FUTURE-PROOFING HUMAN RIGHTS

DEVELOPING THICKER FORMS OF ACCOUNTABILITY

PROJECT SUMMARY

Human rights are increasingly described as in crisis. One reason for this is that current accountability mechanisms cannot adequately deal with intricate and multilayered human rights violations that occur in rapidly changing and vastly complex social contexts. Thus, if human rights are to continue to offer a widely accepted framework for thinking about (social) justice, we urgently need to reconstruct the very notion of accountability on which it is pinned, so that better protection is offered. This project revisits the questions of what counts as a human rights violation, who holds human rights duties and how to actually deliver human rights accountability, in the context of pressing and complex challenges. Harnessing the legal, sociological, anthropological and criminological expertise of the consortium's members, it finds resources and strategies for thicker human rights accountability *within* human rights law, from *other domains of law*, and *beyond* the legal realm. The identification of a variety of avenues for achieving better human rights protection will provide the basis for a thicker conceptualization of the notion of (human rights) accountability.

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PROJECT DESCRIPTION

RATIONALE AND URGENCY

Human rights are increasingly described as in crisis (Alston 2017, Fagan 2019). At one end of the spectrum are those who criticize human rights for quick political gain, with an argumentation that seeks to delegitimize and undermine a system intended to offer protection to those at risk of having their rights violated. At the other end are scholars and practitioners who genuinely worry that the human rights system remains unable to offer adequate protection to all rights-holders. One of their central concerns is that the system does not capture the everyday realities of all these rights-holders. At the heart of the latter critiques lies the realization that formal human rights systems are finding it increasingly difficult to provide solutions to multi-layered human rights challenges, which are occurring in rapidly changing and vastly complex societal contexts. Indeed, if human rights are to continue to offer a widely accepted framework for thinking about (social) justice, we urgently need to revisit some of their core assumptions and characteristics. Because human rights are not spontaneously respected, this endeavor is particularly urgent in respect to human rights accountability, given that a significant accountability gap emerges when accountability mechanisms are not tailored to the real challenges faced by rights-holders.

RESEARCH AIM AND QUESTIONS

In spite of a relatively robust legal framework there is a continued reality of human rights violations and rather low degrees of accountability. Our aim is therefore to strengthen human rights law by identifying means or mechanisms that ensure a thicker form of accountability. This project proposes to further develop the concept of accountability so that it can face up to current social challenges, such as COVID-19, corporate abuse or surveillance dilemmas. Our particular concern is with the disconnect between the formal legal system and the lived experiences of those who suffer harms that could logically be – but are not yet - understood as a human rights violation.

Our overarching research question is: *How can thicker accountability for human rights violations be achieved, so as to ensure better human rights protection in line with the everyday experience of rights holders?* This question breaks down into three sub-questions:

RQ1. What counts/should count, as a human rights violation, i.e. what types of substantive wrongs (do not) trigger accountability in practice?

RQ2. Who can/should be held accountable (i.e. who is a duty-bearer), but now slips through the net?
RQ3. How can the human rights framework be altered to accommodate this, i.e. what are good practices?

WHERE WE LOOK FOR ANSWERS

This multi-disciplinary project looks for answers to these questions *within*, *around* and *beyond* human rights law (Figure 1). Since we do not believe that legal structures can or should be bypassed in the quest for thicker accountability (King 2013), we first explore how accountability can be reinforced from *within human rights law*. At the same time, we position ourselves against analyses that aim to 'rescue human rights' by defending the legal status quo in terms of what counts as a human rights violation (only those recognized in current human rights law), who is considered a duty-bearer (only states) and which kind of accountability is appropriate (only legal) (Hannum 2019). Instead, we believe that a more comprehensive and satisfactory kind of human rights accountability is needed and that this can be developed progressively including by borrowing from *other fields of law*. Other legal fields are therefore the second

place where we will look for answers. Finally, it is crucial to also look *beyond the legal domain* to discover promising approaches to accountability that capture the experiences and lived realities of rights-holders who have been bypassed by the legal framework altogether. This project therefore adopts a research design that looks for answers to our research questions within human rights law (track 1), in the broader legal system (track 2), and in broader social and political domains (track 3), before forming an integrated understanding of how various approaches to accountability reinforce and enrich one another (track 4).

GROUNDBREAKING CHARACTER

Enacting ever more laws or drafting new treaties is unlikely to solve the current human rights crisis (Posner 2014). Instead, one of the things that is needed is a fundamental rethinking of the notion of human rights accountability, thus strengthening the pre-existing framework. This project proposes a multi-disciplinary analysis that allows us to rethink human rights accountability in the face of current challenges.

STATE OF THE ART: HUMAN RIGHTS AND THE ACCOUNTABILITY GAP

The academic literature on accountability is vast. Different interpretations of what it means, how it can be improved, and what it ought to achieve, have been proposed, and this from various disciplines. This is also the case for the literature on human rights. In this necessarily short review, we therefore zoom in directly on the particular aspects that are most relevant to our research project, and is structured around the notion of accountability within, around and beyond human rights law. It builds on insights from legal studies, political science, legal anthropology, criminology and public administration—which also represent the project's disciplinary roots and the expertise within our consortium.

Our starting point for this exercise is that, although human rights are powerful in theory, they are vulnerable in practice. Very often, they are not respected, and sometimes they are actively resisted or paid lip-service to by actors whose commitment to human rights is questionable. Genuine accountability for human rights is clearly a problem, but it could also be the solution if we get it right. Rethinking accountability on the basis of human rights law alone, however, is unlikely to yield satisfactory outcomes. This section therefore integrates insights from law, political science, criminology & public administration.

ACCOUNTABILITY WITHIN HUMAN RIGHTS LAW

In human rights law, a narrow focus on compliance has largely eclipsed debates about thicker notions of accountability. Discussions mostly focus on the question of compliance with existing legal frameworks, often in the narrow sense of implementation at national level of binding international norms or judicial rulings as well as 'recommendations' and other 'soft law' issued by a range of international bodies. More recent work on accountability *within human rights law*, however, has begun to ask whether such a compliance and outcome-focused perspective is sufficient to ensure effective human rights protection 'on the ground' (Gerards 2012, Brems & Gerards 2017). This immediately raises more general questions of accountability.

A particularly important debate within human rights law concerns the way international courts proceed to assess whether states are responsible for human rights violations, as alleged by applicants. The European Court of Human Rights (ECtHR) has been noted for now refraining from dictating substantive solutions to states (substantive review), instead providing states with procedural tools that enable them to take their responsibility of securing human rights (process-based review) (Arnardóttir 2017, Çalı 2018, Spano 2018). For instance, instead of deciding whether the national conviction of a journalist for writing a critical article has violated the *substance* of the journalist's freedom of expression, the ECtHR will now

conduct 'only' a *procedural check* of the domestic judgment. What the ECtHR evaluates is whether the national court has adequately applied the criteria set forth in the ECtHR's previous case law regarding the scope and limits of the right to freedom of expression. If the national court has adequately applied existing standards, the national ruling will generally stand. Scholars have argued that such a shift from substantive to process-based review can lead to thicker accountability by returning the responsibility for human rights protection back to states (Gerards 2012, Brems 2017). Given that international courts are obviously not equipped to deliver hundreds or thousands of substantive rulings on one particular issue, the ECtHR's new approach appears at first sight promising: the court assists states to adhere to their human rights obligations by letting them know what they need to do. This appears to ensure human rights accountability at the same time that it eliminates the need for a multitude of individual complaints to arrive at that result. On a less positive side, however, the focus on processes and procedures risks encouraging a 'checkbox-approach', which generates a potential threat that procedural rights are enhanced *without* improving people's access to substantive rights (Çalı 2018). We therefore need to better understand the effect of this recent evolution in human rights law in terms of accountability.

ACCOUNTABILITY IN THE BROADER DOMAIN OF LAW

Another way to approach the current state of the debate on legal accountability is to find inspiration within the wider international legal domain, as it were *around* human rights law (rather than strictly within it). The most groundbreaking work regarding accountability in this regard is happening in relation to the issue of the notion of human rights duty-bearers. This work is rooted in the growing acceptance, both within legal scholarship and beyond, that a focus on the territorial State as the sole duty-bearer is myopic and increasingly out of sync with realities on the ground (Alston 2005, Clapham 2006, Noortmann et al 2015, Ryngaert 2017). The literature on who can be identified as 'new' human rights duty-bearers is teeming with innovative proposals for – and warning signs about – casting international and supranational organizations, corporate actors, armed groups, non-governmental organizations or individuals as potential human rights duty-bearers, and which fields of law could be built on to conceptualize the notion of accountability beyond the state (Vandenhole 2015). A clear view on the most appropriate way forward is missing. On one side are proposals for enhancing accountability by reinforcing the state (e.g. the treaty initiative on business and human rights) (Thirlway 2017). On the other side are proposals for extending human rights accountability beyond the state, with obligations to be allocated to actors other than the state (Darrow 2003, Bilchitz 2010, Kinley 2018). The former are inspired by a concern with over-inclusion, the latter with under-inclusion. We build on the work of these scholars who have been borrowing from neighboring fields of law (such as space law or environmental law) and from international relations/political science to rethink the notion of accountability.

EXTRA-LEGAL ACCOUNTABILITY

The debates above are both rooted in law (human rights law and other domains of international law). This is not the end of the story though. The notion of thick accountability is also central in various debates beyond the legal realm Debates on e.g. political accountability or ethical accountability invite us to be aware that one should not just look at what is legally and institutionally possible but should also find inspiration for thicker accountability beyond the law. We follow McEvoy (2007), in believing that paying attention to extra-legal debates allow for a more comprehensive form of human rights accountability to materialise in practice.

One of the angles through which the notion of accountability has entered the scholarly debate is precisely that question of how to achieve a greater sense of responsibility among actors who did not have a legal

duty to respect, protect and fulfil human rights (i.e. non-state actors). This debate has sought to bridge legal and other forms of accountability and responsibility. Moreover, as the state started to allow private nodes of control to emerge and develop from the late 20th century onwards (particularly in the information environment), the border between the public and the private realm was - further - recast (Birnhack and Elkin-Koren 2003). The blurring of the distinction between the private and public realm, too, nourished the debate how human rights framed duties and responsibilities beyond the legal realm and the State. Hence, part of the discussion about extra-legal approaches to accountability has revolved around corporate actors and public administration.

Also within the literature on social movements, the accountability-debate has been central. Human rights frequently refer to something broader than human rights law, i.e. to a more loosely defined set of norms that represent ideals of justice and fairness, and that are mobilized by civil society organizations who engage in human rights-based programming, monitoring of government policies through a human rights lens, or mobilisation for human rights (see, for example, Dembour 2010, Merry 2018). Indeed, the literature has acknowledged that human rights mobilisation can both support the struggle for legal accountability (e.g. pushing for the prosecution of these perpetrators or engaging in strategic litigation), as well as achieving certain types of accountability and certain goals of the struggle in itself (e.g. pressuring perpetrators to step down).

An extra-legal approach of accountability thus allows for a vision that also sees accountability as a social process and a political struggle, not merely as institutional or legal provisions. It acknowledges the various social regimes of accountability that operate in different contexts, as well as the fact that, in practice, the actual mechanisms of accountability are as likely to be non-legal as legal (especially in contexts with weak institutional provisions) (Lundy & McGovern 2008). Ian extra-legal approach, thus, complements the institutional understanding of accountability with one that also considers the praxis of rights users. To understand accountability as a dynamic practice, we need to understand the claims that are made by various rights users and how these claims change over time. This facilitates a better understanding of when and under what circumstances accountability for human rights is likely, and when an accountability gap emerges.

Within HR law
How can thicken accountability within the existing HR legal framework

Around HR law
How can we learn from other fields of law to thicken accountability for HR?

Beyond the law
How can we learn from other (extra-legal) disciplines and from practice to thicken accountability for HR?

Figure 1. An embedded understanding of thick accountability

Distinguishing between different forms of accountability is analytically useful. Yet, at the same time, the discussion above makes it clear that thicker accountability for human rights necessarily requires us to think of the border between various kinds of accountability as permeable. As thicker and deeper forms of accountability are explored, new issues, new actors and new approaches enter the scene. As such, we see the debates on the different forms of accountability presented above as related and embedded: from classical legal forms of accountability provided for in human rights law, over those legal forms of accountability borrowed from other fields of law, to extra-legal forms of accountability that do not have their roots in any legal framework or that are not aimed at inducing litigation but rather at influencing

multi-layered processes beyond the law. We consider these forms to be mutually constitutive (fig. 1). In sum, by building on these debates and engaging in a conversation about how borrowing from and building on accountability's various disciplinary roots, we seek to enhance the accountability offered by and within human rights law, as well as beyond it. A concrete example of this would, for instance, be that when a corporate actor contravenes human rights, enhancing accountability *within* the legal realm could consist of ensuring that the actor can be taken to court and held legally accountable. Yet, even when this happens, it might be insufficient to force the actor to alter its behavior in a way that is in line with the needs of rights-holders. In such case, extra-legal accountability mechanisms may be appropriate.

RESEARCH APROACH AND METHODOLOGY

The previous section introduced the state of the debate regarding the most pressing *problem* that this project will analyse. In this section, we explain the *research approach and methods* that are needed in order to address this problem effectively, and to identify potential ways forward.

RESEARCH APPROACH: LAW IN CONTEXT AND A USER-PERSPECTIVE

This project starts from the anthropological and socio-legal understanding that no one part of this complex question can be studied in isolation from its relation to the whole, i.e. if we want law to work for those in need of its protection, it does not suffice to *only* study law and the courts, but neither does it suffice to *only* study those in need of protection. We need both, and we need to understand how they influence each other. This focus on 'law in context' (Nelken 2017) has implications for our epistemological position (critical legal studies) (Beneyto & Kennedy 2012), as well as our methodological choices (multi-disciplinary & multi-method). It also shapes our choice of topics and actors to be researched (both 'classic' and 'unconventional' legal practitioners and debates).

We refer to the variety of relevant actors as *human rights users*, i.e. any individual or collectivity that engages with human rights, either as law or as a mobilizing discourse, ranging from the individuals who 'use' human rights in their own name to human rights lawyers and judges, to social movements (Desmet 2014). This concept allows us to look beyond rights-holders and duty-bearers, as well as beyond 'classic' legal actors: judges, for example, become one (privileged) type of rights users, among others. It also allows for an analysis of the interactions between these various types of users who mobilize the human rights framework in their struggle for accountability. This is important for our project, as it acknowledges both legal as well as non-legal avenues for seeking accountability for human rights. It moreover allows us to make visible problems as well as solutions that would remain under-exposed through a purely legal doctrinal analysis, and facilitates a more fine-grained analysis of how various kinds of users engage with various aspects of the human rights edifice.

As such, our analysis is neither limited to legal doctrinal understandings, nor to the perspectives of rights-holders themselves. It encourages an analysis of the interaction between human rights law and legal frameworks on the one hand and those engaging with them on the other. This interaction can usefully be studied through the lens of vernacularization of human rights (Merry 2018, Goodale & Merry 2007). Vernacularization studies analyse how users (such as rights-holders, judges or corporate actors) interact with the human rights laws and norms with which they are presented, and how content might change along the way.

Thus, while an actor-oriented approach (Nyamu-Musembi 2002, Pantazidou 2013) inspires our project in that we seek to improve accountability for those in need of human rights protection, for the conceptualization of the research design, we broaden our focus to any type of rights users. Certain work

packages (2.2, 3.1) moreover start from the position that looking for the meaning of rights from the perspective of those claiming them can transform existing normative parameters of the debate, question established conceptual categories, and expand the range of claims that is validated as rights.
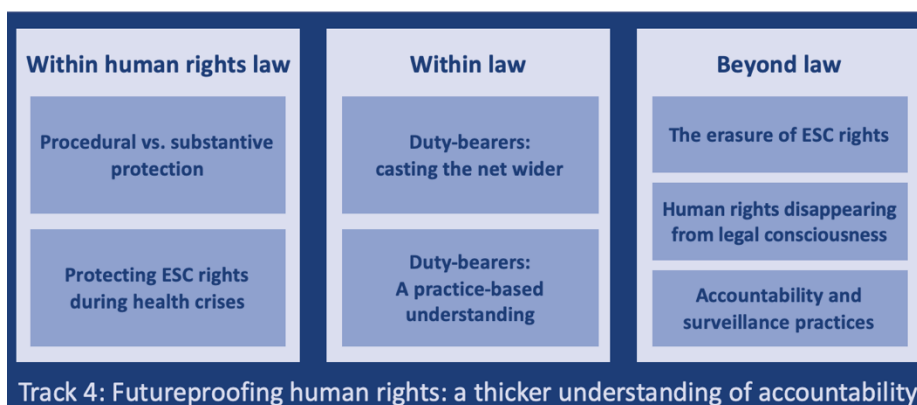
RESEARCH METHOD AND PROJECT INTEGRATION

How can we address the human rights accountability gap so that those most responsible for human rights violations are not let off the hook, and so that those dimensions most relevant to people's daily lives can be adequately protected by human rights law and norms?

This is a daunting question, which requires an ambitious, multilayered and multi-method approach. Our approach is based on legal, theoretical and empirically analysis, and will revisit on central component of the human rights architecture: the notion of accountability. By reconceptualizing it in a way that better reflects the actual – and often vastly complex – experiences of injustice by rights holders, we do not wish to challenge the understanding of human rights as a legal regime; instead we seek to improve it by examining how this legal regime is conceptualized, operates in, and interacts with society (Wilson 2007).

Our methodology (further elaborated upon within each work package) therefore includes critical legal doctrinal analysis, but also goes beyond it to encompass more challenging methods, including qualitative emancipatory fieldwork methods, large-n text mining, (expert) interviews and focus groups, Dembour's anthropological dissecting analysis (Dembour 2020), participant- and direct observation, and surveys. These methods are rooted in legal studies, social and political science, criminology, public administration and (legal) anthropology. These (sub)disciplines and multiple methods are all present in the expertise of the promotors, who will rely on each other's expertise and build on each other's findings.

Combining methods will make it possible to (a) avoid blind spots and offer a more encompassing understanding of the problem, (b) enhance reliability and validity by offsetting potential shortcomings inherent to the use of just one method, and (c) be able to talk to a broader audience across disciplines. Not all methods are employed in every WP, as certain methods are better suited to certain kinds of analysis, which explains the choice for the specific combination of methods within each work package. Should combining methods with differing epistemological roots lead to tensions (e.g. when combining participatory action research with survey design), we will ensure that tensions are properly addressed in advance.

The project is organized into three tracks, structured around the three places where we look for thicker accountability (see Fig. 1), and which go from a more classical legal doctrinal analysis in track 1 to a more multi-disciplinary analysis in track 3. Each track is further divided into work packages (WPs). A fourth track (and attendant WP) integrates the research findings to examine how a thicker kind of accountability for human rights can be achieved across the various realms we examined.

Within human rights law	Within law	Beyond law
Procedural vs. substantive protection	Duty-bearers: casting the net wider	The erasure of ESC rights
Protecting ESC rights during health crises	Duty-bearers: A practice-based understanding	Human rights disappearing from legal consciousness
		Accountability and surveillance practices
Track 4: Futureproofing human rights: a thicker understanding of accountability		

RESEARCH DESIGN

TRACK 1. THICK ACCOUNTABILITY WITHIN HUMAN RIGHTS LAW

Dilemmas of substantive human rights protection

International human rights law tries to ensure legal accountability for human rights violations by combining two elements. First, it imposes on states legal obligations to respect, protect and fulfil human rights. Second, it provides right-holders with access to enforcement mechanisms at the supranational level for when states fail to comply with their legal obligations. These enforcement mechanisms take different forms, but the strongest is that of an international human rights court, such as the ECtHR. This basic architecture of international human rights law generates various dilemmas. One is the subsidiarity dilemma: how can an international court protect the human rights of right-holders without states perceiving the international court as being too interventionist, especially since it is supposed to be a 'subsidiary' mechanism'. For example, when the ECtHR ruled in 2011 that European states could no longer send asylum seekers back to Greece (as the country of first entry into the EU) because of the inhuman nature of reception conditions in that country, several European states complained that the Court had gone too far and had made effective migration policies impossible. However, if the ECtHR had ruled *differently*, it would have been perceived as *failing* to protect the human rights of asylum seekers. A second common dilemma concerns the difficult choices a state has to make when a certain human right conflicts with either another human right or with the common good. For instance, in the context of COVID-19, how should the right to health be balanced against the freedom of movement and the freedom of assembly and right to private life? This is the 'balancing' dilemma: how can/should the state balance various individual human rights or interests against each other? The subsidiarity and the balancing dilemmas may never be conclusively resolved. Whilst they have already been the object of much scholarly research, this track revisits them by analyzing their impact on the possibilities of fostering thicker accountability in light of recent developments. WP1.1 addresses the subsidiarity dilemma, WP1.2 the balancing dilemma. WP1.1. focuses on what happens in normal circumstances whereas WP1.2. considers challenges that arise in extraordinary times.

WP 1.1. The nature and impact of the 'procedural turn' at the ECtHR

In the last half decade or so, the ECtHR has moved from conducting a substantive review of human rights complaints to engaging in process-based review. Thus, in some areas of the case law, the Court's attention is now geared toward assessing whether national authorities have acted in a *procedurally adequate* way – as opposed to determining whether these authorities have either respected or violated human rights norms *in their substance* (see 'State of the Art'). This 'procedural turn' has been praised for encouraging states to take seriously their primary responsibility of safeguarding human rights (Gerards 2012, Spano 2018, Kleinlein 2019). The rationale is that the ECtHR is giving clear guidance to states on how they should proceed, thereby *increasing* human rights protection at the national level – which is of course human rights law's ultimate aim (eg. Brems 2017; Gerards 2012). However, the 'procedural turn' has also been regarded as risky, in that it could hollow out substantive human rights standards (Arnardóttir 2017, Çalı 2018). With no comprehensive and systematic research yet undertaken, this WP asks: '***To what extent, and under which conditions, can the procedural turn by the ECtHR ensure more legal accountability for human rights within the European human rights law system?'***. This question will be answered through a mixed-method approach. In-depth doctrinal legal research will map the extent of the procedural turn, identify how consistently the ECtHR applies it, and evaluate how the ECtHR balances it against substantive justice for rights-holders. Complementary methods will be used to critically evaluate the potential and

limits of the procedural turn. Multiple approaches are possible and equally valuable: quantitative empirical research to determine whether human rights records of states have improved due to the procedural turn; qualitative empirical research in the form of semi-structured interview with ECtHR judges, state officials and NGOs to determine if and how the procedural turn functions as intended; critical analysis of the ECtHR's underlying motivations for the procedural turn and/or its potential impact on specific groups of rights-holders such as religious or ethnic minorities; comparative legal research to evaluate how other supranational bodies, e.g. the Inter-American Court of Human Rights, have resolved the subsidiarity dilemma. The choice of complementary methods will depend on the expertise and skills of the PhD researcher.

WP 1.2 Protecting ESC rights during and after health crises

Human rights must be respected at all times, even in times of crisis when certain human rights obligations can be made more flexible under regimes of states of emergency (Greene 2011). The COVID-19 crisis has dramatically reminded us of the centrality of the issue of how to define and protect human rights during states of emergency (Greene 2020, Scheinin 2020). The measures taken by governments in response to the health crisis have caused human rights restrictions for virtually everyone. The balancing dilemma has therefore been acute. For example: in adopting lockdown measures, have states adequately balanced the right to health (to e.g. achieve a 'flattening of the curve') with a myriad of other human rights (freedom of movement, freedom of assembly, right to education, right to property, etc)? Future legal analyses of the human rights implications of the COVID-19 crisis can be expected to be rife, but also to have civil and political rights as their primary focus, rather than economic and social rights. The reality, however, is that the socio-economically disadvantaged have been disproportionally affected in negative ways by the crisis, including through loss of jobs or income, reduced education (which is more detrimental to some than others), and/or being forced to work in 'essential' jobs such as cleaning, supermarkets and delivery, thereby exposing their health to increased risks.

This WP focuses on the implications of the COVID-19 crisis on the protection of ESC rights by asking: *How should the right to health be balanced against other ESC rights so as to ensure maximal accountability for ESC rights during health crises?* This question will be answered through a multi-method approach consisting of: doctrinal legal research on how international human rights courts and bodies have balanced ECS rights against each other; drawing on social science research on the differentiated socioeconomic impact of crisis measures; (legal) philosophical research on balancing rights (e.g. Smet 2017) and on the failure of human rights to adequately address socioeconomic disadvantage (e.g. Alston 2017, Moyn 2018); and two case studies of national jurisdictions (one jurisdiction that has accounted for the impact on ESC rights and one jurisdiction that has failed to do so; jurisdictions will be determined on the basis of preliminary research and (language) skills of PhD researcher). In answering the research question, the WP will provide a highly-valuable contribution to the scholarly literature on conflicts between human rights, which has mainly concerned itself until now with civil and political rights (e.g. Smet 2017, Smet & Brems 2018, Zucca 2007; but see Vandenhole 2008).

TRACK 2: THICK ACCOUNTABILITY AROUND HUMAN RIGHTS LAW

Towards a more encompassing understanding of who is legally accountable

Track 2 approaches the question thick legal accountability for human rights by zooming in on the specific question of *who* can be held legally accountable. The starting point for this track is the question, *what can we learn from neighboring fields to revisit our understanding of who is a human rights duty-bearer?*

The exclusive focus on states as human rights duty-bearers can be disempowering for rights-holders and victims of human rights violations (Destrooper & Sundi 2017, Vandenhole et al 2013). It is also out of sync with a reality in which states increasingly delegate certain powers and authorities to private actors; corporate actors amassed an unseen kind and amount of power (due to their transnational reach and to privatization and liberalization that led to a transfer -and loss- of economic control by the State); international and supranational organizations assume state functions (especially in those parts of the world where States are failing or virtually non-existent); armed groups fill spaces where the State no longer has military control; and most of these non-state actors – systematically or occasionally – assume state functions and penetrate much more deeply into the lives of people than many States. In response to this, several – legal – initiatives have been taken, and several avenues explored, to identify 'new' human rights duty-bearers, with some seeking to reinforce the state and to strengthen state duties, while others seek to allocate obligations to other actors than state.

This track starts from an exploration of how neighboring fields of law can be an inspiration for updating our understanding of human rights duty-bearers (WP 2.1), and then moves on to an empirical analysis of how rights-holders themselves understand who can be held legally accountable (WP 2.2). Through this two-pronged approach, we problematize the extent to which existing duty-bearer notions let a range of perpetrators – who have effective control – off the hook, and risk alienating rights-holders.

WP2.1. Building a conceptual framework for including new human rights duty-bearers

This WP approaches the notion of thick accountability by identifying legal avenues to include new duty-bearers in a legal accountability framework. This is crucial, because the system of global governance is populated by states and non-state actors alike, who can all make decisions with transnational implications (Rosenau 2003). The exclusion of non-state actors from international law, and from human rights accountability in particular, is therefore increasingly difficult to maintain. But *along which lines should new actors be incorporated into the human rights accountability regime?* Should we rely on a reasoning by analogy that singles out those who hold or exercise state-like power (e.g. international organisations; companies providing public services; armed groups that took power), or rather focus on those who hold or exercise considerable or decisive and asymmetrical power? And how to avoid under-inclusiveness – which risks marginalizing human rights accountability – as well as over-inclusiveness – which risks stretching human rights accountability architecture beyond its limits? There are three major dimensions to thicker legal accountability. The first is *how human rights obligations are allocated* to duty-bearers (the so-called primary norms). In the state-centred model, jurisdiction has been used to allocate obligations, territorially and extraterritorially (Vandenhole 2019, Vandenbogaerde 2016). At its core is effective control over territory. This interpretation of jurisdiction - if not the concept of jurisdiction itself - cannot support a thicker legal accountability that encompasses non-state actors (Erdem 2020). A second dimension is the *allocation of* responsibility for violations: when and to what extent is a duty-bearer to be held responsible for the non-abidance with an obligation (the so-called secondary norms)? The third is the *distribution of responsibility* for violations: more often than not, more than one party is involved in a violation. The current dominant model of individual and separate responsibility may have to give way to shared responsibility (Nollkaemper & Plakokefalos 2014, 2017, Nollkaemper & Jacobs 2015).

This WP will identify criteria for expanding the circle of human rights duty-bearers by learning from environmental law, international economic law, space law, and the field of business and human rights. Based on this analysis, different legal avenues for including new duty-bearers will be explored: the expansion of international human rights law through soft and hard law; the use of domestic law (tort law; criminal law) or other fields of international law (liability law, criminal law); and contractual approaches

('partnerships'), as used for example in the aftermath of the Rana Plaza disaster. Proposals based on these avenues will be examined for empirical relevance in WP2.2.

WP2.2. A praxis-based proposal for a new duty-bearer concept

In many places around the world, the state is a remote entity with no actual presence on, or control over, its territory. It is not rare that such situations are characterized by a deeply-penetrating presence of non-state actors, such as multi-national corporations (MNCs). The question of whether an MNC's presence on the ground can be read as a situation of effective control that generates direct human rights obligations and accountability on the part of the MNC, is one that has received ample scholarly attention. To date however, this debate has mostly been held among legal scholars.

This WP takes the proposals of WP2.1 as they are being developed, and examines their relevance on the ground through a qualitative approach that analyses the perspectives of rights-holders. This way here is an ongoing iterative process between WP2.1. and WP2.2, whereby WP2.2 asks *whether the proposals emerging from the legal analysis in WP2.1 are also supported by those most in need of the protection of human rights.* How do those most disenfranchised and underprivileged understand the duty-bearer notion, and the notion of accountability more broadly? And is a thick kind of legal accountability the one most relevant for them, or can we identify extra-legal interpretations of accountability that are more empowering and offer more protections? Data will be analysed using narrative analysis and critical discourse analysis (Fairclough 1992). If preliminary fieldwork shows the need for a survey (e.g. to better understand regional differences regarding certain dimensions of our question), quantitative skills are present among the researchers to facilitate this. Earlier research and fieldwork by the PI suggest Kongo Central as a relevant case study where a non-state actor is enmeshed in the violations and is nevertheless let off the hook by the law, and where rights holders seek extra-legal ways to foster accountability. The envisioned outcome of this WP is a praxis-based proposal for a new duty-bearer concept that acknowledges the legal framework, but that foregrounds rights-holders' realities, agency and their understanding of accountability.

TRACK 3. THICK ACCOUNTABILITY BEYOND THE LAW

Invisibile rights and the importance of casting the net wider

Track 3 approaches the question of thick accountability for human rights *beyond the law* by zooming in on three different cases where the classical legal framework (human rights or otherwise) is meeting its limits – either because the law does not offer sufficient protections, or, on the contrary, because violators seek to circumvent some of the most stringent elements of that law. In the three WPs under this track, we ask what resources and tools can be found *outside* the law, that help us shed light on a dimension of the accountability gap that we do not see if we stay exclusively *within* the law. How can we use these insights to foster a thicker human rights accountability, either by reinserting these insights back into human rights law (e.g. by using these cases to shed light on current blind spots of human rights law), *or* by exploring complementarity between legal accountability for human rights violations and other forms of (eg. political or ethical) accountability that can reinforce one another. Combined, these cases shed light on potential substantive changes in the meaning of human rights and how we think about accountability.

The question of what issues are (or become) excluded from the law – and thus from legal accountability - is an important one: The type of actions for which – alleged - perpetrators or violators can be held accountable, depends on the avenues that are available for this. Moreover, there is both an accountability and a legitimacy problem if there is a vast discrepancy between what victims think of as human rights violation and what human rights law does. We therefore need to look beyond the law, and into the lived

realities of a broader set of right-users to understand law in context: what resources do we find there to think about thicker accountability? The issue of what gets erased from legal discourse is also important because of the norm-setting power of the law: human rights do not merely exist as law, but also as norms about what we – as a society – consider to be just. Those injustices which we do not label in law, we do not recognize as injustices - or at least, not so readily. As such, human rights (law and norms) have a norm-setting power by allowing certain issues to be framed as human rights concerns, while pushing other issues out of that discourse. It is crucial to gain a better understanding of these dynamics, and of how current interpretations and categorizations of human rights violations erase certain issues from rights holders' understanding of what their rights are, and as such, risk impoverishing the conceptualization of human rights (accountability) (Miller 2008, Schmid 2015).

WP 3.1. The erasure of social and economic rights from transitional justice processes

In the past two decades, transitional justice interventions (e.g. truth commissions or tribunals) have increasingly been conceived of as stepping stones, and participants in them as agents of change who continue the struggle for justice and accountability after the international community leaves (e.g. De Greiff 2015). The rationale is that these interventions have an extra-legal function, namely of raising awareness amongst rights-holders of what their rights are and what they can seek accountability for (Drumbl 2006). The aspiration was that victim participation would maximise (both legal and extra-legal) accountability, lead victims to mobilise and act as 'ambassadors of the justice process', place questions of justice on the public agenda and guarantee the sustainability and follow-through of the justice process (OSF 2016). However, neither practitioners nor scholarship on this issue have so far paid much attention to the alleged causality behind this enhanced accountability. More importantly, it has been observed that the human rights violations prioritized during these interventions (and the justice notion proposed), are often vastly incongruent with rights-holders' own human rights priorities. More specifically, rights users often wish to see much more attention for social and economic rights (violations), which are often largely omitted from many transitional justice procedures (Destrooper 2018; García Martín 2019). The WP therefore asks *what the effect is of this erasure of social and economic rights on rights users' likeliness to rely on human rights institutions to seek accountability for ongoing human rights violations*.

We proceed on the basis of a review of secondary literature and existing empirical analyses (including the PI's ERC database on this topic); a large-n document and text-mining analysis of how much attention has been paid to economic and social rights by a (language-based) sample of truth commis-sions; semi-structured interviews and focus groups with rights-holders to map their legal consciousness. The outcome of this WP is a better understanding of how and when rights users resort to extra-legal avenues for seeking accountability when (assuming that) legal ones are not available to them.

WP 3.2. When human rights disappear from legal consciousness

Human rights violations also risk disappearing from legal consciousness when a court rejects them as being outside the law. For example, the ECtHR refused to recognise a right to family reunion in the first migrant case it decided (*Abdulaziz, Cabales and Balkandali v UK*). As a result, commentaries on the ECRH normally bypass any reference to a right to family reunion (Dembour 2015). To give another example, *Anguelova v Bulgaria* concerned the death of a Roma teenager in police custody. The ECtHR found violations of the right to life and the prohibition of inhuman treatment, but no violation of the prohibition of racial discrimination. And yet, one suspects this would have been the applicants' most important complaint. Understanding this, Judge Bonello wrote a fierce dissenting opinion to the judgment. He stressed that leafing through 50 years of Strasbourg case law, one would have no idea that racial discrimination remains a problem in Europe. He called for different standards of proof to be applied by

the ECtHR (Moschel 2012). This WP aims to identify dissonances between users' perceptions of having had their human rights violated and the inability of the ECHR system to recognize these violations, potentially causing a loss of legal consciousness in society. It does so by reference to the ECHR system and to evidentiary processes.

This WP will thus examine the causes and consequences of having one important issue such as racial discrimination neglected by the ECtHR due to the difficulty/impossibility for applicants to evidence its manifestation. What is it in the way the evidentiary regime is both developed and applied which causes this problem? How is the resulting disappearance from legal and social consciousness experienced by applicants? How do legal representatives navigate it? ***What effect does it have on the way human rights violations are defined and conceptualized? Equally importantly, what good practices can be identified ?*** Answers to the latter question may be sought through reflecting on the nature of evidence from an epistemological perspective: when is evidence 'good enough'? What does it prove? Depending on the interests and expertise of the PhD candidate, answers will alternatively be sought through a comparative legal analysis examining how other international human rights bodies who have a better track-record of finding violations in this tricky area use evidence. WP3.2 will combine doctrinal legal analysis, Dembour's anthropological 'dissecting' method of analysis of documents (especially concerning the 'judicial trajectory' of documents submitted as evidence), interviews with key legal users (including legal representatives and judges) and either epistemological analysis or legal comparison. The researcher conducting WP3.2 will be able to benefit from the research carried out as part of the PI's ERC-Advanced-Grant on evidentiary regimes in human rights adjudication.

WP 3.3: Human rights accountability for contemporary surveillance practices

The political economy of informational capitalism or surveillance capitalism has become one of the key drivers of the expansion of the use of surveillance technologies in society (Zuboff 2018, Cohen 2019). These developments have led to new substantive wrongs and put into question traditional accountability mechanisms in the governance of surveillance. Under the influence of technology companies, the interpretation and understanding of human rights may be shifting. In fulfilling their obligations, they use their own community standards such as data ethics (Taylor & Dencik 2020) that complement data protection laws as their primary frame of reference for self-regulation, rather than international or national human rights standards.

This WP will investigate the substantive wrongs of surveillance that *(do not) trigger accountability in practice*, and identify approaches, instruments and tools, both outside and inside the law, capable of fostering more thicker accountability (legal, political and ethical) for contemporary surveillance practices. It will explore the effect of relevant developments to frame these practices within and outside of human rights law. One could think of the move towards higher scrutiny levels by the European Courts; the inclusion of ethical norms in data protection laws by the European legislator; the creation by the constitutional regulators and courts of new additional rights such as the fundamental right to data protection; the appointment of a UN special rapporteur for privacy, and the creation of novel accountability instruments and technologies such as impact assessments, innovative oversight practices and automated accountability tools as ways of achieving thicker accountability.

Taking surveillance as a case study this WP engages in two analyses. One PhD will investigate the substantive wrongs of surveillance from a socio-legal perspective, followed by an analysis of current human rights law and of the developments mentioned above triggered by a plurality of human rights users to *improve accountability for surveillance wrongs through legal and extra-legal novel instruments*

and technologies. The research methods used for this endeavor consist of a) analysis of human rights case law on surveillance, analysis of policy and legal documents and semi-structured interviews and focus groups with academic experts and civil society organizations, and b) legal and policy analysis of provisions and actors of European and international human rights law and data protection law. A second PhD will investigate *how corporate actors are influencing accountability mechanisms of law enforcement in Belgium to deal with surveillance wrongs.* This analysis includes mapping best and worst practices in terms of legal and non-legal accountability mechanisms. The methodology for this endeavor is inspired by critical discourse analysis as per Fairclough's (1992) three-dimensional model, and uses NVivo software for analysis. Data will be collected through semi-structured interviews and focus groups with law enforcement, oversight bodies and platform representatives, and desk research (government & company policy documents).

TRACK 4. FUTUREPROOFING HUMAN RIGHTS THROUGH A THICKER UNDERSTANDING OF ACCOUNTABILITY
The first three tracks take a descriptive approach to the question of what counts as a human rights violation (RQ1), who can be held accountable (RQ2), and what best practices are (RQ3), and look for answers in human rights law itself (track 1), around it (track 2), and beyond the legal realm (track 3). Track 4 takes a helicopter view: a postdoc will first engage in a further conceptual analysis of accountability on the basis of existing materials, and will then, towards the end of the project, when the findings from the various WPs become available, adopt a user perspective as an analytical lens to integrate the insights from tracks 1-3, and to build on these insights to formulate an overarching answer to the three sub questions (what, who, how), thereby answering the central question of *How can thicker accountability for human rights violations be achieved, so as to ensure better human rights protection?* The postdoc will work in close collaboration with all PI's, researchers and the valorization expert to make both the academic objective of the project, as well as its valorization goals materialize (see below).

This track thus seeks to make significant strides forward in terms of thinking about how to bring these findings together in a way that considers (and seeks out the interfaces and synergies) between 'human rights as law' and 'human rights as norms' in order to arrive at a conceptualization of accountability that is more reflective of rights-holders' lived experiences of injustice. As such, this track forms the capstone in accomplishing our research objective of strengthening human rights law by reconstructing the concept of accountability so that it can face up to current social challenges.

SCIENTIFIC VALUE, IMPACT AND VALORIZATION

At times when human rights are described as in crisis, this frontier research project will provide bold answers to fundamental questions about the future of human rights by ensuring thicker accountability for human rights violations. Its scientific contribution lies in offering a better understanding of how we can learn from various disciplines to strengthen accountability for human rights. As such, it will put Flanders (firmer) on the map as a leading region for legal and socio-legal research on topics that will define the future state of the debate.

In terms of academic and scientific impact, we seek to open up the black box of accountability and to revisit the notion by integrating state of the art insights as they have been developed in various disciplines, to offer a thicker, more encompassing, and more actor-oriented understanding of accountability that facilitates better human rights protection for those most in need. This entails a substantive recasting of the discussion, across disciplinary confines, and requires the integration of legal and extra-legal

perspectives. Also from a methodological point of view, the scientific value and impact of this project will be significant, as we seek to work in a multi-method way, and to introduce innovative social science methods to the field of human rights (e.g. large-n text mining) to offer new perspectives (also section 5.2 for more information about how this methodological integration will be organized).

In terms of valorization, we foresee two trajectories: an academic one and a professional/societal one. As for the academic trajectory, we will prioritize co-authorships within and beyond the research consortium in order to reflect the project's multi-perspectivity in our publications. We will also publish open access as much as possible, and we will seek to respect the principles of open science wherever possible (see annexed Data Management Plan for indication of how we will implement FAIR principles in this project). It is our ambition to facilitate broad reach of our data, research process, methods and findings, in a way that goes beyond the publication of book chapters and A1 articles (we aim at 30+ peer reviewed articles). We also envision the publication of an edited volume that integrates the findings.

As for the professional/societal valorization trajectory, we envision to also reach policy-makers and practitioners, and – to a lesser extent – broad audiences. Valorization beyond the academic community is crucial for this project, precisely because of its pressing relevance to different audiences. Given this, we foresee a dedicated part-time role to support the research team. This will enable, first, stakeholders to be consulted about the outputs and valorization strategy most relevant to them and, second, generating and organizing the outputs strategies thus identified. These are envisioned to include (a) the organization of round tables with practitioners and policy makers, (b) the establishment of an online platform for communication (either through our own project website, a blog platform, or another avenue deemed most relevant by our stakeholders), (c) the publication of policy papers and/or guidelines, and (d) a podcast format to bring the most relevant results to concerned audiences.

We will organize a closing conference for academics, policy-makers and practitioners toward the end of the project to bridge this gap between research and practice and to showcase groundbreaking findings of the project, thus putting the consortium (& Flanders) on the map of important actors in this debate.

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