

Human Rights Accountability of Non-State Actors

Convenors: Elena Pribytkova, Evelyne Schmid

Monday 8 July, 14.00-18.30, 4.A05; Tuesday 9 July, 14.00-18.30, 3.B55

In the modern world, the role of non-state actors in framing global order and influencing the enjoyment of human rights universally has been increased dramatically. Various non-state actors (intergovernmental organizations, NGOs and foundations, transnational corporations, media organizations, etc.) have come to the fore in shaping today's global political agenda, discourse, rules, institutions and practices. The contemporary accountability regime for non-state actors does not, however, correspond to the capacities, freedoms, and power they enjoy. Obligations of non-state actors are frequently believed to be exhausted by negative duties to respect human rights, whereas positive obligations to protect and fulfil human rights, especially obligations to assist in the realization of socio-economic rights, are beyond their concern. There are still no binding international law instruments regulating direct human rights obligations of non-state actors and they can rarely be held responsible for their human rights violations through the existing state-centered accountability mechanisms. The special workshop will pay particular attention to issues surrounding accountability of business, which is relevant in the context of the elaboration of a legally binding international instrument on transnational corporations and other business enterprises with respect to human rights. It will continue discussions started in the special workshop *Our Responsibility to the Global Poor* at the IVR World Congresses in Lisbon (2017). Experts from various disciplines will address the most topical and controversial aspects of the theme, which include, but not limited to, the following questions:

- Responsibility regimes of various non-state actors;
- Territorial and extraterritorial obligations of non-state actors corresponding to socio-economic rights, including obligations to cooperate and assist;
- Non-state actors as agents of global justice;
- Obligations to conduct human rights impact assessments and human rights due diligence;
- State-based and network-based models of accountability for non-state actors;
- The existing remedies for non-state actors' human rights violations;
- International, regional and local monitoring and accountability bodies for holding non-state actors responsible for breaches of their human rights obligations;
- Non-state actors' commitments presupposed by the *2030 Agenda for Sustainable Development*.

Program

Monday 8 July, 14.00-18.30, 4.A05

14.00-14.05 Introduction

14.05-14.40 Elena Pribytkova: Do Non-State Actors Bear Global Obligations in the Area of Socio-Economic Rights? (Discussant: Carl Jauslin)

14.40-15.20 Carl Jauslin: Human Rights Obligations of Non-State Actors: Towards an Asymmetric or a Symmetric Approach? (Discussant: Elena Pribytkova)

15.20-16.00 Amrei Mueller: Can Armed Non-State Actors Exercise Jurisdiction and Thus Become Human Rights Duty-Bearers? (Discussant: Robert Charles Blitt)

16.00-16.30 Coffee Break

16.30-17.10 Robert Charles Blitt: The International Religious Freedom Act: Non-State Actors and Freedom from Sovereign Government Control (Discussant: Amrei Mueller)

17.10-17.50 Marco Antonio Loschiavo Leme de Barros: Sovereignty Debts, Accountability and Human Rights: A shared responsibility model for states and funds in light of an international legal regime? (Discussant: Maciej Krogel)

17.50-18.30 Maciej Krogel: The Need for a Non-State Actors Accountability as a Reason for Protection of the Standards of the Rule of Law and Democracy in the Member States of the European Union (Discussant: Marco Antonio Loschiavo Leme de Barros)

Tuesday 9 July, 14.00-18.30, 3.B55

14.00-14.40 Claire Methven O'Brien: Business and Human Rights and the 'Smart Mix': Regulatory Myth or New Governance Horizon? (Discussant: Elisabeth Bürgi Bonanomi)

14.40-15.20 Elisabeth Bürgi Bonanomi: Environmental Damages from Mining and the Responsibility of Home States: the need for self-contained UN Guiding Principles on Business and the Environment (Discussant: Claire Methven O'Brien)

15.20-16.00 Closing remarks

16.00-16.30 Coffee Break

Abstracts

Do Non-State Actors Bear Global Obligations in the Area of Socio-Economic Rights?

Elena Pribytkova

(New York University School of Law)

My paper focuses on global obligations of non-state entities in the area of socio-economic rights. Global obligations represent the least elucidated and the most unfulfilled type of extraterritorial obligations. In comparison to remedial extraterritorial obligations for a negative effect on the enjoyment of human rights, global obligations do not presuppose any causal link between acts/omissions of global actors and individuals' inability to exercise their human rights. Global obligations are a key legal tool for empowering the most vulnerable individuals and social groups, promoting social and global justice and reducing extreme poverty and inequality worldwide. Despite their importance, global obligations have not yet received adequate legal recognition, regulation, and realization.

My paper questions to what extent non-state entities should be recognized as bearers of global obligations in the area of socio-economic rights. Although states play an essential role in the global arena, the influence of non-state actors in designing global normative and institutional structure and implementing human rights has been grown up significantly. Non-state entities, in particular transnational corporations (TNCs) and international non-governmental organizations (NGOs), and intergovernmental organizations (IGOs), especially international financial institutions, are both global norm-setters and major violators of human rights. Many of them have undoubtedly superior capacities to contribute to global poverty eradication than average states. For instance, in 2017, out of the world's top 100 economies, only 31 were countries and 69 were TNCs. 10 million NGOs worldwide, which receive donations from one third of the world population and engage one fourth of them as volunteers, together form the 5th largest global economy. Decisions of IGOs, especially UN agencies and the Bretton Woods Institutions – the World Bank and the International Monetary Fund – substantially influence the political and economic systems in societies all over the world. Last but not least, the world's billionaires and other “ultra-high-net worth individuals” have substantial opportunities to alleviate global poverty. Thus, traditional views of the state as the main agent of global justice and human rights duty-bearer do not fit comfortably with contemporary reality. Nevertheless, obligations of non-state entities are often considered to be limited by obligations to respect, while obligations to protect and fulfil human rights are reserved for the state. There are still no binding human rights instruments regulating direct obligations of non-state entities, especially their global obligations corresponding to socio-economic rights.

I argue that all global entities – states, IGOs, non-state actors, and individuals – should be recognized as primary agents of global justice and duty-bearers of extraterritorial obligations to respect, protect and fulfil socio-economic rights. The recognition, conceptualization, and implementation of extraterritorial obligations of multiple actors is an important precondition for the shift from a state-centered to a human-centered global order, in which the state and global civil society should remain two important “channels” for representing the interests and protecting the human rights of individuals in the global domain.

My paper has the following structure. Section I analyses the roles which states play in the realization of socio-economic rights and regulating activities of non-state actors. Following this,

Section II addresses the main measures necessary for transiting from the Westphalian state-centered paradigm to a human-centered world order and explores a normative basis for this transition. In Section III, arguments *pro et contra* positive obligations of non-state actors are observed. Section IV focuses on specific responsibility regimes of various types of non-state actors (IGOs, TNCs, and individuals). Finally, Section V briefly discusses ways to determine the scope of multiple actors' global obligations.

***Human Rights Obligations of Non-State Actors:
Towards an Asymmetric or a Symmetric Approach?***

Carl Jauslin

(University of Basel)

Depending on whether we think of *transnational corporations* or *human beings* as the duty holders of so-called horizontal human rights obligations, we move towards either an *asymmetric* or a *symmetric approach* of human rights accountability of non-state actors. There is a variety of non-state actors and they have to be treated accordingly; however, I argue that the choice of the starting point will shape the way we think about human rights accountability of non-state actors in general.

Asymmetric Approach: Human rights obligations for state-like entities

Human rights developed as a reaction to the abuse of power by whoever represented the state. In the last decades, certain private actors like transnational companies have gained more power, influence, control or impact on persons than certain 'failed states' have. However, there is a huge discrepancy between the legal responsibilities of non-state actors on the one hand and the power they enjoy on the other hand. The main argument in favour of an accountability regime for non-state actors emphasises that *the distinction between public and private power has become obsolete*. From the victims perspective it cannot make any difference whether public or private power was abused or not used and resulted in human rights violations. The term 'governance' and the perspective that is adopted through it refers to every activity of governing something and includes both political as well as corporate governance. A *factual assessment* that looks at the organization, the possibility of controlling and influencing people and the impact of that entity seems to become more relevant than a *formal assessment* that looks at legal status – public or private – of the respective entity.

In the *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises* John Ruggie elaborates on the concept of "*sphere of influence*" that was introduced into the corporate social responsibility discourse by the UN Global Compact. It was attempted to use the concept of sphere of influence as a basis for attributing (negative) legal obligations to companies, using it as though it were analogous to the *jurisdiction of States*. In this sense, arguing for an accountability regime for non-state actors means relativizing or showing parallels between the distinction of public and private power.

Symmetric Approach: Human rights among neighbours

Thinking of human beings not only as *right holders* but also as *duty bearers* of human rights means to adopt a truly horizontal and symmetrical approach. To recognize a legal duty to contribute to the realization of each other's human rights would not reproduce the logic of the

above mentioned sphere of influence of state-like entities but would rather represent a paradigmatic turn to a truly horizontal dimension of human rights.

The right to development as stated in the UN Declaration on the Right to Development adopted by the General Assembly in 1986 is a perfect example for the existence of a concept of positive obligations (realization of rights) among human beings in a purely horizontal and symmetrical way. Article 2 Paragraph 2 of the Declaration states that “[a]ll human beings have a responsibility for development, individually and collectively [...]” and therefore establish human beings not only as right holders but also as duty bearers of human rights obligations.

Consequences for the Question of Positive Obligations and their Mutuality

While in the context of liberties and the respective negative obligations the abuse of power is the main concern, for positive obligations power or a certain sphere of influence is a precondition for their existence and fulfilment (*ultra posse nemo obligatur*). A certain asymmetry therefore seems to be a necessary condition for positive obligations. In order to be able to help you need to be better off than the one who needs help.

In result, the *asymmetric approach* concerning transnational companies has the consequence that we understand positive human rights obligations as *one-way obligations* of powerful transnational corporations towards human beings in need. The *symmetric approach* on the other hand, is based on a concept of solidarity that includes shared responsibility and a duty to cooperate of human beings among each other to overcome the problem of *ultra posse nemo obligatur*. It has a much broader scope of application than the asymmetric one that is limited to certain very powerful state-like private entities such as transnational corporations. In addition, it does not question the fundamental distinction between public and private power. But most importantly: It advocates for *mutual* instead of *one-way obligations*.

***Can Armed Non-State Actors Exercise Jurisdiction
and Thus Become Human Rights Duty-Bearers?***

Amrei Müller

(Queen's University Belfast)

Recent literature and UN documents advocate binding most armed non-state actors (ANSAs) to human rights law. This piece takes a more critical stance on this issue. It argues that only a limited number of ANSAs should potentially become human rights duty-bearers: those that exercise *de facto* (human rights) jurisdiction and thus have considerable institutional and military capacities, as well as specific normative characteristics. It specifies these capacities and characteristics with an analysis of ANSAs’ practise that tentatively indicates that some of these entities may indeed exercise *de facto* jurisdiction. The argument is justified by highlighting the broader consequences that recognising ANSAs as human rights duty-bearers will entail: it will also endow them with privileges that will legitimise their authority over time. This is grounded in the normative logic of human rights law which emphasises the fundamental relationship between human rights, equality and democracy that also permeates the notion of jurisdiction, and is further supported by a political understanding of the right to self-determination. The paper closes with a brief sketch of complementary ways to develop international law binding ANSAs: so-called ‘responsibilities for human rights’ and an adapted law of occupation.

The International Religious Freedom Act:

Non-State Actors and Freedom from Sovereign Government Control

Robert C. Blitt

(University of Tennessee College of Law)

The International Religious Freedom Act (IRFA) recently underwent its most significant amendment process since being introduced in 1997. Among the major changes, sponsors of the Frank R. Wolf International Religious Freedom Act (Wolf Act) proposed adding a new framework to IRFA intended to address the phenomenon of nonstate actors (NSAs) violating the right to freedom of religion or belief. The impetus for this new mandate, according to the bill's sponsors, flowed from the realization that NSAs such as ISIS had "turned religious intolerance into a murderous force of global instability" and were responsible for "some of the most egregious religious freedom violations."

Despite its findings that violent NSAs represented an expanding force responsible for exposing a significant percentage of the global population to severe restrictions on freedom of religion and belief, the Wolf Act faced an uphill battle in Congress that necessitated significant compromises to secure its passage. As a result, the final bill modified or altogether failed to enshrine certain measures originally proposed to address NSAs. In their place, the Wolf Act instituted an ambiguous statutory definition for those NSAs that would be subject to scrutiny under IRFA. Furthermore, while the new "Entity of Particular Concern" (EPC) designation for NSAs identified as engaging in "particularly severe violations of religious freedom" appeared to mirror IRFA's existing mandatory sanctions regime for "Countries of Particular Concern", it fell far short by triggering only a suggested obligation only to "take specific actions, when practicable, to address [EPC] violations of religious freedom."

As this new chapter for IRFA enters its third year, the paper will demonstrate that the NSA-related provisions present significant challenges for the U.S. government. To begin the task of fleshing out the nature and impact of these challenges, the paper focuses on one element of IRFA's NSA definition—namely, the requirement that an NSA be "outside the control of a sovereign government." After addressing IRFA's NSA definition and providing an overview of its implementation to date, the article turns to a critical appraisal of how the state control requirement has been implemented. The article closes with several suggestions aimed at clarifying definitions and institutional responsibilities to repair current practice and reinvigorate IRFA's promise of promoting and protecting the right of all individuals to freedom of religion or belief.

Sovereignty Debts, Accountability and Human Rights:

A shared responsibility model for states and funds in light of an international legal regime?

Marco Antonio Loschiavo Leme de Barros

(University of São Paulo)

This paper examines how the debate of an international legal regime of restructuring sovereign debt should encompass issues related with accountability of business in order to avoid the predatory practices of vulture funds. Vulture funds practices is a likely contributor to the rising inequality in underdeveloped countries. Since the 1970s, these funds have systematically bought and enforced the sovereign debts in foreign courts despite their participation in restructuring debts

agreements. The non-participation of the funds in the agreements raise major concerns in terms of reputation, access to loans and budget reallocation of the disputing states. After the Argentina v. NML Capital case in 2014, creditor-driven policies started to debate the consideration of human rights, yet very minimal solutions have been made on the sovereign debt issue. I argue that an important reason for inefficiency is the actual design of the international debt relief mechanisms that relies on foreign courts decisions that settle excessive burdens for the state debtor with no safeguards regarding duties for the funds to exercise due diligence or guarantees against extortionate interest rates or penalty charges. In this sense, I also argue the importance of applying a shared responsibility model where states and funds have mutual obligation to ensure that financial operations do not culminate in unsustainable debt situations like the Argentinian case. Different scenarios can be highlighted such as mandatory due diligence for funds when discussing sovereign debts; compromise with periodical exams of beneficial outcomes for the population of the state debtor derived from the financial operations; responsibilities for creation of debt crises and remedial actions and improve governance, with a similar “say on pay” corporate model of shareholders – where shareholders have the opportunity to cast an advisory vote on their police-based operations. All these scenarios develop in some manner responses options to the sovereign debt debate that account human rights. Thus, the paper focus on the exam of these scenarios in the international organizations discourses like International Monetary Fund and also towards the behavior of foreign courts, which in fact have proved to be historically refractory to the exam of the public interests – usually related with the protection of a minimum core of economic social rights. Finally, the paper address a broader perspective about the need for consideration of human rights accountability of all international actors – not only states - that tackle with sovereign debts issues.

The Need for a Non-State Actors Accountability as a Reason for Protection of the Standards of the Rule of Law and Democracy in the Member States of the European Union

Maciej Krogel

(European University Institute)

The paper addresses the normative claims about the protection of values of the rule of law, human rights and democracy in the European Union. According to some scholars, one of the reasons why the Member States should duly observe these standards is provided by the principle of congruence (alternatively: of consistency)¹. This principle is based on the assumption that if the European Union as a whole intends to promote its fundamental values within the international relations with a proper credibility, its members should comply with this axiology in their internal political sphere. Another claim bases on the ‘all affected principle’, according to which the breach of these values in one of the states brings negative consequences for all other Member States². Both principles are supposed to legitimize the oversight actions of EU institutions towards its Member States.

¹ C. Closa, D. Kochenov, *Reinforcement of the rule of law oversight in the European Union: key options* [in:] W. Schroeder (ed.), *Strengthening the rule of law in Europe: from a common concept to mechanisms of implementation*, Hart Publishing 2016; C. Closa, *Reinforcing EU Monitoring of the Rule of Law. Normative Arguments, Institutional Proposals and the Procedural Limitations* [in:] C. Closa, D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge University Press 2016.

² Ibid.

My aim is to propose a kind of variation of these postulates. It results in the argument stating that the demand of solidarity in upholding EU values as well as its oversight could be justified by the need for the common effective response to the challenges of growing power of non-state actors, mainly international corporations. In other words, in order to increase these actors' compliance with human rights and the rule of law, each Member State should act so as to enhance the framework for their accountability. For example, the considerable thread of corruption in a given state may result in violations of human rights within the practice of private actors. Similarly, decline of independent judiciary precludes the access to justice in cases concerning global corporations.

I intend to critically assess the possible use of this argument. I claim that its potential is undermined by a narrow understanding of the aforementioned principles within EU oversight mechanisms. Constitutional challenges brought by global non-state actors seems to be omitted and little more than the protection of the internal market is presented as a reason for compliance with the rule of law standards. Therefore I plan to point out some conditions upon which the normative force of this argument could increase.

***Business and Human Rights and the 'Smart Mix':
Regulatory Myth or New Governance Horizon?***

Claire Methven O'Brien

(The Danish Institute for Human Rights)

In recent policy discourse on business and human rights the terminology of the “smart mix” has emerged to denote an ideal type regulatory ecosystem combining traditional business regulation via legislation and judicially enforced remedies along with incentive, information-based and multi-actor new governance approaches. The supposed virtue of the “smart mix” is to harness market actors' self-steering capacities while also compensating for consequences of structural power imbalances derived from the concentration of power and resources in business actors via democratically determined coercive measures. Central to the smart mix paradigm are innovations such as the UK Modern Slavery Act 2015 and France's Loi de Vigilance, embodying procedural regulatory models intended to drive the uptake of human rights due diligence. Yet emerging critiques question the scope for smart mix environments to emerge given the persistence of incentive structures for individual corporate actors as well as framework conditions within the global economy driving regulatory competition. This paper will consider evidence of the effectiveness of attempts to secure human rights accountability of business actors via due diligence, in order to reflect critically on the smart mix paradigm and alternative proposals for a business and human rights treaty.

***Environmental Damages from Mining and the Responsibility of Home States:
the need for self-contained UN Guiding Principles on Business and the Environment***

Elisabeth Bürgi Bonanomi

(University of Bern)

Mineral extraction generally comes with economic benefits, but is often also closely associated with environmental and social risks. Transformation towards sustainable economies, however,

requires that extraction is adequately managed, related risks minimized, and liability assumed, while nonetheless enabling extraction to take place. This paper discusses the role of home states of multinational enterprises in ensuring mitigation of environmental risks, and whether new legal mechanisms might improve the situation. While mining often occurs in vulnerable contexts with poor legal infrastructure, investors are usually headquartered in wealthy states with stronger governance systems. Accountability for environmental damages applies to different actors along complex value chains. However, the role of home states has often been neglected.

It will be argued that the legal framework as related to home state governance is more advanced in the field of human rights accountability, and that environmental issues could – and should – be inspired by this debate. The key question is not to which extent environmental concerns can be subsumed under the human rights framework. Human rights do not provide “an all-encompassing basis with regard to environmental issues” (Jesse, Koppe, 2013); but environmental and human rights issues are often closely intertwined. Taking Switzerland as an example, the paper will draw lessons from the human rights framework and argue why “UN Guiding Principles on (Mining) Business and the Environment” might provide momentum for environmental liability law to catch up with the human rights debate and strengthen the legal basis for environmental liability.