of rights and freedoms and establishment of institutional means to achieve these goals. There is also, however, no clear indication that treaties, agreements, protocols and statements of principle result in systematic practical improvement, whereas there is plenty of support for the proposition that, in crucial areas, the global record is getting worse.

If Thomas Hobbes were alive and writing today about the state of nature among nations, his gloomy account of individuals would not be much different than any dispassionate account of international relations today. The editors of this volume, however, help move matters a little bit forward. They explain what needs to be done and they even show how it can be done. What remains is to discover if it will be done.

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