

Strategic human rights litigation from a practitioner's perspective
Instructors: RA Andreas Schüller LLM (schueller@ecchr.eu), Dr. Nicolas Bueno (bueno@ecchr.eu),
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Please contact Simon Rau in respect of any questions regarding the seminar format you may have

Strategic human rights litigation from a practitioner's perspective

INTRODUCTION

This seminar is offered by the European Center for Constitutional and Human Rights (ECCHR), a Berlin-based NGO in the field of strategic human rights litigation. It provides the opportunity to get a first hand impression of strategic human rights litigation from the ECCHR's perspective. The ECCHR has litigated cases in different national jurisdictions and before various international mechanisms. The issues addressed include, amongst others, prisoner abuse in Iraq, the CIA secret renditions program, war crimes in the Colombian civil war, the murder of a trade unionist at a Nestlé plant in Colombia, precarious working conditions in the textile industry in South Asia, corporate involvement in grave human rights abuses in the Democratic Republic of the Congo and violations of the human rights of migrants at the EU borders. For further information see www.ecchr.de.

The participants will get an overview of the concept of strategic human rights litigation, its difficulties and the challenges involved. In the course of the seminar they will "take the law out of the books" and explore how different legal mechanisms can be used by legal practitioners to obtain redress for the victims of human rights violations and to promote structural changes that can prevent future human rights violations. To that aim the participants will work on case studies that are based on the ECCHR's work in our programs on "International Crimes and Accountability" and "Business and Human Rights."

COURSE STRUCTURE

The seminar will be divided in two introductory sessions of 3 h each (2 DS) at the beginning of the semester and two in-depth sessions of 6 h each (4 DS) towards the end of the semester. One of the in-depth sessions will be held on a Saturday at the ECCHR's office in Berlin to provide the students with an impression of our day-to-day working environment. The transfer to Berlin has to be paid for and organized by the participants.

The sessions will be divided between the "International Crimes and Accountability" program to be taught by Andreas Schüller and Simon Rau and the "Business and Human Rights Program" to be taught by Nicolas Bueno and Simon Rau.

The two introductory sessions shall provide an introduction to strategic human rights litigation and the ECCHR's work. One session will focus on "International Crimes and Accountability" and the other on "Business and Human Rights" to introduce the participants to key concepts and challenges in both areas. Although the basis of these sessions will be input by the instructors, the teaching will be interactive and discussion-based. The participants are expected to do the required readings before the sessions in order to be able to discuss the issues raised.

At the end of both sessions the corresponding case studies will be introduced and the participants will pick one of these to work on in teams comprised of two students. It is therefore recommended that the participants have a look at the available case studies as listed in this announcement before the sessions.

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At the in-depth sessions the participants will hold analytical presentations on the case studies. As an additional assignment, the participants shall prepare a handout outlining their main line of argumentation (*Thesenpapier*) to be provided to the other participants three days prior to the session. The presentations will be strictly limited to 25 minutes each. The instructors will then give additional comments and explanations on the basis of their experience from the respective cases to initiate a discussion. The discussion provides an opportunity to further explore specific issues related to the case studies.

At the end of each session, the participants should have developed an idea which specific issue that is related to their case study they wish to write their seminar paper on. This could e.g. be a legal issue crucial to the presented case study.

The papers shall be written in teams of two to three students each and will be due in late August.

The seminar will be taught in English and is limited to 20 participants. Some prior knowledge of international law is required.

Assignments (to be finalized in groups of 2-3 students)

- Presentation on a case study (25 minutes)
- Handout outlining the main line of argument of the presentation (*Thesenpapier*), consisting of 2-3 pages
- Joint Seminar paper comprising 5 pages per team member (excluding title page, table of contents, bibliography. Formatting: Calibri, font size 11, 1.15 spaced, justified, margins of 2 cm each, use footnotes for references)

SCHEDULE

Materials which are not accessible online will be provided in digital form.

Introductory session 1 - Strategic human rights litigation in the field of “Business and Human Rights“

Date: 7 May 2015, 13.00-16.20, SCH/ A214

This session aims at giving a general introduction to the ECCHR's work and the concept of strategic human rights litigation and some of its problems. Thereafter, we will discuss the aims of our “Business and Human Rights” program and some particularities with regard to strategic litigation in this field. Our discussion will focus on the UN Guiding Principles on Business and Human Rights and the advantages and weaknesses of pursuing litigation at the national, transnational or international level.

We will shortly present the case studies we will be focusing on during the in-depth session and conclude by assigning presentation topics on that basis.

Required readings:

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- Wolfgang Kaleck and Miriam Saage-Maaß, „Kämpfe um soziale Rechte: Können strategische Prozesse gegen transnationale Unternehmen einen Beitrag leisten?“, *Juridikum*, Issue 4 2010, pp. 436-448
- ECCHR, Brot für die Welt and Misereor, “Holding Companies Accountable - Lessons from Transnational Human Rights Litigation”, June 2014 <http://www.ecchr.de/business_and_human_rights.html?file=tl_files/Dokumente/Publikationen/Booklet_HoldingCompaniesAccountable.pdf>
- “Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework”, A/HRC/17/31, 21 March 2011 <<http://business-humanrights.org/sites/default/files/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>>
- Wolfgang Kaleck and Miriam Saage-Maaß, „Corporate Accountability for Human Rights Violations Amounting to international Crimes. The Status Quo and its Challenges“, *Journal of International Criminal Justice* 8(3) 2010, pp. 1-26.

Introductory session 2 – Strategic human rights litigation in the field of “International Crimes and Accountability”

Date: 13 May 2015, 14.50 -18.10, ABS/ E04

This session will take up what we have discussed during the first session with regard to the concept of strategic human rights litigation. On the basis of Madlingozi (2010) and Kaleck (2012) we will look at certain criticisms of the concept of strategic human rights litigation as carried out by the ECCHR and possible responses. Thereafter, we will discuss the aims of our “International Crimes and Accountability” program and the particularities of strategic litigation in this field. Our discussion will in particular focus on achievements and challenges with regard to a universal jurisdiction that truly deserves its name and the role that NGOs like the ECCHR can play in that regard.

We will shortly present the case studies we will be focusing on during the in-depth session and conclude by assigning presentation topics on that basis.

Required readings:

- Tshepo Madlingozi, „On Transitional Justice Entrepreneurs and the Production of Victims“ *Journal of Human Rights Practice* 2 (2) 2010 pp. 208-228
- Wolfgang Kaleck, „Vom progressiven Gebrauch des Rechts. Strategische Klagen bei Menschenrechtsverletzungen“, *Juridikum*, Issue 3 2012, pp. 372-381
- Andreas Schüller and Annelen Micus, „Das Zusammenspiel von Menschenrechtsbewegungen und transnationaler Gerichtsbarkeit zur Überwindung von Straflosigkeit“, B. Lange (ed.), *Weltbürgerrecht: Die normative Seite der Globalisierung*, Würzburg: Ergon Verlag 2012, pp. 123-136 <http://www.ecchr.de/aufsaetze.html?file=tl_files/Dokumente/Publikationen/Schueller-Micus%2C%20Das%20Zusammenspiel...%2C%20Lange.pdf>

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- Maximo Langer, "Universal Jurisdiction Is Not Disappearing: The Shift from 'Global Enforcer' to 'No Safe Haven' Universal Jurisdiction", *Journal of International Criminal Justice* 13 2015, Forthcoming
< http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2567036>

In-depth session 1 - "International Crimes and Accountability"

This session will be held at the ECCHR office, Zossener Str. 55-58, Aufgang D 10961 Berlin.

Date: 6 June 2015, 10.30 – 18.00

Teams of 2-3 students will prepare presentations of 25 minutes in which they address one of the topics listed below. Following the presentations, the other students will have the opportunity to critically respond to the presentation. The presenters will have a possibility to react and the instructors will give further input on the basis of their experience. After a discussion of about 30 minutes, another 20 minutes will be dedicated to further questions or suggestions and the development of a research question for the seminar paper (the research questions proposed below are suggestions only).

The idea is to approach the different presentation topics from the specific perspective of the ECCHR as an NGO specializing in strategic litigation. Try to analyze which issues would be particularly important, if the ECCHR decided to become active in the field that you are presenting on and structure your presentation accordingly. The fundamental readings may be helpful in that regard.

Fundamental readings:

- Andreas Schüller and Annelen Micus, „Das Zusammenspiel von Menschenrechtsbewegungen und transnationaler Gerichtsbarkeit zur Überwindung von Straflosigkeit“, B. Lange (ed.), *Weltbürgerrecht: Die normative Seite der Globalisierung*, Würzburg: Ergon Verlag 2012, pp. 123-136
<http://www.ecchr.de/aufsaeetze.html?file=tl_files/Dokumente/Publikationen/Schueller-Micus%2C%20Das%20Zusammenspiel...%2C%20Lange.pdf>

Topics:

1. **EU border regime:** Which rights of migrants under the European Convention on Human Rights (and possibly other international legal instruments) are regularly violated at the EU borders? Which litigation strategy would you recommend to address existing structural human rights violations? Which factual, jurisdictional and procedural challenges exist with regard to respective complaints before the European Court of Human Rights?

Recommended Readings:

- *Hirsi Jamaa and others v. Italy*, App No 27765/09, 23 February 2012 (ECtHR)
- *Hussein et autres c. Italie*, App No 10171/05, 10601/05, 11593/05 and 17165/05, 19 January 2005 (ECtHR)[in French]

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- Andreas Fischer-Lescano and Tillmann Löhrr, *Legal Opinion. Border Controls at Sea: Requirements under International Human Rights and Refugee Law*, ECCHR 2007 <<http://www.ecchr.de/rechtsgutachten-515/articles/gutachten-mittelmeer-rechte.html>>
- Maximilian Pichl und Katharina Vester, "Die Verrechtlichung der Südgrenze", Forschungsgruppe Staatsprojekt Europa (Hrsg.) *Kämpfe um Migrationspolitik. Theorie, Methode und Analysen kritischer Europaforschung*, Bielefeld: Transcript 2014, pp. 187-208
- Sonja Buckel, *Welcome to Europe'. Die Grenzen des europäischen Migrationsrechts. Juridische Auseinandersetzungen um das ‚Staatsprojekt Europa‘*, Transcript 2013, especially pp. 169-336
- EU Fundamental Rights Agency and Council of Europe, *Handbook on European law relating to asylum, borders and immigration*, Luxembourg: Publications Office of the European Union 2013 <http://fra.europa.eu/sites/default/files/handbook-law-asylum-migration-borders_en.pdf>

Possible research questions for a seminar paper:

- Could Article 16 of the ILC Draft Articles on State Responsibility on aid or assistance in the commission of an internationally wrongful act constitute a legal basis to bring a claim against EU states for the delegation of border control operations to third states, if these violate human rights?
 - What are the legal standards for the protection of unaccompanied minors under the ECHR and the Convention on the Rights of the Child? What are your recommendations to address the violations of the human rights of minors at the exterior EU borders through litigation? (if possible, focus on one concrete situation)
2. **International criminal law in the context of Syria:** Which possible avenues exist to facilitate accountability for international crimes committed in the Syrian civil war? Which strategy would you recommend to an NGO intending to push for accountability for crimes committed during the Syrian civil war?

Recommended Readings:

- *9th Report of Commission of Inquiry on Syria*, A/HRC/28/69, 5 February 2015 (published on 20 February 2015) especially pp. 14-16
- Iva Vucusic, "Justice in Syria: If not the ICC, then what?" , *Justice in Conflict*, 10 November 2014 <<http://justiceinconflict.org/2014/11/10/justice-in-syria-if-not-the-icc-then-what/>>
- Beth van Schaack, "Options for Accountability in Syria", *Just Security*, 22 May 2014 <<http://justsecurity.org/10736/options-accountability-syria/>>
- Jennifer Trahan, "New Paths to Accountability for Crimes in Syria and Iraq (Including ICC Jurisdiction Over Foreign Fighters)", *Just Security*, 12 November 2014

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< <http://justsecurity.org/17308/paths-accountability-crimes-syria-iraq-including-icc-jurisdiction-foreign-fighters/>>

- Paul Seils, "Towards a Transitional Justice Strategy for Syria", International Center for Transitional Justice Briefing Paper, September 2013
<https://www.ictj.org/sites/default/files/ICTJ-Syria-Analysis-2013_0.pdf>
- Dawlaty & NPWJ, *Transitional Justice in Syria*, July 2013
< http://www.npwj.org/sites/default/files/ressources/TJSyria_EN.pdf>

Possible topic for a seminar paper:

Prepare a detailed policy paper advising ECCHR on the available options to push for accountability in Syria and their respective advantages and disadvantages. You should try to give your advice against the backdrop of our special position and resources as a Germany-based NGO.

3. **The International Criminal Court and Palestine:** After Palestine's accession to the Rome Statute, are the jurisdictional and admissibility requirements met so that cases concerning Palestine could be opened before the ICC? Which possibilities exist for human rights organizations to push for effective investigations, keeping in mind the precarious situation and political backlashes local human rights defenders may face?

Recommended Readings:

- Al Haq, "Al-Haq Commends Palestinian Accession to the Rome Statute and Submission of Article 12(3) Declaration", 6 January 2015
<<http://www.alhaq.org/advocacy/targets/accountability/81-general/887--al-haq-commends-palestinian-accession-to-the-rome-statute-and-submission-of-article-123-declaration>>
- Daphné Richemond-Barak, "Double Duty at the ICC", *EJIL: Talk!*, 12 January 2015
<<http://www.ejiltalk.org/double-duty-at-the-icc/>>
- Matthew Waxmann, "The Palestinian Authority's Lose-Lose-Lose Move on ICC", *Lawfare*, 5 January 2015 <<http://www.lawfareblog.com/2015/01/the-palestinian-authoritys-lose-lose-lose-move-on-icc/>>
- Nimrod Karin, "The Establishment of the International Criminal Tribunal for Palestine", *Just Security*, 21 January 2015
<<http://justsecurity.org/19272/establishment-international-criminal-tribunal-palestine-part-i/>>
- Victor Kattan, "The Implications of Joining the ICC after Operation Protective Edge", *Journal of Palestine Studies* 44 2014/15 pp. 61ff <<http://www.palestine-studies.org/jps/fulltext/186675>>
- Human Rights First, "The Role of Human Rights NGOs in Relation to ICC Investigations", Discussion Paper, September 2004
< http://www.iccnw.org/documents/HRF-NGO_RoleInvestigations_0904.pdf>

Possible research question for a seminar paper:

What are possible difficulties in determining the temporal and geographical scope of the ICC's jurisdiction with regard to Palestine?

4. **Prosecuting Hissène Habré in Senegal:** What is the special significance of prosecuting a former leader of an African state in Africa, especially against the background of the failed

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attempts to try Habré in Belgium? Furthermore, critically assess the role of NGOs and victims' organizations in the realization of the trial.

Recommended Readings:

- Michael Bronner, "Our Man in Africa. The Dictator America Created, the Blood he Shed, and the Reckoning to Come.", *Foreign Policy* 24 January 2014
<<http://foreignpolicy.com/2014/01/24/our-man-in-africa/>>
- Reed Brody, "Bringing a Dictator to Justice. The Case of Hissène Habré", *Journal of International Criminal Justice* 13 2015, Forthcoming
- Human Rights Watch, "The Case Against Hissène Habré. An 'African Pinochet'" <<http://www.hrw.org/habre-case>>
- Tanaz Moghadam, "Revitalizing Universal Jurisdiction: Lessons from Hybrid Tribunals Applied to the Case of Hissène Habré", *Columbia Human Rights Law Review* 39 2007-2008 pp. 471ff
- Charles Chernor Jalloh, "Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction" (December 21, 2009). *Criminal Law Forum*, 21(1) March 2010 pp. 1-65
<<http://ssrn.com/abstract=1526622>>
- Assembly of the African Union, "Decision on the Report of the Commission on the Abuse of the Principle of Universal jurisdiction Doc. Assembly/AU/14 (XI)", Assembly/AU/Dec.199 (XI), 30 June – 1 July 2008

Possible research question for a seminar paper:

Assess the African Union's critique of universal jurisdiction and the ICC as instruments of postcolonial domination. Can the Habré trial be considered a re-appropriation of the idea of universal justice by African states and civil society?

In-depth session 2 – "Business and Human Rights"

Date:

30 June 2015, 13.00-20.00, (4.DS GER/ 39, 5.DS BEY/117, 6.-7.DS BEY/151)

Structure

Teams of 2-3 students will prepare presentations of 25 minutes on one of the case studies listed below and recommend a litigation strategy to address the case. Thereafter, the other students will be asked to think of factual and legal arguments against the proposed litigation strategy that the responding corporation could raise. The presenters then have a possibility to respond and the instructors will give further input on the basis of their experience. After a discussion of about 30 minutes another 20 minutes will be dedicated to further questions or suggestions and the development of a research question for the seminar paper (the research questions proposed below are suggestions only).

The aim of the presentations is to present and analyze one of the listed case studies and to propose a well-justified litigation strategy that you consider the most promising in that particular case. You will

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have to consider if it makes most sense to pursue a case at the national, the transnational or the international level or if you would recommend an altogether different approach. Also, you should think about possible factual obstacles and the legal questions which will come up in the proceedings and how you would address these. The fundamental readings indicated below constitute useful guidelines and it may make sense to develop your presentation on that basis.

In your presentations you should:

- 1) Present the facts of the case
- 2) Present the parties involved in the case and their role – in particular present the corporation involved and its corporate structure
- 3) Determine the human right that has been violated, its legal basis and normative content
- 4) Propose a litigation strategy to address the identified human rights violations

Fundamental readings:

- Claudia Müller-Hoff, *Making Corporations respond to the damage they cause: Strategic approaches to compensation and corporate accountability*, ECCHR, Brot für die Welt and Misereor 2012
<http://www.ecchr.de/publications.html?file=tl_files/Dokumente/Publikationen/Making%20respond%202012-11.pdf>
- “Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework”, A/HRC/17/31, 21 March 2011
<<http://business-humanrights.org/sites/default/files/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>>

Topics:

1. Case Study : Multinational Corporations and Trade Union Rights

On 10 September 2005 the Colombian trade unionist, human rights activist and former Nestlé-Cicolac employee Luciano Romero was kidnapped, tortured and murdered by members of a paramilitary group. His murder came after a number of death threats that arose in the context of a long-standing labor dispute between the trade union Sinaltrainal and the Nestlé factory Cicolac. Sinaltrainal had reported all death threats made against its members to the Nestlé subsidiary in Colombia as well as to the parent company in Switzerland. Instead of taking the necessary precautionary measures, local Nestlé managers spread libelous reports that Luciano Romero and his colleagues were reputed to be members of the guerilla, rumors which put these individuals in even greater danger. The parent company failed to prevent these actions.

Detailed materials on this case can be found at <<http://www.ecchr.de/nestle-518.html>>

Possible research question for a seminar paper:

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Did the Colombian state violate its human rights obligations and if so which of them? Does international human rights law also impose obligations directly on Nestlé and if so, have they been violated?

2. Case Study : Mining Corporations and the Contamination of Water

The company Tintaya S.A. that is owned by the transnational corporation Glencore Xstrata operates an open pit mine for the extraction of copper and gold in the Peruvian province of Espinar. Inhabitants of local communities allege that the mine has contaminated local water and soil with heavy metals. People believe that this contamination is linked to a recent increase in farm animal deformities. Multiple studies by private and state entities found elevated levels of contaminants including aluminum, arsenic, copper, iron, lithium, and manganese in water and soil samples. A study conducted by Peruvian state authorities that included 12,500 samples concluded that 2.2% of the samples were severely contaminated and 52.71% contained at least one parameter that exceeded official thresholds.

For further materials refer to:

- Multiwatch (ed.), *Milliarden mit Rohstoffen. Der Schweizer Konzern Glencore Xstrata*, Zürich: edition 8 2014, especially pp 74-79
- <<http://www.facing-finance.org/en/database/cases/glencore-xstrata-environmental-pollution-at-tintaya-copper-mine-peru/>>
- <<http://www.multiwatch.ch/de/f97000310.html>>

Possible research question for a seminar paper:

Did the Peruvian state violate its human rights obligations and if so which of them? Does international human rights law also impose obligations on Glencore and if so, have they been violated?

3. Case Study : Textile Industry and Working Conditions

The Ali Enterprise textile factory in the industrial district of Baldia Town in Karachi burned to the ground on 11 September 2012. Bars on the windows as well as obstructed and locked emergency exits meant that factory workers were unable to escape the blaze in time. Over 280 employees lost their lives and hundreds were injured. At least 70% of the textiles produced at the factory were sold to German discount store KIK, according to the retailer's own information. Just a few weeks before the fire, Italian company RINA had issued the factory with an SA 8000 certificate, which is supposed to act as a guarantee of safety and other workplace standards.

Detailed materials on this case can be found at <<http://www.ecchr.de/working-conditions-in-south-asia.html>>

Possible research question for a seminar paper:

Is the right to fair working conditions a human right and what is its content? Which working standards does the ILO recommend for the textile industry and have these standards been violated in this case?

4. Case Study: Multinational Corporations and Violent Repression of Protests

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On 2 May 2011, civilians in the village of Bongulu in the northern Democratic Republic of the Congo became the targets of severe violence by Congolese police and military forces. According to witness testimony, security forces inflicted grave bodily harm, raped women and girls, arrested 16 people and destroyed property.

The security forces reportedly received financial and logistical help, in the form of transport and payment, from logging company Siforco S.A.R.L. (Société Industrielle et Forestière du Congo), which at the time was a subsidiary of the Swiss- and German-based Danzer Group. Witnesses say police and military personnel were transported to the village using Siforco vehicles, that a Siforco vehicle transported detained villagers to prison after the incident and that a local company manager paid the security personnel accompanying the detainees. Siforco had been in a long-running dispute with the community over the company's repeated failure to fulfill the social commitments set out in a contract between the community and the company, as required by Congolese law.

Detailed materials on this case can be found at <<http://www.ecchr.de/danzer-en.html>>

Possible research question for a seminar paper:

Did the violence carried out against the inhabitants of Bongulu constitute international crimes under the Rome Statute? If so, under which conditions could the ICC investigate the case and indict those responsible?