

Implementing the 2030 Agenda requires acknowledging extraterritorial obligations

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One year into the implementation of the 2030 Agenda, the most pressing question is whether the Agenda and its 17 Sustainable Development Goals (SDGs) will be implemented in ways that are universal and integrated, and that protect and even extend human rights – a potential contained in its scope and ambition – or whether its implementation will be reduced to a set of bankable projects and leased out to business and the corporate sector. Much depends on how progress is measured, particularly regarding policy coherence. Will it be measured against the yardsticks of rights and sustainability or against a pick-and-choose menu, celebrating success on some measures and ignoring the others?

Acknowledging the growing danger of the impact of inequalities (of income, resources and power) on the economic, social and environmental health of societies, the 2030 Agenda identifies reducing inequalities within and among countries as a standalone goal (SDG 10). It is significant that, unlike both previous development agendas and traditional human rights approaches, which focus primarily on problems within countries, the 2030 Agenda recognizes in its preamble that “rising inequalities within and among countries” and “enormous disparities of opportunity, wealth and power” are an “immense challenge to sustainable development”.

The implication of this recognition, which goes across all 17 goals, is the understanding that the actions taken by one or more countries have consequences for the ability of other countries to realize their own development goals. As spillover effects of policies and actions in or by one country impact on others and can constrain their ability to live up to their human rights and sustainable development commitments, attention is increasing on the need to address the “extraterritorial obligations” (ETOs) of Member States in protecting human rights and the environment and in designing economic and social policies.

To achieve the 2030 Agenda and reach the 17 SDGs, countries need to do a better job of articulating and implementing their extraterritorial obligations, including those related to transnational corporations.

Yet PPPs are advocated by many governments, businesses and business associations as a major means of implementation of the SDGs and feature strongly in the Addis Ababa Action Agenda.

Maastricht Principles on ETOs

The Maastricht Principles, adopted in 2011, represent the first effort to codify extraterritorial obligations. They represent an international expert opinion, issued by international law experts from all regions, and are intended not to establish new elements of human rights law, but rather, “to clarify extraterritorial obligations of States on the basis of standing international law”. The preamble states:

“The advent of economic globalization [...] has meant that States and other global actors exert considerable influence on the realization of economic, social and cultural rights across the world. Despite decades of growing global wealth, poverty remains pervasive and socio-economic and gender inequalities endure across the world. Moreover, individuals and communities face the continuing deprivation and denial of access to essential lands, resources, goods and services by State and non-State actors alike.”¹

Elaborating on these principles, the ETO Consortium,

1 www.fidh.org/IMG/pdf/maastricht-eto-principles-uk_web.pdf, p.5.

a network of over 140 human rights related CSOs and academics, pointed to “gaps in human rights protection” in the context of globalization, noting specifically the lack of human rights regulation and accountability of transnational corporations (TNCs), the absence of human rights accountability of international financial institutions (IFIs), and the “ineffective application of human rights law to investment and trade laws, policies and disputes”.²

The UN has been pressed to address the linkages of business and human rights standards, resulting in the adoption by the Human Rights Council of the UN Guiding Principles on Business and Human Rights in 2011. While the principles are voluntary and operationalizing them proceeds unevenly and very slowly, they show the beginnings of commitment to close the governance gap regarding large corporations – and show up the inadequacy of the business model of the UN Global Compact, which is based on gentle persuasion at best.³

The adoption of the UN Guiding Principles has also spurred more ambitious efforts to close the governance gap. A Human Rights Council working group is to elaborate an international legally binding instrument to regulate the activities of transnational corporations and other business enterprises.⁴ Well-established UN human rights instruments are issuing general comments and developing guidelines to address human rights and business, and in so doing recognize the extended reach of the instruments. The Committee on the Rights of the Child, for example, in General Comment 16 on the business sector’s impact on children’s rights states that: “Under the Convention, States have the obligation to respect and

ensure children’s rights within their jurisdiction. The Convention does not limit a State’s jurisdiction to ‘territory’”.⁵

In their Draft General Comment on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, the rapporteurs for the Committee on Economic, Social and Cultural Rights emphasized the “urgent need to prevent and address the adverse impacts of business activities on human rights”,⁶ reflected in the Guiding Principles on Business and Human Rights. The General Comment seeks to clarify the duties of States under the International Covenant on Economic, Social and Cultural Rights (ICESCR) to “ensure that the activities of businesses contribute to and do not impede the realization of economic, social and cultural rights”, within and across borders. Under the Covenant, States are obligated to use the maximum level of resources in order to realize human rights, including the adoption of measures needed “to protect individuals from abuses of their economic, social and cultural rights by third parties, including business entities and to provide access to effective remedies”.

While focused primarily on the obligations of States, the Draft General Comment also extends to non-State actors in the business sector, stating that countries “must take measures to ensure that not only domestic laws and policies but also non-State entities do not discriminate against any group”. It defines business activities broadly, to include “such activities of any business entity, whether they operate transnationally or whether their activities are domestic [...]”

Also commented upon is the growing trend towards privatization, particularly related to “social protection, water, sanitation, health, education and cultural life”, which hampers States’ fulfillment of their responsibilities to comply with their obligations, all of which are included in the SDGs, particularly with regard to social protection policies, and “promote the social, economic and political inclusion of all”, as

2 www.etoconsortium.org/nc/en/main-navigation/library/documents/?tx_drblob_pi1%5BdownloadUid%5D=23.

3 For a critique of the UN Global Compact, see www.globalpolicy.org/images/pdfs/images/pdfs/Fit_for_whose_purpose_online.pdf.

4 UN Doc. A/HRC/RES/26/9.

5 CRC/C/GC/16, para 39.

6 UN Doc. E/C.12/60.R.1, para. 2.

mandated under SDG 10. This decision also impedes States' obligations to achieve gender equality, since a disproportionate burden of care among those unable to pay for services falls on women.

The Draft General Comment goes beyond State and business obligations at the national level to look at “the extraterritorial application of human rights obligations”, which it regards as particularly significant due to the increasing interdependence of States and economies. Addressing the dramatic increase in the influence of transnational corporations, investment and trade flows, it adds that “major development projects have increasingly involved private investments, often in the form of public-private partnerships between State agencies and foreign private investors”.⁷

This development, the draft notes, raises particular challenges in accessing remedy given the way businesses are organized. Further, it states:

*“[T]he cross-jurisdictional nature of certain business entities greatly complicates the process of accessing remedy, as seen in some mass tort cases involving pollution and industrial disasters. In addition to the difficulty of proving the damages or establishing the causal link between the conduct of the defendant corporation located in one jurisdiction and the resulting violation in another, transnational litigation is often prohibitively expensive and time-consuming”.*⁸

Nevertheless, PPPs are advocated by governments and business associations alike as a cost-effective approach to implementing the SDGs. Furthermore, many are advocating the use of official development assistance (ODA) to leverage private finance for sustainable development and provide government guarantees for PPPs.

UN expertise goes beyond borders

A number of UN experts are also addressing global systemic constraints to national efforts to protect

human rights and the environment. Their findings and recommendations are regularly reported to the Human Rights Council, and also to the UN General Assembly.

The Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz, and the Independent Expert on the promotion of a democratic and equitable international order, Alfred-Maurice de Zayas have called attention to the international investor-State dispute arrangements (ISDAs), which enable corporations to challenge legislation and policies introduced by the State in an effort to protect public health or the environment on the grounds of lost – or future – profits as well as damage to reputation.⁹ They note the adverse human rights impacts of such arrangements, which have had “a ‘chilling effect’ with regard to the exercise of democratic governance” and have called for their abolition.¹⁰

The 2015 Report to the General Assembly of the UN Special Rapporteur on the rights of indigenous peoples, analysed not only the impact of domestic policies on the rights of indigenous peoples, but also the impact of international investment agreements and investment clauses of free trade regimes on these rights. Among the rights of indigenous peoples negatively impacted are self-determination, land, territories and resources, participation, and free, prior, and informed consent, poverty, and social rights.

ISDAs are available to investors only, not to governments, and allow investors to challenge States for alleged violations of their rights to profit within binding arbitration mechanisms, such as the International Centre for Settlement of Investment Disputes (ICSID). The analysis draws on the work of a number of UN human rights investigations, including the reports of: the Independent Expert on promotion of a democratic and equitable order on the adverse human rights impacts of international and bilateral trade and investment agreements; the Special Rapporteur on the right to food; the Special Rapporteur on the right of everyone to the enjoyment of the

7 Ibid., para. 30.

8 Ibid., para. 45.

9 UN Doc. A/HRC/33/42 and A/HRC/30/44.

10 UN Doc. A/HRC/30/44, para. 5.

highest attainable standard of physical and mental health.

The report on indigenous peoples addresses multiple effects of investment and free trade regimes, including the constriction of governments' policy and legislative space, costs of governments defending themselves within ISDAs, weakened rule of law, and the perpetuation of international power imbalances. It points out that some 78 percent of the known 608 investor-State dispute settlement claims brought against 101 countries have been against less developed countries, although a growing number are now being brought against developed countries as well. In 2014, for instance, 40 percent of new cases were against developed countries, brought mainly by investors in other economically advanced States, such as those in North America and the European Union. The overwhelming majority of these cases have to do with challenges to government measures to protect public health and the environment. How will these regimes and arrangements impact and constrain State policies and actions to implement the SDGs?

The indigenous peoples report emphasizes the lack of coherence of such treaties within international law, stating "International investment and free trade law regimes have been developed as a separate strand of international law from human and indigenous rights standards." It recommends, in the context of the 2030 Agenda for Sustainable Development, that Member States "reconsider development paradigms that do not lead to sustainable and inclusive development and poverty reduction amongst all groups".¹¹

The Committee of the Convention on the Rights of the Child General Comment 16 addresses how Convention obligations to act in the best interests of the child apply:

"States are obliged to integrate and apply this principle in all legislative, administrative and judicial proceedings concerning business activities and operations that directly or indirectly impact on children. For example, States must ensure that the best interests of the child

*are central to the development of legislation and policies that shape business activities and operations, such as those relating to employment, taxation, corruption, privatization, transport and other general economic, trade or financial issues."*¹²

Human rights treaties to lead policy coherence

In this regard it is important to note that human rights advocates are using the Convention on the Elimination of Discrimination against Women (CEDAW) to confront ways in which activities of rich countries and non-State actors – constrain the ability of other countries to achieve development goals and honor their human rights obligations. Several important submissions indicate new efforts to demand accountability from both State and non-State actors to extraterritorial obligations in such critical areas as arms exports, tax havens, the extractive industry and trade and investment agreements.

Swedish arms exports

In response to a submission from the Women's International League for Peace and Freedom (WILPF) regarding the impact of Sweden's arms exports on gender-based violence and the actions of Swedish corporations violating human rights abroad, in 2016 the CEDAW Committee recommended that Sweden "uphold its due diligence obligations to ensure that companies under its jurisdiction or control respect, protect and fulfill women's human rights when operating abroad".¹³ How will this be applied in connection with target 16.4 of the SDGs to reduce illicit arms flows and included into review and reporting processes of the High Level Political Forum and the Voluntary National Reviews?

Swiss tax havens

A CEDAW opinion with regard to Switzerland in 2016 made clear that countries' obligations regarding the activities of corporations abroad extends to tax

¹¹ UN Doc. A/70/301, para. 65 and para.78(c).

¹² UN Doc. CRC/C/GC/16, para. 15.

¹³ <http://wilpf.org/cedaw-committee-recognises-extraterritorial-obligations-towards-human-rights-for-sweden/>.

abuse, which restricts the ability of other countries to mobilize sufficient revenues to fulfill their human rights commitments. Although Switzerland has publicly condemned the impact on developing countries of illicit financial flows, and has pledged to join an international effort to eliminate the causes of such flows, a 2016 submission by CESR, Alliance Sud, NYU Law School Global Justice Clinic, Public Eye and the Tax Justice Network¹⁴ points out that Switzerland has failed to conduct an independent assessment of the ways in which its own policies encourage overseas tax abuse, including bank secrecy laws, corporate tax privileges, and weak reporting standards.

The Committee's Concluding Observations expressed concern that Swiss financial secrecy policies and rules on corporate reporting and taxation can negatively impact on the ability of other States, particularly those already short of revenue, to mobilize maximum available resources for the fulfillment of women's rights. The Committee urged Switzerland to honor its international human rights obligations by undertaking "independent, participatory, and periodic" impact assessments of the extraterritorial effects of its financial secrecy and corporate tax policies on women's rights, and public disclosure of its findings.¹⁵

Canadian overseas mining activities

Two submissions to CEDAW in 2016 addressed Canadian mining corporations: one, by a coalition of human rights groups (EarthRights International, Mining Watch Canada), found that "since 1999, Canadian mining companies were implicated in the largest part (34%) of 171 incidents alleging involvement of international mining companies in community conflict, human rights abuses, unlawful and unethical practices or environmental degradation in a developing country".¹⁶ The other, submitted

by WILPF and the International Platform Against Impunities highlighted the ongoing violation of women's human rights, particularly in indigenous communities, by Canadian mining countries in Latin America, where more than 80 percent of mining companies are Canadian. In addition to the failure of the Canadian government to address these violations it also cites its failure to establish "effective administrative and judicial mechanisms to ensure access to justice" for such violations. It cites a 2014 report from the Working Group on Mining and Human Rights in Latin America, that showed companies' "systematic practice of human rights violations of the community members", including the denial of consultation and "prior, free and informed consent".¹⁷

In response the CEDAW Committee recommended that Canada strengthen legislation governing the conduct of corporations in relation to their activities abroad, and require corporations to conduct human rights and gender impact assessments prior to making investment decisions. It further recommended that trade and investment agreements that Canada negotiates "recognize the primacy of its international human rights obligations over investors' interests, so that the introduction of investor-State dispute settlement procedures shall not create obstacles to full compliance with the Convention".¹⁸

CEDAW is not the only relevant convention with regard to the Canadian extractive industry. The submission from EarthRights International, Mining Watch Canada stated that as far back as 2002 the UN Special Rapporteur on Toxic Waste raised concerns over the lack of extraterritorial regulation of its corporations operating abroad. Since then, it added, four UN treaty bodies have expressed concerns about the impacts of Canada's extractive sector corporations operations abroad – the Committee on the Elimination of Racial Discrimination, the Committee on the Rights of the Child, the Human Rights Committee,

¹⁴ www.taxjustice.net/2016/12/01/un-criticises-switzerland-pressure-mounts-human-rights-impacts-tax-havens.

¹⁵ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/402/99/PDF/N1640299.pdf?OpenElement>, para. 41(a).

¹⁶ www.earthrights.org/sites/default/files/documents/eri_hrc_mwc_cedaw_committee_report_october_3_2016.pdf.

¹⁷ http://wilpf.org/wp-content/uploads/2016/10/CEDAW-Canada-report_final.pdf.

¹⁸ www.etoconsortium.org/nc/en/main-navigation/library/documents/detail/?tx_drblob_pi1%5BdownloadUid%5D=194, para. 18.

and the Committee on Economic, Social and Cultural Rights.

Trade and investment agreements are also commented upon by the UN Committee on the Rights of the Child in General Comment 16. As a Guide for States on Implementing General Comment 16 prepared by UNICEF and the International Commission of Jurists underlines – that “trade agreements may have profound impacts on human rights”. While they may bring opportunities for development it adds that “these changes do not guarantee equitable, sustainable and inclusive development, nor do they necessarily promote greater respect for human rights. States, whether acting bilaterally or through multilateral arrangements such as under the World Trade Organization, must take into account their children’s rights obligations and should specifically provide for these in trade agreements.”¹⁹

Accountability across borders and policy streams

The transformative potential of the 2030 Agenda has been recognized and embraced in many policy forums, from local authorities to the G20, and has also captured the energy and expertise of CSOs from all regions, constituency groups and policy tracks.

In addition to demanding a top-quality agreement, CSOs advocated for a robust accountability mechanism and remain disappointed with a High-level Political Forum that brings in all but mandates none.

Working with a range of UN thematic instruments to hold countries accountable for activities of their corporations abroad as well as at home, alliances between tax justice and feminist networks, human rights and development groups, peace advocates and environmentalists are steadily building a robust accountability architecture that crosses borders.

But this responsibility cannot rest solely with CSOs. The effectiveness and durability of the 2030 Agenda will depend on whether interlinked goals and targets

can be implemented outside silos, in a whole-of-UN accountability framework and across borders as well in the country context.

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¹⁹ www.unicef.org/csr/files/CSR_GC_OBLIGATIONS_AND_ACTIONS_FINAL_AUGUST05.pdf, p.17.