

GLOTHRO WORKSHOP

SCIENTIFIC REPORT:

LITIGATING TRANSNATIONAL HUMAN RIGHTS OBLIGATIONS

EIUC Monastero San Nicolò, Riviera San Nicolò 26, Lido, Venezia

3-4 May 2012

www.glothro.org

Summary

The GLOTHRO RNP aims at deepening the understanding of human rights obligations of foreign states, and to bring together sub-fields of human rights study, i.e. on the human rights obligations of transnational corporations, international organisations and foreign states. Up to date the GLOTHRO network has mainly focused on deepening the understanding at the conceptual level. The 2010 Brussel Workshop on extraterritorial obligations, the 2011 Antwerp Stock-Taking Conference, as well as the 2012 Tilburg Workshop on the obligations of international financial institutions all adopted mainly a conceptual approach.

The GLOTHRO workshop on Litigating Transnational Human Rights Obligations wanted to address the absence of much case law on transnational human rights obligations. The absence of case law reflects not only a newness in the law, but also, a certain degree of hesitancy about litigating in this realm.

Against this backdrop a book project, titled *Litigating Transnational Human Rights Obligations* has been launched to lead by example, by crafting legally sound judgments from a number of adjudicatory fora – the ICJ, various regional human rights commissions and courts, domestic tribunals, the individual and inter-state complaint mechanisms in the United Nations, the WTO, and so on – that address a particular “real-world” problem involving the issue of transnational duties. The book will present various models for the progressive interpretation of international law. A secondary objective of this volume is to test and demonstrate the accountability dimension of emerging soft law frameworks and principles, such as the Maastricht Principles on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights (September 2011) and the UN Guiding Principles on Business and Human Rights (May 2011).

The workshop provided a unique opportunity to present and thoroughly discuss advanced drafts of the hypothetical judgments. Each time, two commentators with a particular expertise of the complaints procedure at stake, voiced detailed comments, after which a discussion with all present followed. The workshop was also instrumental in identifying cross-cutting themes, and allowed to discuss the way forward for the project.

Description of the scientific content of and discussions at the event

Following the May 2011 stock-taking conference, Mark Gibney and Wouter Vandenhole have initiated a book project, tentatively titled *Litigating Transnational Human Rights Obligations*. The objective of this book project is crafting legally sound judgments from a number of adjudicatory fora that address a particular “real-world” problem involving the issue of transnational duties. Such a project was deemed necessary, as case law on extraterritorial or transnational issues is largely absent. The book project presents various models for the progressive interpretation of international law. The ambition is to include the full range of both civil and political rights and economic, social and cultural rights.

A secondary objective of this volume was to test and demonstrate the accountability dimension of emerging soft law frameworks and principles, such as the Maastricht Principles on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights (September 2011) and the UN Guiding Principles on Business and Human Rights (May 2011). The workshop also provided an opportunity to examine and use various accountability mechanisms which have not yet entered into force. Some of the potentially powerful accountability mechanisms such as the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR) have been adopted fairly recent but have not obtained the necessary ratifications to enter into force. Consequently we will have to wait several years before first cases arise before the Committee on Economic, Social and Cultural Rights. The same holds true for the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure.

The workshop was hosted by the European Inter–University Centre for Human Rights and Democratisation (EIUC). EIUC is an interdisciplinary centre formed by 41 universities from all European Union Member States. It is founded on a commitment to the realisation of the values enshrined in the European Union Charter of Fundamental Rights, the promotion of high-level inter-disciplinary human rights education, research, training and culture, and a shared global understanding of human rights and democracy.

Located in Venice (Italy) the meeting took place in a non-partner country. However, the meeting at the EIUC premises offered great visibility and constituted an important opportunity for GLOTHRO and ESF to make themselves further known to the EUIC research community at large, and to the European Union.

Potential authors, mainly junior scholars and experts had been selected and asked to submit a brief abstract by the end of August 2011, that identified 1) an issue/case that they would like to address, with the proviso that it should concern other actors than the domestic state and, 2) the forum – e.g., a UN Committee, the ICJ, a regional Commission or Court of Human Rights, or a domestic tribunal – that will be issuing this “judgment.”

Drafts of these opinions or “judgments” were due by 31 January 2012. The editors reviewed the various draft judgements and asked for a revised draft by 1 April 2012. The author presented those advanced drafts at the Venice meeting to the other authors, members of the GLOTHRO SC and experts on some of the mechanisms. E.g., Dr Magdalena Sepúlveda Carmona, United Nations Special Rapporteur on Extreme Poverty and Human Rights, attended the meeting to act as a respondent. Ms. Sepúlveda Carmona has considerable experience with international accountability mechanisms and commented in depth on the judgements. Also present was Dr Ana Maria Saurez Franco, with a very rich first-hand experience with the Geneva based UN monitoring bodies. The draft judgements drew on international, regional, and national accountability mechanisms and concern civil and political as well as economic, social and cultural rights.

The draft legal opinions drawing on the UN treaty body mechanisms were:

Rachel Hammonds – Extraterritorial Obligations and the Right to Health

Accountability mechanism: OP-ICESCR

Arne Vandenbogaerde – Extraterritorial Obligations and Parallel Responsibility - Labour Rights in a Transnational Perspective

Accountability mechanism: OP-ICESCR

Niko Lusiani & Gaby Oré – “Only the Little People Pay Taxes”: Tax Havens and Switzerland’s Extraterritorial Obligations to Economic, Social and Cultural Rights

Accountability mechanism: OP-ICESCR

Gamze Erdem – Putting an end to victims without borders: Litigating a hypothetical transnational ‘child pornography’ case

Accountability mechanism: OP-CRC

Jernej Letnar Cernic – Economic, social and cultural rights of Nuba peoples

Accountability mechanism: OP-ICESCR

Margreet Wewerinke – International responses to climate change

Accountability mechanism: Optional Protocol to the International Covenant on Civil and Political Rights

Wouter Vandenhoe – Is there an obligation to refrain from withdrawing development assistance for primary education for children with disabilities?

Accountability mechanisms: Optional Protocol to the Convention of the Rights of Persons with Disabilities

The draft legal opinions drawing on various regional accountability mechanisms were:

Nico Moons – Extraterritorial jurisdiction for military interventions by states outside the context of occupation

Accountability mechanism: European Court of Human Rights

Matthias Sant’Ana – Bail-out agreements under the European Social Charter

Accountability mechanism: European Committee of Social Rights

Ana Maria Suarez-Franco – Landgrab in South-America

Accountability mechanism: Inter-American Commission on Human Rights

Khulekani Moyo – Corporate Human Rights Abuses under the African Charter: the Case of Diamond Mining

Accountability mechanism: African Commission on Human and People’s Rights

The legal opinions drawing on international courts were:

Amita Punj – Farmer’s suicides in India

Accountability mechanism: International Court of Justice

Michael Wabile – Economic crime, asset tracing and States’ extraterritorial human rights obligations

Accountability mechanism: International Court of Justice

Chris Mbazira – Empty Domestic Remedies versus Enforcing Extra-Territorial Obligations: Lessons from the Mubende Case in Uganda

Accountability mechanism: International Human Rights Court

The legal opinion drawing on a domestic accountability mechanism was:

Mark Gibney – Extraordinary Rendition

Accountability mechanism: United States Supreme Court

The legal opinions drawing on accountability mechanisms of the World Trade Organization and the World Bank were:

Claire Buggenhoudt – Import bans and the protection of public morals

Accountability mechanism: WTO Dispute Settlement Body

Alexia Herwig – Measures Affecting Trade in Biofuel Crops

Accountability mechanism: WTO Dispute Settlement Body

Joss Saunders – The World Bank (IFC) and investment

Accountability mechanism: International Finance Corporation Compliance Advisor Ombudsman

The nature of the facts underlying the various hypothetical judgments varied. The authors have either chosen to rewrite an existing judgement, rely on existing facts, or have developed a completely hypothetical case.

The respondent to the draft judgements as well as the other authors were asked to focus particularly on the legal ‘accuracy’ of the judgements. The debates at the meeting dealt with a number of legal issues that arose at the admissibility and merit stage. These issues included the legal basis of the foreign States’ obligations, the concept of jurisdiction, and the attribution and distribution of responsibility between the various actors. Although the judgements are inevitably forward-looking and ahead of current jurisprudence, respondents critically focused on the fact they also must be founded on a solid legal basis.

Taking into account that many governments (as well scholars) consider extraterritorial obligations to be non-existent or weak, thorough discussions on the legal accuracy of the judgements are vital if the volume is to be also legally convincing.

Assessment of the results and impact of the event on the future directions of the field

The discussions and the draft judgements themselves highlighted at least five issues that are of utmost importance for the GLOTHRO RNP and the wider scholarly community.

First of all, the judgements demonstrated that current accountability mechanisms *can* deal with a range of extraterritorial issues. The various international and regional accountability mechanisms are all in a position to address extraterritorial issues. The workshop also demonstrated that lesser known accountability mechanisms such as the WTO Dispute Settlement Body or the International Finance Corporation Compliance Advisor Ombudsman can play a role in providing accountability for extraterritorial violations of human rights.

Secondly, by applying the various treaties and emerging frameworks on concrete examples the workshop further deepened the understanding of extraterritorial obligations of States. A concrete example about the advancement of our understanding of extraterritorial obligations is found in the debate surrounding the concept of jurisdiction. While at the GLOTHRO Brussels meeting in 2010 the issue of jurisdiction still posed considerable problems for the scholarly community the judgements have demonstrated that this does not need to be a controversial issue (anymore) in extraterritorial cases. The workshop demonstrated that in practice too the Maastricht Principles on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights, which were adopted in September 2011, constitute a useful document for the adjudication of extraterritorial issues. The workshop has demonstrated that for example the treaty bodies can find useful guidance in the Maastricht Principles when dealing with extraterritorial cases. The GLOTHRO RNP has clearly been successful in reaching its objective of deepening the understanding of obligations of foreign States, and has facilitated the growing acceptance of such obligations by scholars, independent experts, as well as the various accountability mechanisms.

Thirdly, the topics covered in the judgements demonstrate that structural as well as individual issues can be dealt with under the existing accountability mechanisms. The cases range from the detrimental effects of climate change on the enjoyment human rights to the issue of extraordinary rendition, and involve foreign States as well as transnational corporations or international organisations.

This brings us to a fourth element relevant to GLOTHRO: the issue of transnational obligations of non-State actors. The various judgements and debates at the meeting

demonstrated that the current framework can address direct human rights obligations of non-State actors such as transnational corporations only to a very limited extent. The various cases involving non-State actors dealt with such actors indirectly, that is through the obligations of the home and/or foreign State. This shows an urgent need to develop a thicker understanding of the transnational obligations of non-State actors.

A fifth element arising from the workshop is that the meeting greatly served the GLOTHRO overall objective of creating a global research community (in particular early career researchers) with a global dimension on the topic. Not only through the collaboration with EUIC but also by bringing together young scholars on the issue, GLOTHRO has worked towards this objective.

ANNEXES

Annex 1 | Workshop Programme

Conference Venue: EIUC Monastero San Nicolò,

Riviera San Nicolò 26, Lido, Venezia

3rd May 2012

12:00 – 12:30 Meet and greet at conference venue – EUIC Monastero San Nicolò

12:30 – 14:00 Lunch at Nicelli Airport Restaurant, Aeroporto G. Nicelli Venezia, Lido Via Morandi, 9 - 30126 Lido di Venezia (VE)

14:00 – 14:15 Welcome by EIUC at conference venue

14:15 – 14:30 Introduction by Mark Gibney and Wouter Vandenhoele

14:30 – 16:00 Discussion of Hypothetical Judgements

Panel 1: International/UN Treaty Bodies (Global Society Room)

- Rachel Hammonds (CESCR) – Shared responsibility for the right to health
- Arne Vandenberghe (CESCR) – Labour rights in a transnational perspective
- Niko Lusiani & Gaby Oré (CESCR) – Tax havens and States' extraterritorial obligations to ESC Rights (*not present*)

Respondents: Ida Koch & Magdalena Sepúlveda & Ana-Maria Suarez Franco

Panel 2: International-/UN Treaty Bodies (Human Development Room)

- Gamze Erdem (CRC) – Putting an end to victims without borders: Litigating a hypothetical transnational 'child pornography' case
- Jernej Letnar Cernic (CESCR) – Obligations of former colonial master for ESC rights of Nuba people

Respondents: Benedict Wray & Jens Vedsted-Hansen

16:00 – 16:30 Coffee Break

16:30 – 18:00 Discussion of Hypothetical Judgements

Panel 1: International/UN Treaty Bodies (Global Society Room)

- Margreet Wewerinke (HRC) – International responses to climate change
- Amita Punj (HRC) – Farmer's suicides in India
- Wouter Vandenhoe (CRPD) – Is there an obligation to refrain from withdrawing development assistance for primary education for children with disabilities?

Respondents: Magdalena Sepúlveda & Ida Koch & Ana-Maria Suarez Franco

Panel 2: Regional/Europe (Human Development Room)

- Nico Moons (ECtHR) – Extraterritorial jurisdiction for military interventions by states outside the context of occupation
- Matthias Sant'Ana (European Committee of Social Rights) – Eurozone: financial assistance from the European Central Bank and from the European Union

Respondents: Jens Vedsted-Hansen & Jernej Letnar Cernic & Benedict Wray

19:30 GLOTHRO Dinner

4th May 2012 – EUIC

09:00 – 10:30 Discussion of Hypothetical Judgements

Panel 1: International/WTO (Global Society Room)

- Claire Buggenhoudt (WTO) – United States’ Trade Sanctions against Myanmar
- Alexia Herwig (WTO) – Non violation and situation complaints

Respondents: Jernej Letnar Cernic & Jens Vedsted-Hansen & Benedict Wray

Panel 2: Regional/Africa (Human Development Room)

- Sisay Alemahu (African Court) – transnational companies (*not present*)
- Takele Soboka Bulto (African Commission) - Human rights responsibilities of a state for the foreign operations of its companies (*not present*)
- Michael Wabile (African system) – Economic crime, asset tracing and States' extraterritorial human rights obligations (*not present*)

Respondents: Ana-Maria Suarez Franco & Magdalena Sepúlveda & Mark Gibney

10:30 – 11:00 Coffee break

11:00 - 12:30 Discussion of Hypothetical Judgements

Panel 1: Regional/Americas & US (Global Society Room)

- Ana Maria Suarez-Franco (IAC) – Landgrab in a context of bilateral investment
- Joss Saunders (IFC Compliance Advisor Ombudsman) – Land investment in the Indian Ocean island of Agraria

Respondents: Ida Koch & Magdalena Sepúlveda & Wouter Vandenhole

Panel 2: International/World Bank and Regional/Africa (Human Development Room)

- Khulekani Moyo (African system) – Controlling the off-shore activities of a company in diamond mining (*not present*)
- Mark Gibney (US Supreme Court) – Extraordinary rendition

- Chris Mbazira (African system) – non-national remedies in case of evictions (*not present*)

Respondents: Jens Vedsted-Hansen & Jernej Letnar Cernic & Benedict Wray

13:00 – 14:30 Lunch at Nicelli Airport Restaurant

14:30 – 16:00 Conclusions & Way Forward

Annex 2 | Participants List

Alexia Herwig	University of Antwerp
Ana-Maria Saurez Franco	FIAN
Amita Punj	National Law University Delhi
Arne Vandenbogaerde	University of Antwerp
Benedict Wray	European University Institute
Claire Buggenhoudt	University of Antwerp
Gamze Erdem Turkeli	University of Antwerp
Ida Koch	University of Lund
Jens Vedsted-Hansen	University of Aarhus
Jernej Letnar Cernic	University of Ljubljana
Joss Saunders	Oxfam*
Magdalena Sepúlveda Carmona	OHCHR, SR on Extreme Poverty and Human Rights
Margreet Wewerinke	European University Institute
Mark Gibney	University of North Carolina*
Matthias Sant'Ana	Université catholique de Louvain
Nico Moons	University of Antwerp
Rachel Hammonds	Institute of Tropical Medicine, Antwerp
Wouter Vandenhole	University of Antwerp

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