Research Networking Programmes

Short Visit Grant ☐ or Exchange Visit Grant ☒

(please tick the relevant box)

Scientific Report

Scientific report (one single document in WORD or PDF file) should be submitted online within one month of the event. It should not exceed eight A4 pages.

***Proposal Title**:* The Human Rights Responsibility of the Member States of International Financial Institutions

Application Reference N°: 4255

1) Purpose of the visit

I chose the Erik Castrén Institute as host so as to work closely with Professor Jan Klabbers and discuss a few international institutional law issues and, more generically, how to develop further my research. In view of the publication I would have to prepare, my main goal was to obtain a better insight into the idiosyncrasies of the relationship between International Organisations and their member States, with a particular focus on the World Bank.

2) Description of the work carried out during the visit

A few initial meetings with different Professors and Researchers at the Institute set the tone of my first weeks: I was steered into thinking about the socio-political dynamics of International Organisations and how to go about such intricate reality through a legal perspective. I devoted most of the time to reading books and articles that were suggested to me, not only in the field of international law but also international relations theory. I focused in particular on the World Bank, taking into account the publication that had to be finalised.

Based on a few readings (e.g., G. A. Sarfaty, Values in Translation: Human Rights and the Culture of the World Bank, Stanford University Press, 2012) and exchanges of ideas, I was able to obtain a better insight into the organisational culture of the Bank, and the various legal and institutional obstacles that must be overcome when discussing the human rights obligations applying to its operations. Important to remember

is that the gaps in terms of human rights internalisation in the Bank are not only owed to political obstacles but also to the managerial and operational culture of the institution, where the predominant ethos is economic rationality. At this stage, I was able to finalise a paper on 'Incorporating Human Rights Due Diligence into World Bank Operations', to be presented at the 57th Congress of the Union Internationale des Avocats, in November.

In the next phase of my research stay, I concentrated on the law of international responsibility as applied in the institutional setting offered by the World Bank: the theme of my publication required delineating the contours of an applicable legal regime in the context of World Bank operations, covering both the conduct of the Bank and the conduct of its member States, for responsibility purposes.

To that end, I first explored the relationship between the World Bank and its members. I focused on the normative implications of the interplay between the margin left for States to pursue their will in an institutional context on the one hand, and the autonomy with which the Bank is meant to operate as an international legal person, on the other. A clarification of the position of member States vis-à-vis the World Bank was deemed rather relevant in order to enable an accurate application of attribution rules in such institutional framework.

Based on these findings, I moved on to investigating the human rights responsibilities of both the World Bank and its member States. With regard to the former, I built up on research previously undertaken in the framework of the revision of the 2003 Tilburg Guiding Principles on World Bank, IMF and Human Rights. In particular, by looking at new sources in the literature, I addressed both the legal and policy frameworks of the Bank and the circumstances under which the Bank may be held responsible for internationally wrongful conduct, as set out in the International Law Commission's 2011 Articles on the Responsibility of International Organizations. This was done with particular attention being paid to the complementary normative framework introduced by the due diligence principle.

In what concerns the human rights responsibilities of member States, the analysis was centred on the conduct of State representatives within the Bank's Boards whilst designing and approving the latter’s policies and loan decisions. First, it was necessary to review the interpretations so far developed by human rights bodies with regard to the extraterritorial scope of human rights instruments. The human rights regime was once again looked at through the lens of the due diligence duty.

In order to better grasp what due diligence entails, I mainly drew upon the jurisprudence of the International Court of Justice and attempted to transpose the Court's interpretations to the context of World Bank decision-making processes. Finally, I examined the possibilities offered by current secondary rules of international law to establish member State responsibility, not only for wrongful conduct perpetrated by the World Bank, but also for the States' own conduct whilst participating in the Bank's operations.

Interestingly, by the end of my research visit, I had the opportunity to discuss all these issues in the context of the operations of the Nordic Investment Bank, in a meeting held with an official of the Bank. The meeting was quite insightful, in that we not only discussed practical aspects regarding the Bank's activities but also the socio-political dynamics underpinning its functioning. More concretely, we discussed the goals of the Bank as defined in its constituent documents, its working culture, and the on-the-ground operationalization of its policies and guidelines, ranging from the 'Sustainability policy

and guidelines' to the 'Integrity due diligence guidelines for lending transactions' and its 'Disclosure policy'. The role of member States in the Bank's decision-making processes was also discussed. In my view, the (geo)political and self-interested motivations behind States' choices when acting as members of the Bank were evinced quite straightforwardly.

A final note to mention that apart from the work directly related to my research topic, I also participated in some of the activities of the Institute. For example, I integrated the jury of a Moot Court session (final students examination) on the Berlin Conference (1884-85) and the general thematic of international law in a colonial context.

3) Description of the main results obtained

In this section I would like to highlight two aspects of my research that I was somehow able to solidify throughout the month spent in Helsinki. The meeting held at the Nordic Investment Bank certainly contributed to the main results obtained.

Firstly, the dual capacity with which States act in the framework of international organisations (i.e., as members or organic parts of the organisation, and as sovereign States upholding their own domestic preferences) emerges as a crucial analytical tool when discussing international responsibility - and in particular attribution issues - in an institutional context. It has almost become a truism that even after having transferred competences to an international organisation, member States do not just leave their human rights obligations at home. This begs the question of what are the criteria to determine that States actually acted in the framework of the organisation's operations in their capacity as subjects of international law - as such acts will constitute the basis upon which member State compliance with international human rights rules may be judged.

Once it is possible to identify the circumstances under which member States are in fact acting in the pursuit of sovereign preferences, a line can be drawn between the international organisation and its members. In other words, such differentiation allows for the apportionment of international responsibility between the organisation and its member States.

When it comes to decision-making processes, it can be contended that the voting behaviour of State representatives, acting under instruction from governmental authorities, emerges as a manifestation of the exercise of governmental powers in the external domain. The exercise of voting rights can therefore be (legally) categorised as an act of the State, that must be distinguished from the final decision adopted: this decision emerges as an expression of an autonomous institutional will and is thus an act attributable to the international organisation.

Such an understanding was (subliminally) confirmed at the interview with the Nordic Investment Bank's official. In the Bank, the collective decisions adopted entail an evident political dimension wherein the various national preferences are known, and accounted for. Within the space left for State-to-State bargaining, national geopolitical interests can - sometimes blatantly - be put forward and the position assumed by State representatives through their votes constitutes a direct manifestation of that.

After becoming acquainted with the various steps before any loan decision is taken, it is worth emphasising the constant flow of information between Board Directors and the competent ministries of the States they represent. Importantly, the information gathered by Bank staff with relation to the design and the impacts of the projects under consideration is transmitted to the (member) States' governmental authorities prior to the approval of these projects. On the basis of such elements, national authorities steer the voting behaviour of State representatives at the Board in a certain direction.

This brings me to the second issue I would like to highlight: having established that the exercise of voting rights by Board Directors can be attributed to the State, how, then, can their conformity with international human rights law be assessed? It goes without saying that human rights prescriptions can only be said to apply in this context where they impose a particular course of action upon the State whilst participating in decision-making processes.

In my view, the proceduralisation of human rights plays an essential role in this regard. Indeed, the policy framework of the Nordic Investment Bank, alike other Multilateral Development Banks, requires an assessment of the environmental and social impacts of all loan applications; for "category A projects", i.e. projects entailing greater impacts, public consultation is also required before a decision is taken on whether or not to finance a given project. As mentioned above, all this information is provided to Board Directors and the governmental authorities they represent before a vote is cast. Hence, in light of the human rights regime and complementary due diligence prescriptions, it can be claimed that voting in favour of a loan where the member State has not taken any preventive measures to avoid harmful conduct, for example, by not taking into account the environmental or human rights impacts of the project at hand, may give rise to State responsibility, for a violation of its positive obligation to exercise due diligence in protecting human rights abroad.

In order to establish member State responsibility, resort can be made to a judicial review of executive decisions taken by the State entities responsible for directing the vote of the Executive Directors on the Boards of the financial institution, in light of the States' human rights obligations. By confronting national instructions with the information placed at the disposal of these entities, it will be possible to conclude whether the required due diligence standard was respected in that particular occasion.

4) Future collaboration with host institution (if applicable)

Professor Jan Klabbers is developing a new research project on the application of virtue ethics to international organisations. This framework is meant to overcome the insufficiencies revealed by the international legal framework. As noted by Klabbers, these include policy dilemmas such as "situations where various applicable rules are in conflict with one another: the World Bank being torn between its own constituent treaty and human rights standards." I am interested in following the discussion as it introduces virtue ethics into the question of how to control international organisations, and thus, might bring to the fore new criteria to judge leadership in an institutional setting.

As doors were left open for me to come back to the institute, the plan is to organise my next research visit next year already, but for a longer period. I will thus be able to follow closely the evolution of the project and potentially integrate new ideas into my own research. Be it as it may, Prof. Klabbers keeps a strong interest in the law of international responsibility and manifested his willingness to delve further into discussions concerning my research topic.

5) Projected publications / articles resulting or to result from the grant *(ESF must be acknowledged in publications resulting from the grantee's work in relation with the grant)*

The outcome of my research visit will be the publication of a chapter in a book resulting from a GLOTHRO workshop on the Common Interest in International Law. It will be published in 2014 by Intersentia in the framework of their Law and Cosmopolitan Values series. The provisional title of the chapter is: Shaping the Common Interest in Global Development: The World Bank and its Member States as Responsible Actors.

6) Other comments (if any)

In order to fully benefit from a research experience in a new academic context, where different Professors and colleagues alert to new topics and concerns, the grant provided should be able to cover longer periods (around 2 months would be ideal). In an institute as rich as the Erik Castrén, I feel the time was not enough to absorb and deeply reflect upon the new ways of thinking I came across - and ultimately to translate all this in the expected research output, namely, the publication.