

Beyond Territoriality: Globalisation and Transnational Human Rights Obligations (GLOTHRO)

Scientific Report:
Joint Workshop GLOTHRO & ETO Consortium
12- 13 November 2010,
Brussels, Belgium

with the financial support of



Summary

The GLOTHRO RNP started its 4 year programme with a workshop in Brussels, Belgium. The workshop was held jointly with the ETO Consortium. The consortium is a network of organisations and individuals who are working towards the drafting on principles on extraterritorial obligations of states in the field of human rights.

The ETO consortium is experiencing some delay in the drafting of the Maastricht Principles. These were not adopted in December 2010, as initially scheduled, but are planned to be adopted in September/October 2011. As the ETO Consortium was looking for expert input in the process, it was considered useful to convene a joint workshop with the drafting committee and the members of the ETO Consortium who are currently drafting the Maastricht Guidelines on ETOs.

Many of the issues the ETO Consortium is dealing with, are relevant for the work of GLOTHRO. The displacement of the state and the increased power and impact of corporations and international organisations pose major practical and conceptual challenges to human rights law. In practice, human rights law faces a serious risk of marginalisation if it fails to adapt to this changing reality. Conceptually, the decentralisation of the territorial state necessitates a fundamental re-thinking of a basic tenet of human rights law, i.e. that human rights obligations are primarily if not exclusively incumbent on the territorial state. The GLOTHRO RNP intends to address a dual challenge, i.e. to **deepen 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.

This workshop was held in light of the first objective to deepen the understanding of extraterritorial human rights obligations of States, and allowed for the exchange of insights and the identification of research gaps at the national and international level. Interaction with the ETO Consortium will be continued by holding the next ETO Consortium meeting back to back with the May 2011 GLOTHRO Stock-Taking Conference.

1. Scientific Content and Discussion

Five issues were flagged and discussed during the two days:

1. *Do ETOs involve two distinct types of obligations (global/shared v. extra-territorial proper) and if so, what would be the proper terminology and classification*
2. *ESC rights – CP rights: differences and convergences and their relevance for the Principles*
3. *Jurisdiction - whether the concept is fundamental to a consideration of ETOs, its scope and parameters in relation to ESC rights, differences and convergences with CP rights; distinction between jurisdiction and attribution of state responsibility*
4. *The basis for ascribing obligations to states engaging in international cooperation and assistance.*
5. *Extraterritorial obligations to protect against violations by TNCs.*

1.1. Do ETOs involve two distinct types of obligations (global/shared v. extra-territorial proper) and if so, what would be the proper terminology and classification

The first item on the agenda was whether ETOs involve two distinct types of obligations (global/shared v. extra-territorial proper) and if so, what would be the proper terminology and classification. It was argued that it would be useful to take another step forward, by elaborating and clarifying global obligations of cooperation in the area of human rights.

'Global' obligations were defined as those that can be derived from the obligations undertaken by states as members of the United Nations, under Articles 55 and 56 of the UN Charter, as reinforced by Article 1(3). They are the obligations flowing from the international law of cooperation, which was intended to be the essence of the new international order envisaged after the collapse of the traditional nation-state system during World War II.

The unfolding of the international law of cooperation has been a slow and difficult process, first hampered during four decades by the Cold War, and later also by conflicting interests in the search for a new international economic order. The debate over the right to Development has been a major entry point into the operationalisation of global obligations, but there is still a long way to go to make them credible and manageable. A suggested starting point was that all states have global obligations under

the UN Charter. Furthermore, it was submitted that the realisation of human rights should be considered as public goods at the national level and as global public goods on the world level. The content of the obligations needs to be spelled out.

All states have obligations to implement human rights within their own territory. This is an obligation they owe not only to their own inhabitants, but also to the international community as a whole. It is the common interest of the world community as a whole that human rights are respected and ensured within each state. This is important for stability and constructive international cooperation and is therefore a common concern.

When, therefore, a state fulfils the human rights contained in the International Bill of Human Rights, it does so not only for its own sake but for the world community, and the world community is entitled to push for and assist in fulfilling that duty. If all states have a common interest in ensuring human rights inside all countries, they have also an interest in collaborating to make that possible, and a duty to participate in that collaboration.

1.2 ESC rights – CP rights: differences and convergences and their relevance for the Principles

The second discussion point on the agenda was whether the Maastricht Principles should be limited to ESC rights to the exclusion of CP rights.

One view presented was that the Principles should describe the content of the **obligations to respect and protect** civil, cultural, economic, political and social rights in combination, and giving equal weight to the sources of authority deriving from civil and political rights on the one hand, and economic, social and cultural rights on the other. In order for the Maastricht Principles to follow this combined approach, the Consortium would need to take some bold steps in relation to civil and political rights. It was argued that the Principles should stipulate that States are required to respect the human rights of persons outside their territory and their jurisdiction, and should protect rights extra-territorially by ensuring that actors under their control or influence also respect human rights. As an exception to the general rule, the Principles should only seek to define **obligations to fulfil** economic, social and cultural rights, rather than human rights in general.

The contrasting view was that one should rather look at the nature of the extraterritorial conduct (action or omission) and its effects on human rights, defined as ESC rights and civil and political rights. Coherence and interdependence with civil and political rights is necessary, but the latter should not be the focus of the text to be drafted. This has consequences for the treatment of the jurisdiction concept

in the Principles. The concept should therefore only be mentioned and dealt with in cases and/or situations where it has (legal) meaning and relevance for the extraterritorial protection of ESC rights.

1.3 Jurisdiction - whether it is fundamental to a consideration of ETOS, its scopes and parameters in relation to ESC rights

The question on the relevance of jurisdiction for extraterritorial ESC rights was the most contentious issue to be discussed. Contrasting views on whether or not to use the term jurisdiction in the Principles were expressed.

Those against the use of the notion argued that while a state has full jurisdiction over its territory, it does not follow that acts outside its territory are outside the state's jurisdiction, and therefore not covered by human rights law. In any event, the Covenant on Economic, Social and Cultural Rights does not limit itself to a state's jurisdiction, but rather requires that states take steps 'individually and through international assistance and cooperation to the maximum available resources for the full realization of...' the rights guaranteed.

It was further submitted that the use of 'jurisdiction' in other international human rights treaties, including the Optional Protocol to the Covenant on Economic, Social and Cultural Rights should be interpreted to indicate that when a state acts outside its territory (most of these acts are such that states are entitled to carry them out unless, for instance, they violate the provisions of the Charter of the United Nations), the legitimacy of these acts are determined by their impact upon human rights in other countries. Several argued that the question of jurisdiction is separate from that of state responsibility in that state responsibility is triggered if a state acts contrary to its international obligations, whether this is done through acts covered by their jurisdiction (for instance development assistance gone wrong), or acts outside their jurisdiction (for instance through the aggressive use of force against another state). If a wrongful act (or omission) can be attributed to the state or an agent of the state, state responsibility should be apportioned according to the facts of the individual situation.

Others argued that to ignore the question of jurisdiction in any project that purports to set forth general principles is to fail to grapple a fundamental problem from which there is no egress. They argued that the Consortium could choose to ignore jurisdiction, but the outside world of international lawyers and policy will not do so. They argued that the Principles can make a contribution to defining the scope of jurisdiction and promote expansive expression; but that it cannot dispense with jurisdiction altogether.

1.4 The basis for ascribing obligations to states engaging in international cooperation and assistance.

A forth issue on the agenda was the problem of lack of any detailed jurisprudence under international human rights law that clarifies how obligations might be assigned for the fulfillment of, or assistance in fulfilling, socio-economic rights by states other than the right-holders own.

A difficulty at present is that states can only be said to have 'imperfect' obligations: largely aggregated duties of an 'undifferentiated' international community to cooperate in addressing, hunger, malnutrition and related deprivations that find expression in human rights treaties. In so far as all states are bound by obligations of international cooperation under the UN Charter, and states parties to the relevant treaties dealing with economic, social and cultural rights are bound by obligations of international assistance and/or cooperation, the task remains to identify the basis/es upon which duties might be disaggregated and thus more clearly assigned. Different bases of ascribing obligations were forwarded and discussed: capacity, the least-cost principle, historical responsibility, and causation.

1.5. Extraterritorial obligations to protect against violations by TNCs

The last point of the agenda was the discussion on state obligations to monitor, regulate and adjudicate transnational corporations (TNCs). Economic, social and cultural rights are not only violated by state actors but also by private businesses. Although classic international law doctrine sees only states as primary human rights duty holders, the factual influence of corporations on ESCR cannot be denied. Due to the complicated structure of those TNCs and long supplier-chains, available national legal remedies tend to be insufficient to hold them accountable. Therefore the question becomes pressing to which extend states are obliged to monitor, regulate and provide effective remedies for the violation of ESC rights caused by TNC extraterritorially.

The new Ruggie framework was also discussed and was generally believed to be unsatisfactory, as it is weak in providing remedies and conservative on extraterritorial obligations – as he finds there is no legal basis for such obligations. In order to convince Ruggie, the Consortium should thus further operationalise the obligations it proposes and clearly identify a legal basis. The Consortium should at least be prepared to respond to the Ruggie's framework. There is also more input needed on the issue of remedies.

2. Assessment of the results and impact of the event on the future direction of the field

The identification of research gaps and new fields of research is one of the envisaged achievements of the research programme. GLOTHRO benefited greatly from the collaboration with the ETO Consortium, as it gained insight into the various hurdles still to overcome in the field of ETOs. These difficulties are still significant and strengthen GLOTHRO's conviction of the need to deepen and widen the understanding of transnational human rights obligations further. So, the relevance of the core GLOTHRO research questions have been confirmed by practice, and have been further clarified through the exchange.

For the future work of GLOTHRO, it was confirmed to adopt a sustained interdisciplinary approach to the issues mentioned. A sustained effort on the political philosophy aspect is deemed to be needed, from the May 2011 stock-taking conference to the closing conference in 2014, in order to truly benefit from interdisciplinary collaboration. Given the ever increasing impact of TNCs and the Ruggie Framework and Principles which are likely to be adopted by the UN in 2011, it was also decided to explicitly focus on transnational human rights obligations of companies in the course of 2012.

Furthermore, the ETO Consortium expressed its gratitude for the GLOTHRO attendance and invited its members to work more closely together and become part of the Consortium. In order to continue the collaboration, it was agreed to hold an ETO Consortium meeting back to back with the GLOTHRO Stock-Taking Conference in May 2011. ETO Consortium members and some GLOTHRO members will come together on the 17th and 18th of May 2011 to discuss the draft Principles which will be circulated by then. A possible commentary of the ETO Consortium draft was also mentioned. GLOTHRO will thus have a considerable impact on the development of the Principles, which will be a landmark document on extraterritorial human rights obligations in the years to come.

As envisaged in the GLOTHRO proposal the workshop was also an important step in the development of a high-level and well-functioning European research community on the issue of transnational human rights obligations. The meeting also attracted several young scientists from across Europe who are willing to support and work together with GLOTHRO.

3. Meeting Programme

Day 1: Friday, 12 November

Venue: FWO, Fonds Wetenschappelijk Onderzoek – Vlaanderen, Egmontstraat 5, 1000 Brussels

09:00- 09:30

Formal Welcome and Registration

09:30 – 11:00

Do ETOs involve two distinct types of obligations (global/shared v. extra-territorial proper) and if so, what would be the proper terminology and classification?

Speakers: Asbjorn Eide and Rolf Künnemann

11:00 – 11:30

Coffee Break

11:30 – 13:00

ESC rights /CP rights – differences and convergences and their relevance for the principles

Speakers: Ashfaq Khalfan, Ian Seiderman, Fons Coomans

13: 00 – 14:30

Lunch

14:30 – 18:00

- ❖ Jurisdiction - whether it is fundamental to a consideration of ETOS, its scope and parameters in relation to ESC rights, differences and convergences with CP rights; distinction between jurisdiction and attribution of state responsibility
- ❖ The basis for ascribing obligations to States engaging in international cooperation and assistance

Speakers: Sigrun Skogly, Mark Gibney, Ian Seiderman, Margot Salomon, Gorik Ooms

16:00 – 16:30

Coffee Break

16:30 – 18:00

Continuation of the discussion

Day 2: Saturday 13 November

Venue: Hotel Chambord, Rue de Namur 82, 1000 Brussels

09:00 -10:30

Extraterritorial obligations to protect against violations by TNCs

Speaker: Rolf Künnemann

10:30 – 11:00

Coffee Break

11:00 – 12:00

Conclusion – closing of the workshop

Speaker: Wouter Vandenhole

13:00 – 14:00

- ❖ ETO Consortium lunch
- ❖ GLOTHRO steering committee work lunch

14:00 – 15:30

Steering Committee Meeting of the ETO Consortium

List of participants

GLOTHRO

Wouter Vandenhole

William Schabas

Koen de Feyter

Gorik Ooms

Arne Vandenbogaerde

Gamze Erdem

Rachel Hammonds

Jens Vedsted-Hansen

Willem Van Genugten

Wolfgang Benedek

Asbjorn Eide

Jernej Letnar Cernic

Margot Salomon

Elina Pirjatanniemi

Cedric Ryngaert

Sisay Alemahu Yeshanew

Fons Coomans

Maija Mustaniemi-Laakso

Gregor Noll

Margreet Wewerinke

ETO Consortium

Ian Seiderman

Ashfaq Kalfan

Mark Gibney

Sigrun Skogly

Rolf Kunneman

Marcos Orellano

Meghna Abraham