

EW07-129 Exploratory Workshop
Transnational Human Rights Obligations
in the Field of Economic, Social and Cultural Rights

Scientific Report

1. Executive Summary

Organisation of the Workshop

The Exploratory Workshop on *Transnational Human Rights Obligations in the Field of Economic, Social and Cultural Rights* was held from 24 to 26 January 2008 at Tilburg University, the Netherlands. It was convened by Prof. Dr W.J.M. van Genugten, Faculty of Law, Tilburg University (The Netherlands), Prof. Dr Martin Scheinin, Institute for Human Rights, Åbo Akademi University (Finland) and Prof. Dr Wouter Vandenhoele, Faculty of Law, University of Antwerp (Belgium). 27 experts from 12 different countries actively participated in the workshop.

The workshop brought together scholars working on transnational human rights obligations and general experts in human rights, environmental and general international law. The discussions were organised in five sessions. In each session, a cluster of cross-cutting or horizontal issues was discussed, i.e. terminology, legal basis and status, jurisdiction, causation and division of responsibility.

Introductory and respondents' papers had been prepared and were disseminated to all participants prior to the workshop. Following an introduction of the topic, respondents with a general human rights and international law/environmental law background commented. Thereafter, a discussion among all experts present ensued.

Relevance of the Topic

The growing impact of third party states and international organizations on the (lack of) realisation of human rights elsewhere has been widely recognized and researched. However, the impact of this dimension of globalisation on human rights law has not yet been explored scientifically in all its dimensions. Growing impact on the human rights situation outside national borders necessitates profound study of the existence and conceptualisation of so-called transnational human rights obligations, i.e. human rights obligations for other states/international organizations than the domestic state party to human rights treaties.

Scientific Impact

The workshop has made a major contribution to the much needed reflection on the impact of globalisation on (human rights) law, and the need to rethink and reconceptualise legal concepts to bring them in line with new realities. A conceptual re-thinking of human rights law is required in order to enable it to fulfil its vocation, i.e.

to be a corrective to failures of state and market. One dimension of this rethinking is the better definition and extension of the circle of duty holders, including inter alia other states and international organizations in addition to the domestic state, through the concept of transnational human rights obligations. The Workshop has been instrumental in *identifying* the many outstanding and complex issues, which require further research. Secondly, it has set in motion a process towards a systematic and extensive *program of research*, to flesh out in more detail all the outstanding research questions.

This workshop has equally made an important contribution to cross-fertilization between human rights, environmental and general international law. While human rights law may benefit from insights that have grown in the field of international environmental law (for example in relation to the notion of transboundary effects and causality), and from doctrinal work in general international law on state responsibility, conceptual developments in human rights law may also contribute to further development of international environmental law and general international law.

Finally, the workshop has also made a major contribution to introducing the topic even further to established scholars, so that it may benefit from increased attention in mainstream scholarship.

Outcomes

- Short-Term

A first short-term outcome of the workshop is a joint book project, based on the papers submitted in preparation of the workshop. The three convenors of the workshop will act as co-editors of the edited volume. The manuscript is expected to be submitted to the publisher by October 2008, and to be out in 2009.

A second outcome is increased interaction with a Consortium of NGOs and universities that works towards a "Maastricht 3" document in 2010, following up on the Limburg Principles and Maastricht Guidelines. As the Consortium mainly focuses on cases, it naturally complements the work on horizontal issues as embarked upon by the ESF Exploratory Workshop. A number of experts involved in the workshop have or will join the Consortium and vice versa. In this way, both processes reinforce each other while preserving a distinct character and logic.

- Longer-Term

A first longer-term outcome is the organisation of a next scientific meeting. Four topics in particular have been identified as possible topics for a next meeting, probably to be held in 2010: a systematic scrutiny from the perspective of public international law; positing the topic against issues of distributive justice and political economy; a strategic analysis and comparison of concepts which all aim at widening the circle of duty-bearers for development within a human rights framework; and the inclusion of obligations of other actors than third party *states*, such as international organisations and corporations.

A second longer-term outcome is the initiation of substantive research on the topic (doctoral research and other) by individual experts.

2. Scientific Content of the Event

The growing impact of third party states and international organizations on the (lack of) realisation of human rights elsewhere has been widely recognized and researched. However, the impact of this dimension of globalisation on human rights law has not yet been explored scientifically in all its dimensions. Growing impact on the human rights situation outside national borders necessitates profound study of the existence and conceptualisation of so-called transnational human rights obligations, i.e. human rights obligations for other states/international organizations than the domestic state party to human rights treaties.

Following a keynote address on the crucial importance of the topic for daily practice, five outstanding research questions were addressed in the workshop, on the basis of papers which had been prepared by participating experts and circulated to all participants. They related to terminology, legal status, jurisdiction, causation and distribution of responsibility/accountability.

a. Terminology

A variety of terms has been used in literature, ranging from international obligations, universal obligations, transnational obligations, transboundary obligations, third state obligations to extraterritorial obligations, amongst others.

A profound discussion took place on the specific meaning of each term, so as to clarify its scope and implications. The following conclusions were reached as an agenda for future research:

- the primacy of territory in human rights law is accepted, but this acceptance should not end the discussion;
- the number of concepts that are being used should be rather drastically reduced;
- while a majority conclusion was reached that the term 'extraterritorial obligations' may be the most accurate to be used, it was felt that the real challenge lies in the the assignment of specific meaning to particular concepts. Defining the concepts could take place on the basis of the actors to which the obligations are applicable to, or on the basis of the division and degree of responsibility. In the latter case, the context, nature and scope has to be further explored.

b. Legal Status

The following questions were debated: what is the legal basis for transnational human rights obligations: can they be derived from human rights treaties, or can support be found in customary international law and the general principles of public international law? What is the legal meaning and exact scope of those provisions of the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child and the Disability Convention that textually recognize the responsibility of the non-territorial state? The key provision on state obligations in the ICESCR (article 2, paragraph 1), refers not only to the obligations of the territorial state but also to other states acting 'through international assistance technical and co-operation, especially economic and technical' (see also articles 11, 22 and 23 ICESCR). A similar reference to international cooperation can be found in articles 4 CRC and 32 of the Disability Convention.

The following conclusions were drawn as to the way forward on this topic:

- an orthodox methodology should be applied to determining the legal status of transnational human rights obligations in the field of economic, social and cultural rights;
- the work of the Committee on Economic, Social and Cultural Rights is relevant, but could itself benefit from a more orthodox approach;
- a stronger integration in general public international law is needed;
- the relevance of the tripartite typology and/or the distinction between negative and positive obligations needs to be further investigated.

c. Jurisdiction

The following questions were debated: how important is the issue of jurisdiction, which is very prominent in the discussion on extraterritorial obligations in relation to civil and political rights? Can concepts of effective control over persons or territory appropriately be transplanted to the field of economic, social and cultural rights?

Preliminary conclusions drawn at the end of the discussion were:

- is jurisdiction a relevant concept for transnational obligations in the field of economic, social and cultural rights?
- If so, should a standard of care be introduced?;
- Can jurisdiction be equated with attribution? How important are the general rules of state responsibility?
- How to move beyond the Bancovic-doctrine?

d. Causation

A complex issue is how to establish a causal link between the action or omission of an actor other than the domestic state, and the non-realization or violation of economic, social and cultural rights of particular individuals in a particular country in the South. Arguments have been developed for a strict test, the reversion of the burden of proof or the abandonment of any requirement of causality.

The following research questions resulted from the discussion:

- is causation really an issue?
- Should causation be approached as a gradual concept?
- Is the concept linked to impact or act?
- Should the burden of proof vary according to the legal procedure (most strict in complaints procedure; most lenient in political assessment)?

e. Division of Responsibility – Accountability

While there seems to exist a general agreement that the domestic state party is the primary duty-bearer, the further division of responsibility between the domestic state and other actors, and among other actors, is unclear. Some have suggested that transnational obligations are always secondary, whereas others believe that the transnational obligations to respect and protect apply simultaneously with the domestic obligations, and that only the transnational obligation to fulfil is secondary or subsidiary, in the sense that it is triggered off if the domestic state is unable to abide by its obligation of fulfilment. Suggestions have also been made that the

transnational obligation to fulfil is weaker than the domestic state obligation, containing only an obligation of assistance. Which accountability mechanisms could be used to enforce this division of responsibility?

The following research questions were identified as in need of further exploration:

- should the primary responsibility of the domestic state been taken for granted, in light of structural obstacles to realisation (political economy)?
- How to divide responsibility among different third party states?
- How could accountability for transnational obligations be ensured through the future OP-ICESCR?

3. Assessment of the Results, Contribution to the Future Direction of the Field, Outcome

While there was no doubt from the beginning that transnational human rights obligations as such were still underresearched, and all the more so in the field of economic, social and cultural rights, it came nevertheless still as a surprise how much confusion and uncertainty on the topic persists, notwithstanding the individual research already undertaken by the experts present.

The workshop has been extremely instrumental in *identifying* the many outstanding and complex issues, which require further research (see above for the preliminary conclusions reached on outstanding research questions). Secondly, it has set in motion a process towards a systematic and extensive *program of research*, to flesh out in more detail all the outstanding research questions. Thirdly, the systematic interaction with human rights, environmental and general international law has brought many new insights into the field, and also demonstrated the need for a sustained effort towards cross-fertilization between human rights, environmental and general international law. Finally, the workshop has also made a major contribution to introducing the topic even further to established scholars, so that it may benefit from increased attention in mainstream scholarship.

Outcomes

A first short-term outcome of the workshop is a joint book project, based on the papers submitted in preparation of the workshop. The three convenors of the workshop will act as co-editors of the edited volume. Final papers are expected by the end of April, and the manuscript is expected to be submitted to the publisher by October 2008.

A second short-term outcome is increased interaction with a Consortium of NGOs and universities that works towards a "Maastricht 3" document in 2010, following up on the Limburg Principles and Maastricht Guidelines. As the Consortium mainly focuses on cases, it naturally complements the work on horizontal issues as embarked upon by the ESF Exploratory Workshop. A number of experts involved in the workshop have or will join the Consortium and vice versa. In this way, both processes reinforce each other while preserving a distinct character and logic.

A first longer-term outcome is the organisation of a next scientific meeting. Four topics in particular have been identified as possible topics for a next meeting, probably to be held in 2010:

- Deepening the research by a systematic scrutiny from the perspective of public international law
- Extending the (interdisciplinarity of the) research by positing the topic against issues of distributive justice and political economy
- Extending the research by strategically analyzing and comparing concepts which all aim at widening the circle of duty-bearers for development within a human rights framework (extraterritorial obligations – right to development – human rights-based approaches to development)
- Extending the research by taking into account obligations of other actors than third party *states*, such as international organisations and corporations.

Given the global dimension of the topic, the possibilities of funding as a ESF Research Networking Programme will be further explored.

A second longer-term outcome is the initiation of substantive research on the topic (doctoral research and other) by individual experts.

As to long-term outcomes, the possibility of a joint application for funding for substantive research will be taken up again on the occasion of a next meeting, which is intended to be held in 2010, subject to the availability of funding.

4. Final Programme

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| Thursday 24 January 2008 |
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Coffee

9.00 Word of Welcome: Willem van Genugten, Tilburg University

9.15 Presentation by ESF Representative

9.30 Keynote Address: Rolf Künnemann

10.15 *Coffee break*

Cluster 1 – Terminology (Chair: Martin Scheinin)

10.45 Introductory Paper: Mark Gibney

11.15 Respondent: Fons Coomans (represented by Wouter Vandenhoele due to illness)

11.35 Plenary Discussion

12.45 *Lunch (Tilbury)*

Cluster 2 - Jurisdiction (Chair: Willem van Genugten)

- 14.15 Introductory Papers: Smita Narula and Rick Lawson & Maarten den Heijer
- 15.15 Respondents: Martin Scheinin and Cedric Ryngaert
- 15.55 Plenary Discussion
- 18.15 *Dinner (Tilbury)*

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| Friday 25 January 2008 |
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Cluster 3 – Legal status (Chair: Wouter Vandenhole)

- 9.15 Introductory Papers: Magdalena Sepúlveda and Felipe Gómez Isa
- 10.15 Respondent: Koen De Feyter
- 10.35 Plenary Discussion
- 12.00 *Lunch (Tilbury)*

Cluster 4 – Causation (Chair: Martin Scheinin)

- 13.00 Introductory Papers: Margot Salomon and Sigrun Skogly
- 14.00 Respondents: Dinah Shelton and Willem van Genugten
- 14.40 Plenary Discussion
- 15.40 *Coffee Break*

Cluster 5 - Division of Responsibility – Accountability (Chair: Willem van Genugten)

- 16.15 Introductory Papers: Ashfaq Khalfan and Wouter Vandenhole
- 17.15 Respondents: Asbjørn Eide and Wolfgang Benedek
- 17.55 Plenary Discussion

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| Saturday 26 January 2008 |
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10-12.00: Conclusions and Recommendations – Planning – Future Co-operation

12.30-13.30 *Lunch (Auberge)*

5. Final List of Participants

1. Benedek Wolfgang, University of Graz
2. De Feyter Koen, University of Antwerp
3. Eide Asbjørn, University of Oslo
4. Heijer Maarten den, Leiden University
5. Hustad Richard, University of Oslo
6. Genugten Willem van, Tilburg University
7. Gibney Mark, University of North Carolina
8. Gómez Isa Felipe, University of Deusto
9. Gondek Michal, Maastricht University
10. Khalfan Ashfaq, Oxford University
11. Künnemann Rolf, FIAN International
12. Lawson Rick, Leiden University
13. Letnar Cernic Jernej, University of Aberdeen
14. Meijknecht Anna, Tilburg University
15. Mits Martins, Riga Graduate School of Law
16. Mustaniemi-Laakso Maija, Åbo Akademi University
17. Narula Smita, New York University
18. Rijken Conny, Tilburg University
19. Salomon Margot, London School of Economics and Political Science
20. Scheinin Martin, Åbo Akademi University
21. Rinwigati Patricia, University of Uppsala
22. Ryngaert Cedric, Catholic University of Leuven
23. Sepúlveda Magdalena, International Council on Human Policy
24. Shelton Dinah, George Washington University
25. Skogly Sigrun, Lancaster University
26. Vandenhoe Wouter, University of Antwerp
27. Yeshanew Sisay Alemahu, Åbo Akademi University

6. Information on Participants

| | <i>n</i> | % |
|---|----------|------|
| <i>a. Age Bracket</i> | | |
| Junior experts | 9 | 33 % |
| Senior experts | 18 | 66 % |
| <i>b. Countries of Origin</i> | | |
| Austria | 1 | 3 % |
| Belgium | 3 | 11 % |
| Finland | 3 | 11 % |
| Germany | 1 | 3 % |
| Latvia | 1 | 3 % |
| Netherlands | 6 | 22 % |
| Norway | 2 | 7 % |
| Spain | 1 | 3 % |
| Sweden | 1 | 3 % |
| Switzerland | 1 | 3 % |
| United Kingdom | 4 | 15 % |
| United States | 3 | 11 % |
| * It should be noted that much more nationalities were represented, as countries of origin refers to the institution at which an expert is based. | | |

| <i>c. Gender</i> | | |
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| Female | 9 | 33 % |
| Male | 18 | 66 % |

Willem van Genugten
Martin Scheinin
Wouter Vandenhole