



FINANCIALISATION, ECO-DESTRUCTION AND HUMAN RIGHTS BEYOND BORDERS

European Conference of the ETO Consortium

28-29 September 2017

Maastricht University Brussels Campus

Table of Contents

CONVENORS' SUMMARY	4
CONCEPT AND METHODOLOGY OF THE CONFERENCE	5
PROGRAMME	7
REPORTS OF THEMATIC SESSIONS	8
1. DEBT, AUSTERITY AND SOCIAL TRANSFERS	8
<i>Written Contribution 1.1 - Debt and Structural Adjustment Program (SAP) impact negatively human rights</i>	8
ORAL INTERVENTION 1.1: SOVEREIGN UNILATERAL ACTIONS TO QUIT ILLEGITIMATE AND ODIUS DEBTS	9
ORAL INTERVENTION 1.2: HOW DO ECONOMIC CONSIDERATIONS AFFECT THE IMPLEMENTATION OF SOCIO-ECONOMIC RIGHTS?	10
Discussion	11
2. CLIMATE AND ECOLOGY	13
<i>Written Contribution 2.1 - End Ecocide on Earth</i>	13
<i>Written Contribution 2.2 - Why climate, biodiversity and human rights dynamics go beyond borders</i>	14
<i>Written Contribution 2.3 - ETOs in the field of climate change</i>	16
<i>Written Contribution 2.4 - Tracing extraterritorial human rights accountability of (multilateral) development banks in climate finance</i>	17
ORAL INTERVENTION 2.1: RECOGNIZING ECOCIDE AS ONE OF THE GRAVEST CRIMES	19
ORAL INTERVENTION 2.2: THE BIODIVERSITY-CLIMATE-HUMAN RIGHTS NEXUS	20
ORAL INTERVENTION 2.3: CLIMATE CHANGE MITIGATION AND CLEAN DEVELOPMENT MECHANISM	21
ORAL INTERVENTION 2.4: APPLYING SAFEGUARDS IN CLEAN DEVELOPMENT MECHANISMS	21
Discussion	22
3. DEGROWTH AND MONETARY REFORM	23
<i>Written Contribution 3.1 - Wachstumswende and Degrowth</i>	23
<i>Written Contribution 3.2 - How to escape the growth imperative?</i>	24
<i>Written Contribution 3.3 - Creating a banking system that works for society</i>	25
<i>Written Contribution 3.4 - Monetary reform as a prerequisite for the implementation of human rights</i>	26
ORAL INTERVENTION 3.1: THE PRESENTATION OF WACHSTUMSWENDE	28
ORAL INTERVENTION 3.2: HOW TO EXIT THE GROWTH IMPERATIVE?	28
ORAL INTERVENTION 3.3: STEPS TOWARDS CHANGING TODAY'S ECONOMIC SYSTEMS	29
ORAL INTERVENTION 3.4: REFUTING SYSTEMIC DEBT	29
Discussion	30
4. FINANCIALISATION, LAND GRABBING, MICROFINANCE	30
<i>Written Contribution 4.1 - Infrastructure finance and ETOs</i>	30
<i>Written Contribution 4.2 - The case of pension funds investments into land globally</i>	32
<i>Written Contribution 4.3 - Financialisation: Reconsidering jurisdiction, and public procurement</i>	33
<i>Written Contribution 4.4 - Microfinance</i>	35
ORAL INTERVENTION 4.1: INFRASTRUCTURE FINANCE	36
ORAL INTERVENTION 4.2: PENSION FUNDS AND OPAQUE INVESTMENT WEBS	37
ORAL INTERVENTION 4.3: DEFINING NATIONALITY AND JURISDICTION TO HOLD INVESTORS ACCOUNTABLE	37
ORAL INTERVENTION 4.4: MICROFINANCE TO FIGHT INEQUALITIES?	38
5. REGULATING TNCs (AND OTHER BUSINESS)	38
<i>Written Contribution 5.1 - Regulating TNCs? - Learnings from the court rooms</i>	38
ORAL INTERVENTION 5.1: ACCESS TO REMEDY FOR VICTIMS OF HUMAN RIGHTS ABUSES BY TNCs	39
ORAL INTERVENTION 5.2: RECLAIMING PEOPLES SOVEREIGNTY AND DISMANTLING CORPORATE POWER BY A BINDING TREATY ON TNCs AND HUMAN RIGHTS	40

ORAL INTERVENTION 5.3: TREATY ALLIANCE STRUGGLING FOR A BINDING TREATY ON TNCs AND HUMAN RIGHTS	41
ORAL INTERVENTION 5.4: COMMENTING CSO CONTRIBUTIONS	41
Discussion	42
6. KICKING REGIMES: INVESTMENT & TRADE	42
<i>Written Contribution 6.1 - The conflicts between human rights and the investment protection regime</i>	42
<i>Written Contribution 6.3 - The challenge of trade and investment agreements for the ETOs</i>	44
ORAL INTERVENTION 6.1: INVESTMENT PROTECTION	45
ORAL INTERVENTION 6.2: PROMOTING SUSTAINABLE INVESTMENT	46
ORAL INTERVENTION 6.3: INVESTMENT PROTECTION IMPEDING ON LEGISLATIVE INITIATIVES AND PUBLIC REGULATION	47
ORAL INTERVENTION 6.4: MULTILATERAL INVESTMENT COURT ET AL.	47
Discussion	47
OUTCOMES OF THE WORKING GROUPS	49
1. ECONOMIC POLICY AND ETOs	49
2. FINANCIALISATION AND ECO-DESTRUCTION	49
3. PROJECTS, CASES, ENGAGEMENT	50
PARTICIPANTS	53

Convenors' Summary

On September 28-29, 2017, almost 50 CSO activists and academics from 11 European countries discussed how human rights beyond borders (could) impact in a number of policy fields. The conference was held at the Brussels Campus of Maastricht University. The same venue was already used for the first European regional conference of the ETO Consortium (ETOC) on February 23-24, 2015. While formally again a “regional conference” (to use the language of the ETOC), it was very different from the 2015 conference in many respects:

The conference carried a title – « Financialisation, Eco-destruction and Human Rights beyond Borders » – indicating a particular choice of different, but interdependent policy areas that were to be treated with an ETO lens and the perspective of human rights beyond borders: these areas were treated in six sessions and three working groups and were further specified as debt and austerity, climate destruction, ecocide, degrowth, monetary reform, financialisation in infrastructure – and microfinance.

None of these specific fields had so far been dealt with by the ETO Consortium in any detail. It had been clear to the convenors that this approach was not without risk: each specific field required substantive knowledge – and the level of this knowledge was expected to be very different among the participants – given the tendency that « experts » largely talk among themselves and do not carefully listen to people from other fields. Monetary reform, degrowth and financialisation proved particularly challenging.

The conference was an outreach event hoping to introduce ETOs into the discourse of the mentioned policy fields. For this matter, it was an outreach conference in terms of experts as well: only 9 of the 21 speakers were members of the ETOC. At the same time, the European ETOC members got introduced into specific policy fields and discussed with the speakers the relevance of human rights beyond borders.

The conference was very intense, as was to be expected. Participants, however, were never « turned off », as had been feared by the convenors. On the contrary: the discussion was lively – and some participants expressed that they found the conference fascinating. Perhaps this was due to the growing awareness about the links between the specific policy fields. Some processes were obviously driven by others – not in the sense of simplistic causality, but in a complex net of relations that nevertheless has to be treated with human rights beyond borders. In fact, many people felt that via the specific policy fields the speakers looked at the same problem from different sides.

Still – one has to conclude that the outreach of this conference was only a first small step, perhaps smaller than expected. The ETOC should soon take further steps in these specific fields to consolidate and expand the results. Moreover, the concrete perspective of using human rights beyond borders in CSO activities and the campaigns of Social Movements in these fields remained underdeveloped. On the question of strategic case work proposals have been made, but this question is yet to be resolved. One approach could be to move with standard ETO cases, such as in land grabbing, the regulation of TNCs, investment regimes or social transfers, in a way that not only scratches the surface, but develops a more far-reaching systemic human rights analysis beyond borders that takes into account the policy fields of this conference and the financial and anti-ecological forces at work.

Fons Coomans, Maastricht University
Stephan Backes, FIAN International
Rolf Künnemann, ETOC Secretariat

Concept and Methodology of the Conference

Introduction

Although human rights largely empower rights-holders against their own States, under many circumstances this is insufficient. Extraterritorial obligations (ETOs) and the corresponding human rights beyond borders have increasingly gained terrain in human rights circles.

Human rights beyond borders are relevant in a number of policy fields; hence some key areas were represented in this conference. Financialisation – we could also call it “financial capture” – describes the erosion of democracy and the increasing power of financial institutions over elected governments (including those in foreign countries). What is increasingly at stake are human rights themselves as we know them – establishing, obligating and controlling the powers of States and ensuring that the political sovereign is the people.

Financialisation ran almost like a red thread through the different sessions of the conference. In Europe, the experience of Greece (and other countries) in the context of sovereign debt (financial capture) and imposed austerity (foreclosure acquisitions) has to be seen with an ETO lens. Social security as a human right risks to be run over ([Session 1](#)).

Governance and regulation is needed to stop the destruction of ecosystems and of a conducive climate. How are human rights beyond borders applicable in these contexts? ([Session 2](#)). National and global GDP is a rough indicator for the level of greenhouse gas emissions and eco-destruction – and exhaustion of resources. Can the ongoing destruction be stopped without economic degrowth? Who will have to degrow and how can this happen without “the weak suffering as they must?” (see [Session 1](#)). Which challenges emerge for ETOs?

Government debt and the push for GDP growth are also driven by banks and the way money is created. Is there a need for monetary reform – beyond borders? ([Session 3](#)). With private financial institutions for 20 years in a position to massively create money for themselves – these institutions increasingly pull the strings in infrastructure funding, in extracting the benefits from land and resources and from the sweat of the very poor via microfinance ([Session 4](#)).

In all of these contexts, the community of States faces great regulatory challenges. Attempts to regulate transnational corporations (TNCs) on the basis of human rights are countered by the corporate sector with strategies to capture human rights and subvert their meaning ([Session 5](#)). Investment and trade regimes are set up to “kick away the ladder to growing productivity” for local and national businesses in States with low productivity – in order to maximize the returns of TNCs and create flows of money for the financial institutions funding their projects ([Session 6](#)).

How should human rights be operated in these contexts? In order to avoid fierce internal and external repression and cross-country clashes, one need of the hour is to “extraterritorialize” the understanding of human rights: States obligations go beyond borders – and political and legal mechanisms have to be found in order to make them operational and justiciable for the rights-holders abroad. What would this mean in the policy fields mentioned?

We are all jointly rights-holders, no matter where we live (holding these rights also against foreign governments and intergovernmental institutions). And yes – perhaps our community of human rights holders must even include future generations.

These issues are of global importance, but they also relate to the European project and its current impasse. Perhaps the concept of human rights beyond borders and their related ETOs could be useful. For this to happen, Europeans would have to rediscover the political meaning of human rights beyond borders for their own sovereignty as citizens and communities – and prevent corporate capture of human rights.

How can the [ETO Consortium](#) contribute to a broad people's understanding of human rights as the basis for their sovereignty – even if they give up some of their own State's sovereignty in return for getting a legal handle on other States: Human rights beyond borders.

Methodology

Each session (90 minutes) featured 2 to 5 panellists (in general 2 from CSOs, 2 from academia). CSOs focused on their cases or campaigns. Academics and researchers shared their views (including comments on cases or campaigns presented).

Each panellist had 10 minutes – so that there was ample time for clarification and discussion. On the panels, CSOs started off by presenting their cases or campaigns. CSO panellists were expected to share the gist of their inputs on one-pagers a few weeks before the conference. Academics then commented. (Some academic panellists produced one-pagers as well.) Then the floor was open.

Panellists were invited to link up their issues in the other policy fields addressed in the conference.

Programme

September 28, 2017

- 08:00 **Breakfast Briefing with MEPs** (*in the European Parliament*)
- 10:30 **Registration**
- 11:00 **Welcome**
- 11:30 **Session 1: Debt, austerity, social transfers**
Eric TOUSSAINT – Committee for the Abolition of Illegitimate Debt (CADTM)
Ben WARWICK – Birmingham Law School, University of Birmingham
- 13:00 **Lunch - Lunch briefing with media / press conference**
- 14:30 **Session 2: Climate, Ecology**
Marie TOUSSAINT – End Ecocide on Earth
Claudia ITUARTE-LIMA – Stockholm Resilience Centre Stockholm
Juliane VOIGT – Carbon Market Watch
Jeanette SCHADE – ClimAccount Researcher
- 16:00 **Coffee break**
- 16:30 **Session 3: Degrowth, Monetary Reform**
Helmut FEDERMANN – Netzwerk Wachstumswende
Oliver RICHTERS – Oldenburg University
Edgar WORTMANN – Ons Geld
Maurizio DEGIACOMI – International Movement for Monetary Reform - Vollgeld Initiative
- 18:00 **End of day**

September 29, 2017

- 9:00 **Session 4: Financialisation, land grabbing, microfinance**
Nicholas HILDYARD – The Corner House - TBC
Roman HERRE – FIAN International
Tomaso FERRANDO – Universities of Warwick and Torino
Phil MADER – IDS, University of Sussex
- 10:30 **Break**
- 11:00 **Session 5: Regulating TNCs (and other business)**
Claudia MÜLLER-HOFF – European Centre for Constitutional and Human Rights (ECCHR)
Brid BRENNAN – Transnational Institute (TNI)
Anne VAN SCHAIK – Friends of the Earth Europe
Jernej LETNAR ČERNIČ – Graduate School of Government and European Studies, Ljubljana
- 12:30 **Lunch**
- 13:30 **Session 6: Kicking regimes: Investment, trade**
Cecilia OLIVET – Transnational Institute (TNI)
Elisabeth BÜRGI – Bern University
Burghard ILGE – BothEnds
Markus KRAJEWSKI – Erlangen University
- 15:00 **Break**
- 15:30 **Group session**
Special *ad hoc* groups meeting in parallel (Clusters to be defined).
 1. Specific academic agendas following from this conference.
 2. Cooperation between CSOs (and academics) on cluster 1 of issues.
 3. Cooperation between CSOs (and academics) on cluster 2 of issues.
- 17:00 **Group reports. Cross-over discussion between groups**
- 18:00 **End of conference**

Reports of Thematic Sessions

I. Debt, Austerity and Social Transfers

Written Contribution I.1 - Debt and Structural Adjustment Program (SAP) impact negatively human rights

Eric Toussaint

Committee for the Abolition of Illegitimate Debt (CADTM)

The system of illegitimate debt is used by the capitalist system to subject public policies to the demands of capital. While public debt could be used to finance an ambitious program of ecological transition and food sovereignty, it is actually used to enforce anti-social, extractivist and productivist policies, policies that increase competition between peoples. Public debt is not bad in itself. Governments can contract loans to finance land reform and the ecological transition. This would allow 1) financing the complete shutdown of nuclear plants, 2) replacing fossil energies with renewable energies which respect the environment, 3) drastically reducing road and air transport and replace them with collective transport by rail. Public borrowing can thus be legitimate if it is used to finance legitimate projects and if those who contribute act in a legitimate way. The CADTM believes that big companies and the richer households should contribute to non-profit-making government loans, i.e. with zero interest rate. Most households could make voluntary contributions with a positive interest rate. Yet, the opposite happens: governments and local authorities mostly borrow to finance illegitimate policies such as armaments expenses, white elephants, nuclear plants, public-private partnerships, repayment of former illegitimate debts, bailing out banks. Public debt is thus used to finance illegitimate expenses. The way repayment of the debt is financed is illegitimate too: big companies and the richer households pay little or no taxes whereas those with limited incomes have to tighten their belts to repay the debt.

In the so-called developing countries, what are the short-term or shock measures imposed by structural adjustment, and what are their consequences? The end of subsidies on products and services of primary necessity; a drastic reduction in social expenditure; often, devaluation of local currency; high interest rates.

What are the long-term or structural measures imposed by structural adjustment, and what are their consequences?

1. **The development of exports.** To procure the foreign currency needed to repay the debt, the developing countries need to increase their exports. This leads them to reduce food crops for the local population. Very often, they specialize in one or several export crops, one or several raw materials to be mined, or primary activities such as fishing. They then become highly dependent on this resource or mono-culture. The economies are all the more unstable because the prices on the global market can suddenly vary.
2. **The complete opening up of markets through the elimination of customs barriers.** Opening up the markets often leads to subsidized foreign products coming into the local market in an unhindered way and competing freely with local producers, thus completely destabilizing the local economy. The competition is unequal. Local producers are often less highly trained, less well equipped, and unable to make even modest investments. On the other hand, the multinationals have a significant financial and technological might, and the States of the North generously subsidize their production, especially the agricultural one.
3. **The liberalization of the economy, especially the abolition of capital movement control and exchange control.**

4. **A system of taxation which further aggravates inequalities, with the principle of value-added tax (VAT) and the protection of capital revenues.**
5. **Massive privatization of public companies and subsequent retreat of the State from strategic sectors of production.**

We should stand for the repudiation of public illegitimate debts and for the elimination of the SAPs. ETO Principles (ETOPs) that might be considered are ETOP 29 on the Obligation to create an international enabling environment (with a look at taxation, finance...) and also ETOP 29a (regular review of agreements).

Oral intervention 1.1: Sovereign Unilateral Actions to Quit Illegitimate and Odious Debts

Eric Toussaint, Committee for the Abolition of Illegitimate Debt (CADTM)

FIAN and CADTM encountered each other around the issue of debt and its impact on human rights, and we had discussions about how we can apply international obligations and human rights incorporated in different treaties to debt and austerity.

States seek to avoid being accountable and responsible under these international Human Rights treaties. In this way, they often end up violating the treaties. I specifically refer here to dominant States that seek to dominate other States and peoples.

I can illustrate the idea that States avoid their obligation with a number of examples, such as the European Stability Fund, the Troika and the Club of Paris.

The Club of Paris is an informal group, not a juridical entity. This means that when the States meet within the Club of Paris, they cannot be held accountable as it is not a juridical entity. CADTM has created a website under the name "Club of Paris"¹. This fake website aims at denouncing their actions. The Club of Paris has contacted us to ask whether we could shut down the website. We asked them to send us an official request through their lawyers, but the lawyers never contacted us because they know it is an informal club.

The letters of intent of different governments which set out the policies they will implement in order to get a loan are actually dictated by the International Monetary Fund (IMF). When acting in a State, the IMF makes sure to transform them into in a demand on the State. The IMF knows they are violating the international treaties by imposing these policies on the States. This is why it seeks to protect itself and makes sure it is the government who officially decides and asks for the SAP.

CADTM believes that States which are victims of such behaviour should take sovereign unilateral measures based on international treaties. We consider we cannot wait for settled negotiations through institutions and come to a solution. This is what happened in Greece in 2015 and we know the result.

Sovereign unilateral acts can lead to solutions. There are numerous examples in history:

- USA, 1830: 8 American States repudiate their debts after popular protests due to infrastructural projects signed by the State but linked with corruption. After pressure by the people, the States took a sovereign unilateral action against these manufacturers.
- Mexico, 1861-1867: Mexico repudiated its debts which they considered odious and illegitimate. The French re-imposed the debts after which they were repudiated a second time with success.
- USA, end of the civil war: victorious States of the Union repudiated their debts from the South.
- Russia, first Russian revolution 1905: financial manifesto issued by revolutionaries asked for an audit of the Tsarian debt and announced after the revolution a repudiation of this debt. Effectively

¹ <http://clubdeparis.fr/?-English->

after the revolution, the third big decree they issued was to repudiate all Tsarian debts for which the creditors were France and the UK.

- Brazil, 1930s: They suspended the debt payments and organized an audit.
- Ecuador, 2008: A committee of public debt was created. They analysed the public debt of Ecuador which ended in a unilateral decision of the Ecuadorian government to suspend the payments and to issue a major debt cancellation in 2009.
- Iceland, 2008: They suspended their debt repayments towards the UK and the Netherlands (*Icesave* case). Under popular pressure, they refused to compensate for the lost deposits. They also had a victory for the arbitration court.

A counterexample is Greece: The Greek Government could have suspended their debt repayments after the debt audit. Yet, instead of supporting the Truth Committee on Public Debt, it was put under pressure by the European Central Bank and the European Commission and finally entered into negotiations with European institutions. This ended in giving up. Prime Minister Alexis Tsipras should have unilaterally suspended the debt repayments to change power relations with the EU. Two lawyers – who are members of the ETO Consortium – participated in this Truth Committee on Public Debt.

States and international institutions should respect and apply their ETOs. In order to achieve this, peoples' movements are necessary to put pressure on States. Through these movements, we can find governments that have the courage to take sovereign unilateral actions against their creditors which can lead to a victory.

Oral intervention 1.2: How do Economic Considerations affect the Implementation of Socio-Economic Rights?

Ben Warwick, Birmingham Law School

Ben first gave some comments on what Eric said:

1. It is important when using the idea of dominant creditor States that dominate debtor States through financial means, to complicate the notion. States might act on the two sides at the same time. They might dominate their population by finance and debt while being dominated internationally.
2. Eric mentioned the use of informality as a means for powerful States and alliances of States to keep things below the surface. It goes further than informal clubs. Also formal clubs use informal means. For example: in the EU, they often come to agreements at times when not everybody is there or where there are no translators, etc. If we think about legal mechanisms to introduce ETOs and tackle debt, there has to be a strategy for addressing these informal mechanisms. There is no use in changing formal mechanisms when major decisions are taken in informal manner. If we want effective accountability, we need to go about elaborating upon what States' responsibility means (i.e. what formal and informal decisions they are responsible for).
3. Civil disobedience has a real role to play, but I have two points of caution: Firstly, contrary to Eric's view, I suspect the idea that the refusal to repay your debt could be based on international law is a too expansive reading of international law. Secondly, it is important to consider the possible consequences. Whatever the merits in the medium or long term, if a State defaults on its debt there will be serious short term consequences, and these are likely to fall on the most vulnerable people and communities without serious preventative/corrective action. If you think about Greece: what would have been the consequence if it had defaulted on the debt?
4. What is the meaning of legitimacy in Eric's use of the term? If legitimacy means only things we do not like or debts we would have wanted not to pay for, it becomes relatively meaningless.

Ben then turned to his own contribution and identified some links with ETOs: what can ETOs mean for social movements? ETOs have a radical potential in what they might bring to us, e.g. how to use social rights against neoliberal austerity measures. There remains a very limited understanding of what ETOs can

contribute to confront States with their human rights obligations. There is still a lot of work to do on this regard. It is related to how we see State obligations. If we focus only on obligations of States within their national borders, then the rights framework can become constrained by the limited resources of States; but ETOs give possibilities to seek responsibilities beyond borders.

It is worth unpacking on what level we contest debt and austerity. Do we contest it based on an individual right or based on more general human rights. Right to food is very specific and useful but when we talk about austerity and debt, it is much less specific and in this case ETOs might be more useful to use.

We cannot equate things that are not commensurate and therefore should be cautious about seeking to balance human rights with other interests, for example, with the claim that we cannot spend more on housing as we do not have the budget due to a deficit. The two things should not be ranked as equally important. For an improvement of housing, the deficit can go slightly up. Human rights can become subordinated by economic rhetoric. Putting a price on human rights is problematic.

Discussion

Questions by participants

1. One of the most recent strong human rights violations was the incineration of Grenfell Tower. In this case, it was not related to lack of finances of the State. North Kensington has a lot of money. Should we not see these violations as more influenced by a political vision than by economic rhetoric?
2. As lawyers, we have to analyse the notion of legitimacy. It is tied to the capacity of the State. I would like to hear a few more of your reflections and why you feel uncomfortable engaging with it?
3. You mentioned we should be strategic when using a certain type of rights (specific rights and broader concepts). In my field – the environment – both are relevant. Could you elaborate?
4. Investment arbitrations are now also used in debt-related cases. Do you see it as an extra layer of complexity?
5. Human rights and economics should not be put on the same scale. However, this is what constitutions and policies are doing now. How do we go in another direction as the world?

Eric Toussaint

There is a co-responsibility of debtors and governments. In general, debtor governments are co-responsible with debtors. Furthermore, government members usually belong to the dominant class in their countries. From the beginning, the elites in debtor countries are supporting the creditors. The people need to go against their own governments and the debtors.

There is a lot of information on the question of legitimacy. An interesting doctrine to address this question is the doctrine of odious debt. This doctrine is underestimated by lawyers but was for example used by the USA after the invasion in Iraq. They used it because it was in their interest. They wanted the cancellation of Iraqi debt in order to reintroduce new debt after the war so as to finance construction. In the camp of our enemy, they use the doctrine of odious debt when it is in their interest. Some important lawyers (such as Mitu Gulati) have argued we have to use the doctrine of odious debt in the case of Venezuela. This doctrine is discussed in many places such as the EU and Geneva. This doctrine is part of international law. There are two criteria according to Alexander Nahum Sack: 1) the debt was not in the interest of the people and 2) the debtors knew or should have known it was not in the interest of the people.

On Greece, we can say it is complicated but I was very much involved. We produced a report which showed the illegitimate and odious debt. Since the beginning, the European Central Bank (ECB) closed the access for Greek banks to liquidity. You need to suspend payment to creditors to be able to negotiate with creditors. You have to change the balance of power. The situation is complicated but we have to analyse what

happened. If only Alexis Tsipras had had the courage to suspend the repayment and to use the money to invest, the situation would have been quite different today.

Ben Warwick

It is necessary to deconstruct what happened and what might have happened. We need to deconstruct political, institutional and practical ways in which austerity is implemented. Economics are often a placeholder for an ideology, where actually it is a choice to not invest in people. In our world, you have to divide and balance resources, but you can always make new claims to resources and find new resources somewhere.

Balances are necessary, individually and in broader dimension. The International Covenant on Economic, Social and Cultural Rights (ICESCR) is the most important treaty on those rights and integrates certain balances.

Regarding the question of legitimacy, we need to do a lot of work on analysing what it means. What I am uncomfortable with is the broad use of legitimacy, for example if it is a reaction on something by an elected government I disagree with.

There are different levels of advocacy and an important issue is how holistic your advocacy is (large issues or specific issues). We have to be alert to use the right level depending on the policy we are targeting. If the policy is very specific, do not go in with very broad terms.

Other questions

- In the case of Greece, what is the responsibility of States when involved in supranational bodies? What role did the Member States play within the European Union and/or did the European Commission have a clear mandate? The same question for the IMF: what are the roles and responsibilities of States parties to the IMF?
- Looking at the big manifestations of neoliberalism in relation to human rights: in relation to debt, I think it is important to show that in the last decades, agreements have been put in place between States that have rolled back agreements which put human rights more in the center of international relations. This is particularly relevant for social movements' struggles. The big question seems that EU Member States went along with it. There was no independent voice to contest.
- There was international solidarity at peoples' level, but when the actual crisis came there was a strong paralysis of international solidarity. Where do you see the role of movements to reclaim human rights at the centre of international relations? There is a strong role for the legal profession.

Eric Toussaint

14 States from the Eurozone gave loans to Greece in 2010. They needed to go very quickly to protect the interests of the private banks of those countries which were directly exposed in front of the Greek debt. They lent bilaterally to Greece. Afterwards, they created a European stability fund to avoid this exposedness in the future. We continue to campaign against the policy of our governments, who will reclaim from 2022 onwards the reimbursement of an odious debt given to Greece. This debt has serious human rights impacts. The European States are violating their ETOs towards the Greek people, because they continue to demand austerity measures towards the Greek people with a strong adverse human rights impact. They have direct responsibility as direct creditors to the Greek people. During the negotiations, the Greek government did not explain to the people what was happening during the negotiations. As a progressive government, you have to contest these secret negotiations.

Ben Warwick

How do you prepare for the collapse? You have to plan and anticipate what will happen. It is important that lawyers speak out. To make them more progressive, they need to mix with other disciplines.

2. Climate and Ecology

Written Contribution 2.1 - End Ecocide on Earth

Marie Toussaint
End Ecocide on Earth

In the early 21st century, the struggle for an autonomous and powerful environmental law has still not been posed yet as a political question. Environmental law has emerged in a sectorial, piecemeal manner addressing the environmental harm caused in times of war, as well as certain questions of environmental health, or around nuclear or industrial plants... The key environmental, social and political struggle of our century is therefore the struggle to address environmental harm, in particular severe harm, no matter whether this harm is intentional or unintentional, or whether it directly affects human beings or "only" eco-systems.

What is ecocide?

The term ecocide comes from the word *eco* which means « house » in Greek and the word *cide* (from Latin *caedere*, which means « to kill »). An ecocide is a severe damage covering one or more eco-systems or their destruction. It can have consequences for several generations and for the survival of humanity.

Crimes against the environment are classified according to their severeness. In order to come to a definition, the team of Johan Rockström at Stockholm University formulated in 2009 nine planetary boundaries. They are today part of the terms of reference of the UN, defining the safe operating space for the human beings avoiding planetary destabilisation.² Ecocide refers to environmental harm relating to these boundaries.

A situation of impunity

Applying the Maastricht ETO Principles could help responding to this severe environmental harm and overcoming the situation of impunity of many States, TNCs and individuals.

Principles 1 and 2 apply in particular as certain populations are discriminated and suffer a greater impact than others from the environmental harm: the youngest, the old people, women and indigenous peoples The freedom of expression or the right to obtain effective legal recourse are also affected, as well as the right to life: in 2016, at least 200 environmental defenders were killed...

Principles 3, 4 or 8 could be used in particular to respond to situations when States fail to protect their populations or fail to take steps «to the maximum of their capacities ». Tepco, for example, decided to build a wall, 10m high, instead of the 13m recommended by the scientists in order to keep toxic nuclear waste from spilling into the Pacific.

Principle 24 could also be used to avoid that TNCs ignore national jurisdiction (Bhopal, Chevron-Texaco...). It would allow to limit the involvement of banks or enterprises that invest in projects that destroy the environment and entail violations of human rights: Mega-dams like Belo Monte, or gas-lines like the Dakota Pipeline.

The law of compensation is also not applied, as in the case of Probo Koala, where only 1 million Euro was paid by the European enterprise to Ivory Coast.

A new Earth Law, the example of climate

² Global warming, collapse of biodiversity, human interference with the nitrogen and phosphorus cycles, reduction of the ozone layer, acidification of the oceans, depletion of fresh water resources, loss of top soil, chemical pollution and atmospheric pollution by aerosols.

The citizens that started to come to the rescue of the climate the world over also frequently make use of ETOs. The Maastricht Principles, however, have flagrant limitations. On the one hand they do not apply directly to TNCs. On the other hand ecocide has a multitude of responsible actors – in the climate case, the Heede report points to 100 enterprises being responsible for 52% of GHG emissions since 1751. And finally, because the harm done does not always have a direct effect on human rights. In the case of the climate, we know that the current emissions will have effects for many decades, and still nothing allows us today to condemn the growth of Total's production capacity.

In India, Colombia, New-Zealand... rights of nature have been recognized in order to overcome these legal obstacles. We are dealing here with the third generation of rights – based on the rights of future generations, the respect for planetary boundaries and the solidarity with all living beings. The recognition of ecocides, which works both on the prevention and the remedy for such harm, provides its corner stone.

Written Contribution 2.2 - Why climate, biodiversity and human rights dynamics go beyond borders

Claudia Ituarte-Lima
Stockholm Resilience Centre

The interplay between climate, biodiversity and human rights demands rethinking States' obligations to respect, protect and fulfil human rights in order to consider dynamics at multiple levels.

While many human rights cases are local in their direct impacts, they are increasingly an outcome of interconnections and social-ecological system dynamics that go beyond national borders. These complex dynamics include for example the nexus between progressive and unexpected sudden events derived from climate change and degradation of ecosystems. Biodiversity and healthy ecosystems, which are key for human prosperity, are rapidly being degraded and destroyed with grave and far-reaching implications for exercising a wide range of human rights especially the rights of individuals and groups in vulnerable situations (Knox 2017).

Networked global environmental risks are risks where causality and impacts are connected across continental scales, display complex systems properties, and are highly contested such as the 2008-09 food crises (Galaz et al 2017). Proposals that have emerged in the literature for addressing such risks include overarching principles for Earth system governance (Biermann, 2015) and proposals to acknowledge "Ecocide" as a "crime against peace" (Higgins, Short, & South, 2013).

As for State's extraterritorial obligations to protect human rights, innovative interpretations by national courts linking general principles of international law, climate and human rights law can offer interesting insights on the strategic use international law to foster sustainability and climate justice. For example, in the case *Urgenda v State of the Netherlands* the Court recognised that Dutch emissions are among the highest in the world and employed general principles of international law, such as the 'no harm' rule as well as human rights such as the right to life (Article 2 ECHR) and the right to health and respect for private and family life (Article 8 ECHR) as a source of inspiration to define the State's duty of care in a climate context (Lambrecht, J, and Ituarte-Lima, C 2016). These types of cases could serve to interpret point 25.a) on "harm or threat of harm (that) originates or occurs on its territory" of the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (Maastricht Principles).

Likewise, the nexus between climate and biodiversity dynamics is relevant when understanding and acting upon States Obligations to Protect human rights and point 25.a) of the Maastricht Principles in the context of contemporary social-ecological dynamics. The increase of pests is affecting negatively agro-diverse forestry systems. For example, the rust disease is significantly affecting shade-grown coffee which is the main source of livelihoods of millions of family farmers

in the Global South (Libert, Ituarte-Lima and Elmqvist forthcoming). These impacts, which are intertwined with climate dynamics, can have significant effects on various human rights such as rights to food and right to health. State's Obligations to protect human rights in these cases would entail for example a prompt declaration of phytosanitary emergencies and collaboration between States to address these type of socio-ecological crises. International schemes for financing climate mitigation, such as Reducing Emissions from Deforestation and Degradation and forest enhancement (REDD+), have generated concerns about the effect of large influxes of money on the human rights of local land users, and biodiversity. While there is agreement on the need for safeguards to prevent negative effects, how prescriptive or flexible those safeguards should be is not well understood. We have found that State's procedural obligations (e.g. public participation, freedom of speech and expression, access to justice) in climate and biodiversity related mechanisms are intertwined with substantive rights such as tenure/property rights (Ituarte-Lima and McDermott 2017, McDermott and Ituarte-Lima 2016). Both types of rights and their interactions need to be taken into account respecting, protecting and fulfilling States' obligations. The Maastricht Principles in particular Section V. on obligations to fulfil would be relevant in the interpretation of these obligations.

Questions for dialogue:

- Considering that humanity depends on the ecosystems for its wellbeing and ultimately for its survival; when the Maastricht principles mention "Primacy of human rights among competing interests", could we think of "Primacy of human rights *and safeguarding Earth's life support systems* among competing interests"?
- Taking into account advances in environmental law as well as considering that human rights, healthy ecosystems and biodiversity are intertwined, what would be the pros and cons of expanding the definition of scope of extraterritorial obligations of States mentioned in Section II of the Maastricht principles? Specifically, expanding the scope to include obligations of global character set out in *other relevant instruments including in environmental law*, complementary to those set out in the Charter of the United Nations and human rights instruments?

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Written Contribution 2.3 - ETOs in the field of climate change

*Juliane Voigt and Eva Filzmoser
Carbon Market Watch:*

As States work towards developing the post-2020 climate architecture in the United Nations Framework Convention on Climate Change (UNFCCC), it is crucial to reflect on what has worked so far and what has not. One reason efforts have fallen short —or worse, led to additional problems— is a failure to fully appreciate the harm that can result from actions we take to mitigate climate change. This includes harm to individuals, indigenous peoples and communities.

With melting glaciers, rising sea levels, and stronger and more frequent storms, droughts and floods as a consequence of industrial activities in a number of States, it has become clear that the respective States extraterritorial human rights obligation on ESCR have been breached: The victims usually live outside the borders of those States that are largely responsible for global warming. Perhaps less immediately obvious, but clear from recent examples, is a new type of human rights violations resulting from climate change mitigation action: Mitigation in the context of climate stabilization measures refers to actions taken to prevent or reduce further contributions to the disruption of our climate, particularly by reducing emission levels and stabilizing greenhouse gas concentrations in the atmosphere.

Mitigation actions have in some cases caused harm to the environment and people —affecting the enjoyment of the rights to life, health, food, water and sanitation, housing, and culture, among others. Invariably, the poor and most vulnerable have been the hardest hit (due to factors such as geography, gender, age, disability, and indigenous or minority status).

One example is the Barro Blanco hydro dam in Panama. Despite opposition by the indigenous communities, the project was registered under the Clean Development Mechanism (CDM) in 2011. European development banks from Germany (DEG) and the Netherlands (FMO), as well as the Central American Bank for Economic Integration (CABEL) loaned US \$78 million for the financing of the project. Worryingly, local communities and indigenous peoples affected have not been appropriately consulted, in violation of the internationally recognized notion of free, prior and informed consent (FPIC). Moreover, peaceful protests were violently repressed and the recent flooding of the area saw cultural important sites and living grounds irreversibly destructed.

Indeed, as countries develop the rules needed to operationalize the Paris Agreement, they have to should apply the same sort of forward-thinking approach to planning and to avoiding harm that they would for any other kind of project. For instance, if a community needed a school, but during the construction of the school, the community's homes would have to be bulldozed to make room for the equipment and site of the school, every attempt would be made to alter the project design to avoid that counterproductive result. Similarly, mitigation actions can end up causing more harm than good if not approached correctly. Proper planning in the design and implementation — each with full and effective participation and, when applicable, free, prior and informed consent of affected peoples and communities— are crucial to avoiding harmful consequences of mitigation actions. States involved in funding or implementing such projects directly or via an intergovernmental organisation carry extraterritorial obligations to protect human rights in this context.

Is there hope? Yes. It is entirely possible to undertake climate change mitigation actions without causing harm to peoples and communities. Unfortunately, some UNFCCC mechanisms have not taken the necessary steps to prevent such harm —and in some instances, mitigation actions have threatened or violated human rights.

Yet, the wealth of experience offered by the CDM is enormously valuable in informing the numerous processes that are currently being established to channel billions of dollars of climate finance - including public money. In the development of these new structures, it will be important to learn from these lessons and meet the respective territorial and extraterritorial human rights obligations in climate finance payments.

Written Contribution 2.4 - Tracing extraterritorial human rights accountability of (multilateral) development banks in climate finance

Jeanette Schade
ClimAccount

The purpose of this 2-pager is twofold. It summarizes the main findings of a case study on human rights infringements related to a renewable energy project in Kenya. Such cases raise the question of climate justice in terms of asking “who bears the social costs” for the energy transformation climate experts are calling for. In fact the marginalized sections of society often incur both the injustice of climate change and of climate policy. Additionally, the 2-pager demonstrates a way how to investigate the responsibilities of the financiers of climate projects who rarely violate human rights directly because they are not the implementers. Usually they are not even domiciled on the same territory as are the victims. Therefore it is core to establish a sound causal chain between a violation at the local level and the distant acts and omissions of a financier when exercising their due diligence.

In this context it is noteworthy that most climate finance comes from other sources than funding mechanisms of the United Nations Framework Convention on Climate Change (UNFCCC). In recent years, national and multilateral development banks' (MDBs) climate finance has constituted up to 42 per cent of global climate finance. Financing renewable energy accounts for 35 per cent of mitigation finance from MDBs and for 81 per cent of global climate finance (public and private). Since 2013 the European Investment Bank (EIB) has an annual percentage target for climate lending of at least 25%. EIB climate funding in developing countries ranks second after the World Bank. In the case presented both have been major financiers.

In 2015 a human rights impact assessment of a resettlement measure was conducted as part the ClimAccount research project. The assessment looked specifically at the extraterritorial human rights obligations of the European Union in relation to its climate policies. The case in point was the resettlement of four Maasai communities – a total of 1,200 persons – due to the construction of a geothermal power plant in Kenya, Olkaria IV, registered with the Clean Development Mechanism. Olkaria IV was financed by the World Bank, the European Investment Bank (EIB), the French Development Agency (ADF), and the German KfW. The subsequent resettlement was investigated by the EIB's institutional complaint mechanism (EIB-CM) and the World Bank's Inspection Panel. The investigation process resulted in mediation between the aggrieved project-affected persons (PAPs) and the operator.

From a human rights perspective, the detected breaches of bank safeguards translate into infringements of substantive human rights such as the right to adequate housing (lack of houses, threat of mudslides), the right to water (unreliable water supply), and the right to an adequate standard of living more generally (problems related to the re-establishment of livelihoods). The resettlement also threatened the right to health and to a healthy environment (proximity to a new geothermal drilling, threat of mudslides, and human-wildlife conflict), which could also amount to threats to the right to life. Inadequate compensation and the failure to transfer the promised title deeds of the land to the PAPs to date further breached their right to property. Finally, the non-application of the World Bank's Operational Policy on indigenous peoples (OP 4.10) infringed on the Maasai's rights as indigenous peoples, specifically their right to benefit

sharing and to special procedures in negotiations, such as the translation of documents into Maa. Additionally, the applied mechanisms for participation and complaint on the operational level had been put in place belated, were coordinated by the operator (KenGen, a parastatal enterprise) instead of a third-party entity, and enjoyed little trust because of suspicions that some village chair persons have been bought over.

The actor accused by the PAPs was mainly KenGen and the Kenyan State. However, also the financiers breached the rights of PAPs. This can be best demonstrated by analysing their human rights due diligence performance along the three main phases of a project cycle: Pre-appraisal, appraisal, and monitoring. *Pre-appraisal* determines the applicable safeguards that, depending on their quality, may amount to adequate human rights standards. The Environmental and Social Impact Assessments (ESIA) conducted for the *appraisal* and other resettlement-relevant project documents allow decision-makers of banks to make informed decisions about project approval. *Monitoring* during implementation allows the banks to observe whether applicable safeguards are actually implemented and, if necessary, to request adjustments according the bank-client contract.

The *pre-appraisal* document for Olkaria IV determined OP 4.10 to be applicable. OP 4.10 was, however, not applied because of negotiations between African governments and the World Bank that OP 4.10 is understood to apply to hunter and gatherer communities only and not to pastoralists. Though recognized by the African Commission on Peoples' and Human Rights as indigenous the pastoralist Maasai had instead been categorized as "vulnerable group" and only OP 4.12 on involuntary resettlement was applied. The banks thus breached the PAP rights as indigenous people.

The ESIA prepared for the *appraisal* indicated that there was evidence of soil run-off and that this threat would increase if less- or non-permeable surfaces were erected – such as houses, and requested specialized hydrological studies. However, lenders seemingly failed to insist on additional studies and consultations on the quality of the resettlement land. This arguably contributed to inadequate land-for-land compensation and to the threat of mudslides. Further, whilst the first version of the ESIA (2009) mentions a land conflict between the Maasai and the registered land owner (Kedong Ltd.) the paragraph disappeared in a later version (2012) despite the fact that some Suswa Maasai in the meanwhile had filed a law suit against Kedong Ltd. In the contrary, the resettlement action plan (2012) reports that, according to the operator, there are no other people claiming ownership. As a result the PAP (Okaria Maasai) moved to the new site without land ownership being clarified, and are still land insecure.

Mechanisms for participation and complaint are a core instrument to ensure the consideration of PAPs' interests in project planning and *monitoring*. As described above the mechanism for Olkaria IV suffered from several flaws. Financiers arguably contributed to these flaws by insisting in establishing the agreed mechanisms only in 2012 when the contentious issue of site selection was mostly concluded. Further, they supported that it was not a third-party mechanism in order to ensure KenGen's project ownership. They never met PAP unaccompanied by the operator, actively discouraged PAP to complain directly to them and did not inform them about their independent complaint mechanisms. The complaint letters the banks had received were only submitted to the complaint mechanisms upon request. Thus, PAPs' right to access to justice was breached severely.

A final concern is the delegation of responsibility in co-funding arrangements. It impeded adequate engagement of EIB social experts in pre-appraisal and appraisal, and impaired the investigations. EIB Services withheld communications with co-financiers about sensitive issues, arguing the EIB-CM has no mandate over these. This was particular ironic, because the co-financier in charge of social due diligence, ADF, by that time had no independent complaint mechanism, and no light was shed on its role. According to the European Court of Human Rights, the delegation of responsibilities must comply with two conditions in order to be

legitimate. It may be ‘... justified as long as the relevant organization is considered to protect fundamental rights, as regards both the *substantive guarantees* offered and the *mechanisms controlling their observance*, in a manner which can be considered at least equivalent ...’ (Bosphorus decision). But social due diligence for Olkaria IV was transferred to the European financier least capable of exercising it, and for the resettlement it was transferred to the World Bank, which did not apply OP 4.10.

Related Publications:

2017 International Climate Finance Mechanisms and Extraterritorial Human Rights Obligations: Status Quo and Future Prospects; mit Wolfgang Obergassel, Lauri Peterson, Nicolas Kreibich, Timo Beiermann; ein Dossier von FIAN Deutschland; <https://www.fian.de/artikelansicht/2017-07-19-internationale-klimafinanzierung-und-risiken-fuer-die-menschenrechte/>

2017 Kenya ‘Olkaria’ Case Report, Bielefeld: COMCAD Working Paper 151/2016, COMCAD – Centre on Migration, Citizenship and Development. Bielefeld; www.unibielefeld.de/soz/ab6/ag_faist/downloads/WP_151.pdf

2016 Assessing the Evidence. Migration, Environment and Climate Change in Kenya; Jeanette Schade, Dulo Nyaoro. Kerstin Schmidt; Project Migration, Environment and Climate Change: Evidence for Policy (MECLEP), Internationale Organisation für Migration (IOM), Genf. (Link) (Download)

2016 Human Rights Performance in EU Climate Policy. The Role of European States in Climate Measures, and Access to Justice for Affected Populations; Synthesis Report of the ClimAccount Project, Schade, J, Ammer, M., J. Hofbauer, M. Mayrhofer, F. Mersmann und W. Obergassel (Download)

Oral intervention 2.1: Recognizing Ecocide as one of the gravest crimes

Marie Toussaint, End Ecocide on Earth

For some time now, lawyers lobby for the recognition of ecocide under national and international (human rights) law. Today, existing law does not take ecocide into account.

A key problem here is the more indirect and delayed effect and impact (“time lag”) of the attempts on the environment. As well as the fact that environmental damages can be caused without being committed on purpose. Moreover any attempt on the environment has consequences on the entire planet, without any legal basis to prevent and punish it. So we need a qualification of direct and visible as well as invisible ecocide to put this on the agenda. For example, the Chevron-Bhopal case had massive impacts – but no legal consequences.

There are also many constructions to escape the law. One is to escape behind national borders. So there is an inherent need for international law when dealing with ecocide. For example, there is the case of ships that are full of toxics in Ivory Coast. These are European ships. The law only held them responsible (a 1 million Euro fee) for not properly loading the boat. On the other hand, these companies make 75 billion Euro profits a year.

We have weaknesses in laws and especially for the implantation of precautionary law. An example here: TEPCO (Tokyo Electric Power Company) builds a 10-meter-high wall in Fukushima while all experts say there is a need for a 13-meter-high wall at least. But you can merely say that there is a risk building only a 10-meter-high wall. No law takes into consideration the risk dimension.

So we need new law: binding environmental legislation. And we need the **recognition of ecocide**. We consider this at the same gravity as crime against humanity because bringing the planet in danger is bringing all of humanity in danger.

We need real, clear and strong interdiction of doing harm to people. There are many examples of climate change – like e.g. the increase in number of tornados, etc. – but we cannot hold anyone legally responsible for this. ETOP 13 (“Obligation to avoid causing harm”) would be a good basis for this. ETOP 24 supports the regulation of activities of international firms.

There are positive signs: Environmental destruction became a stronger focus of the International Criminal Law (ICC).³ Yet, so far, it is impossible to sue TNCs at the ICC. Even though there is no international environmental police in place, citizens could, as a strategy observe, document and send cases to the ICC and national governments.

Furthermore, we have to keep in mind the different impacts of ecocide and the issue of non-discrimination: the impact of climate change on women, elderly people, indigenous peoples, etc.

ETOP 4 on “maximum of its ability” is also relevant for the discussion.

Final remarks:

- The environmental question is also a question of democracy, as environmental activists are often brutally silenced.
- The question of future generations: Can or should a child go to court? How can someone defend the rights of people not yet born?
- The problems about direct causality and the dimension of time. See Roundup Ready soybeans, plants dying, two-headed pigs....

States are considered as responsible for people’s sovereignty. Maybe a new international citizenship is needed to not so much rely on States?

Oral intervention 2.2: The Biodiversity-Climate-Human Rights Nexus

Claudia Ituarte-Lima, Stockholm Resilience Centre, Stockholm University

Claudia addressed the nexus between biodiversity, climate change and human rights. She said we need to rethink the respect, protect, fulfil framework in the context of complex social-ecological dynamics and impacts that go beyond the boundaries of one Nation State. Global environmental risks have very complex cause-effect links that are difficult to prove in human rights settings. Yet, they have significant impacts on human rights and a healthy environment and hence the urgent need to understand and act upon these dynamics. She gave examples which are further explained in the written contribution.

She argued that we have to think holistically: humans are part of the biosphere, that sphere that encompasses all air, water and land on the planet in which all life is found. We have to resolve the dichotomy between people and nature. Both groups – environmental and human rights movements and lawyers – should work more hand in hand to achieve complementary objectives. Human rights such as right to food and health depend on life support systems and also exercising human rights such as right to participation and information, access to justice contribute to healthy ecosystems. The implementation of human rights and environmental law is vital for a prosperous future for present and future generations. Hence, laws for safeguarding human rights and ecosystems should have primacy in case of conflicting laws and interests such with laws governing the extractive sector.

³See “ICC widens remit to include environmental destruction cases”, *The Guardian*, 15 September 2016. Accessed here: <https://www.theguardian.com/global/2016/sep/15/hague-court-widens-remit-to-include-environmental-destruction-cases>.

Oral Intervention 2.3: Climate Change Mitigation and Clean Development Mechanism

Juliane Voigt, Carbon Market Watch

Climate change has significant effects on human rights. And these are the consequences of the conduct of the industrialized States, while climate change traditionally hits the most vulnerable by far the most.

But climate change mitigation equally can have severe effects on human rights (right to housing, right to health...). Example: the Clean Development Mechanism (CDM) under the UNFCCC. The aim is to have a most cost-efficient contribution to climate change mitigation. Here are always two countries involved. Industrialized nations can “reduce emissions” wherever in the world’s cheapest certificates are offered.

The case Barro Blanco (large dam project in Panama): there were already major concerns when this project was registered under the CDM. Despite these concerns, the project got registered and development banks gave money (FMO und DEG). No FPIC was guaranteed and peaceful protests have been criminalized. This led to a 1st complaint ever at DEG (German Development bank) and it concluded that the bank failed especially to comply with indigenous rights. But nothing ever happened. Then, test flooding occurred in 2015 that also flooded a school. Only in 2016, the CDM withdrew this project from its accreditation.

This is one of many negative projects in the context of CDM.

Now we have the Paris Agreement. And there is a reference in its preamble on human rights. There is a new mechanism in the Paris Agreement: Sustainable Development Mechanism (SDM – negotiation on this will take place end 2019). So, there is a chance (again) to make human rights work in the context of CDM. But on the other hand, the SDM does not seem to really “learn” from CDM as no grievance mechanism is being discussed.

Oral intervention 2.4: Applying Safeguards in Clean Development Mechanisms

Jeanette Schade, ClimAccount Researcher

Jeanette and the ClimAccount Project investigated three projects registered with the Clean Development Mechanism (CDM). All three projects involved involuntary resettlement measures that led to human rights violations. All three cases also involved investigations by complaint mechanisms of the financing banks (multilateral development banks).

Lead questions: European States have ETOs, but what exactly are the related and distinct obligations in a mix where you have a host State, an operator and international financing?

Can we make the international funders directly responsible, even though they have not directly effected the harm and often even have not been present in the area where the harm was suffered? So what exactly is their responsibility – their human rights due diligence? This responsibility is linked to the project cycle. It is key to do proper pre-appraisals and assessments and then to decide which safeguards should be applied, and to monitor and control the application of the safeguards adequately. Further, access of project-affected persons to complaint mechanisms, may it be extra-judicial ones, is core.

In the pre-appraisal phase it is decided which safeguards of the financiers are applied. They become part of the financial contract. Depending on the selected safeguards Environmental and Social Impact Assessment (ESIA), resettlement plans, indigenous peoples’ plans have to be conducted by the operator. The operator has to write periodical reports how safeguards are implemented. Usually only once a year the financiers make own visits, which are usually guided by the operator. Thus they do not really have an independent clear view on the projects – maybe even do not want to have this detailed view.

So, it is key to choose the right and relevant safeguards, read them carefully and have a plan how to do the monitoring (big difference between own monitoring, not guided by operator or guided visits). In many cases safeguards could be improved, but the bigger challenge is controlling and ensuring the implementation of safeguards properly.

An additional complexity in real life is to know how to deal with multi-actor-financing of projects. It is important to look at who has the lead regarding safeguards and social responsibility. In one case, the financier/bank having the lead for social due diligence did not even had an institutional complaint mechanism.

Discussion

Some general comments and questions at the beginning:

- There is a weak conceptual foundation on ETOs in environmental law which makes it shaky to construct obligations. E.g. the concept of “common concern” could be helpful in this regard.
- Being very concrete is very good. In concrete case work, detailed causalities have proven to be very helpful.
- Is there a need for UN Guiding Principles on business and the environment?
- We must better use existing law.
- Indeed, law is often part of the problem. Law is inherently conservative and protects the interests of the rich. Human rights are better in this regard. We therefore need to engage more with social movements, in demonstrations.... This is an inherent part of solutions. Law is both part of the solution and part of the problem. And we have to be clear that “safeguards” are not law.
- One key pillar of the right to food is stable access to natural resources. This exemplifies that there are relevant links to environmental issues in human rights law. We have to make use of them.

Do we have to establish causalities? The Maastricht Principles are clear on this as they refer to “foreseeable risks”. So, there is no hard need to establish a causal relationship. On the other side, it is also considered that establishing causality is important especially in the case of concrete violations and for policy processes. Furthermore, establishing causality is often very helpful, also when it comes to public relations work.

Open questions: Are clashes between human rights and environmental law due to not updated legal texts or to substantive ideological differences? In France, e.g., there is a case law where the judge’s decision claimed that the right to property prevents us from stopping climate damaging projects.

We need an explicit right to clean and healthy environment.

Human rights instruments are living instruments and should be adapted to new developments and contexts. At the same time, a matter of fact and of concern is that some actors use the discourse of environmental protection to abuse human rights.

We also have a problem of both rights holders’ and duty bearers’ capacities. This becomes obvious when we look at environmental ministries in Global South States.

Key issue is that we often have good safeguards but extremely weak operationalization. Another big problem in this context of environmental justice and ecocide is the weak access to justice. At global level, the UN process for a Binding Treaty on TNCs and other businesses in relation to human rights is relevant in this context.

A question for the working groups is to know how to reach out to the EU on this issue.

3. Degrowth and Monetary Reform

Written Contribution 3.1 - Wachstumswende and Degrowth

Helmut Federmann
Wachstumswende e.V.

1. Introduction

Wachstumswende is a network of persons mainly in Germany, who join to find solutions for a society beyond growth imperatives.

Everybody knows: Unlimited material growth of the human economy on this small planet with limited sources for production and sinks for waste is impossible.

The material limits to a beneficial economy have been surpassed, the future generations have been put at severe risk. Imagining an economy beyond economic growth is one of the great challenges of our times, to prevent a social and environmental debacle that could threaten humanity itself.

How do we steer the economy and society away from this deadly course into a new economy with the elements listed below?

2. What is Degrowth?

2.1. Degrowth is a theory of societal change where this is debated.

Degrowth is not:

- the inverse of GDP growth;
- Degrowth is critical of the GDP concept - nor is it only a quantitative question of producing and consuming less.

It is a tool proposed for initiating a more radical break with dominant economic thinking - 'reordering' of our value system and state functioning along the lines of economic, social and cultural rights beyond borders.

It's research and actions create new thinking in socio-economic analysis and relations. Current orthodoxy (neo-feudalism) reduces the human being and its existence exclusively to one – exploitable – dimension.

We now need Commons and Cooperation instead of economic competition and “market solutions” alone.

We need decoupling, dematerialization and fossil fuel divestment for changing the amount of material and quantity of energy throughput in our economies.

2.2. Elements of Degrowth

- **reformulation of political economics in relation to biophysical constraints**
 - less exploitation of natural resources,
 - reducing ecological footprint per person
 - lower levels of material throughput
 - less materialistic wealth – „consume less and share more”
 - not relying on growth-enhancing market relations
 - a transition to a state of less production and less consumption.
- **striving for social justice worldwide**
 - socially sustainable economic degrowth
 - more worldwide equality

- **political aspirations**
 - conducive environment for economic social and cultural rights
 - broadening of human relationships and deepening of democracy
 - people's sovereignty
 - better quality of life.

3. Some major Degrowth policy issues for ETOs

Degrowth has severe repercussions world-wide in international relations and hence in the related ETOs including ETOPs 20, 21, 24, 29, 32:

On a global scale there is a correspondence between debates on degrowth in the global north and on post-extractivism in the global south, as the sustainability limits of the planet are being reached.

Overconsumption in the North is based on extractivism in the South. Degrowth in the North puts an end to economic growth. In the global South, growth must be differentiated into “good and bad growth”. The global South must seek sustainable life options that are not a mere caricaturesque copy of unsustainable western/northern lifestyle.

As important steps in this direction, Nature must be de-commodified and economy must be rethought and subordinated to ecology.

Extractivism follows the logic of growth which is part of the “genetic code” of today’s economic system, programmed to grow or die. It is not only promoted by neoliberal political forces in Latin America, but also by “progressive” governments. The neoliberal international regime of plunder has to be replaced by multilateral agreements based on ETOs that include

- changing the lifestyle in the global North by reducing fuel consumption and material throughput. in absolute quantities. It has to be realized, that the poor are not victimized in this process.
- overcoming extractivism in the „global South“
- restructuring national and international financial systems
- reformulating and implementing a new generally accepted accounting scheme on wellbeing instead of the misleading indicator GDP.

Written Contribution 3.2 - How to escape the growth imperative?

Oliver Richters

Carl-von Ossietzky Universität Oldenburg

The UNESCO *Declaration on the Responsibilities of the Present Generation Towards the Future Generation* states in Article 1 that “the present generations have the responsibility of ensuring that the needs and interests of present and future generations are fully safeguarded.” The excessive use of natural resources, sinks and sources (planetary boundaries) and the destruction of the commons: (atmosphere, oceans, soil degradation, biodiversity, climate change) are severe threats to human survival. Poverty remains pervasive and socio-economic and gender inequalities endure across the world. Politics tries to “solve” this problem by fostering economic growth, despite its severe conflicts with sustainability.

It is contested whether this is ‘only’ a question of political and individual will or ‘unavoidable’ to maintain economic stability. We call the latter situation a “growth imperative”. We conclude that neither commercial competition, nor profit expectations, nor the monetary system are stand-alone growth imperatives. Market economies do not necessarily depend on growth. Growth becomes inevitable for consumers and businesses, when technological innovations are

introduced. Market forces lead to a systematic necessity to net invest due to the interplay of creative destruction, profit maximization, and the need to limit losses. Unemployment is substantially caused by productivity gains, and states are forced to fight against looming unemployment to maintain political stability and economic stability of social welfare systems. Therefore, states push economic growth by several incentives for investment, increased economic activity etc. To ensure the competitiveness of the national economy within world markets, states particularly promote high-tech investments to increase productivity gains, fuelling this cycle of “creative destruction” (Schumpeter).

Technology is not purely a question of inventions and ideas, but resource use plays a crucial role. 200 million tons of material are extracted every day and poured in the economic process. Automation and productivity gains are profitable because productive energy and materials are cheap compared to labour at current prices. This strikes at the normative foundations of market economies / meritocracies: In theory, "merit = talent plus effort" is no guarantee but a fair chance for an adequate income. But when "talent" as well as "effort" can be supported by capital and energy consumption to increase personal productivity, this could weaken distributive justice in a market economy: Technology then undermines the meritocratic principle by literally using resources not based on merit. Similarly, big corporations engage in rent seeking through land grabbing, political influence, lobbying etc. Again, they generate income only partly based on economic achievements. According to this analysis, a just, sustainable and liberal economic order can be a market economy. Instead of “overcoming” markets and the merit principle, their significance has to be strengthened by fighting economic rents (income not based on merit) and unfair competition.

Policy measures include resource caps that limit resource use on a global level and make resource use much more expensive (Cap and Trade). This shifts the tax burden from labour to natural resources and makes automation less profitable. The economic value derived from land (including natural resources) should belong equally to all members of society. The income from taxation can be used to finance public investment, or to generate a dividend for everyone (that may not provide a livelihood). Accumulation in the sense of individual wealth and corporation size has to be limited to avoid the establishment of powerful actors that shape political decisions in their interest. We may limit economic power in a similar way to democracies that tend to limit and separate political power. A limit on accumulation of financial assets is also a limitation of debts, because both are two sides of a coin.

A fair primary distribution reduces the need for excessive redistribution and increases equity. Reduced usage of natural resources and destruction of nature protects the common good and secures the livelihood for future living beings. The economic system is stabilized because problems of “too big to fail” are avoided.

Some literature on the growth imperative:

Oliver Richters, Andreas Siemoneit: Fear of stagnation? A review on growth imperatives. VÖÖ Discussion Paper 6, March 2017. <http://voeoe.de/dp6>

Oliver Richters, Andreas Siemoneit: How imperative are the Joneses? Economic Growth between Desire and Social Coercion, VÖÖ Discussion Paper 4, January 2017. <http://voeoe.de/dp4>

Written Contribution 3.3 - Creating a banking system that works for society

Maurizio Degiacomi
Vollgeld Initiative Schweiz, International Movement for Monetary Reform

amended by Rolf Künemann

The aim of the International Movement for Monetary Reform (IMMR) is to create a banking system that works for the people and for society.

Today 80-90 percent of the money in circulation is bank money, created by commercial banks in the lending process. Bank money is essentially loan to a bank – it is only a promise that the bank account owner can get “real money” when she/he wants. The IMMR campaigns that bank money is replaced by sovereign money – issued by the central bank rather than private banks.

Swiss democracy allows for people’s initiative to change the constitution. An initiative towards the introduction to introduce sovereign money has already been launched.

The current monetary system adversely interferes with human rights internally and externally:

- Most money is created by banks out of nothing. They can then lend it out on interest (and with a view to getting their hands on collateral in the case of default of the debtor). This adds to growing income disparity and increasing economic power of banks that eventually threatens democracy.
- The money system is not stable (bank runs, bubbles, speculation, banks too big to fail) creating systemic risk that translates into unemployment
- Bank money may be one of the drivers for unwanted resource consumption and eco-destruction and a driver for financialisation.
- States become dependent on banks for their policies. Speculators become “too big to jail”. This is a threat to democracy and the rule of law.

The extraterritorial perspective

We know today that our financial system is inherently unstable, inefficient and costly. This does not stop us from exporting it to the global south in order to give people access to formal finance. Once installed new financial institutions obey a certain set of rules created by few international bodies like the World Bank and the IMF. Financial sustainability is the primary goal. Achieving it can have severe side effects.

- Exporting today's banking system to the global south is questionable because it can generate high cost for society in the destination countries
- Changing the system at home should be a necessary prerequisite in order to make the export of it morally acceptable

Taking away the capability of a financial institution to expand its balance sheet by creating money shifts power back to the people and governments:

- Civil society may have a bigger influence on banks financing decisions
 - Banks can easily be punished for ethically unfavourable investment decisions abroad
 - Reputation loss must be perceived much riskier by a bank if it is fully dependent on funding from customers and governments

Written Contribution 3.4 - Monetary reform as a prerequisite for the implementation of human rights

Edgar Wortmann
OnsGeld

Background: In Europe, the consensus is that structural reforms are needed. The question is: what needs to be reformed? Society, to better fit the money system, or the money system, to better serve society? Creditors point in the direction of societal reform by austerity. Human rights and digital technology however point in another direction: monetary reform by *unlinking the currency from bank balance sheets*.

Peoples' sovereignty and the right of self-determination are basic for human rights — and therefore figure in article 1 of both Human Rights Covenants. A State's obligation corresponding to peoples' right of self-determination refers to other peoples, not (only) those that created and maintain the State in question. The related obligations are therefore ETOs.

Although every State is free to choose its own money (under the unwritten international legal principle of *lex monetae*), money is not a mere national issue: In particular the USD (that serves de facto as world reserve currency) and the Euro (that links different States into one joint currency) have great impact on the enjoyment of human rights beyond borders.

Thesis: The present money system subjects peoples' right of self-determination to limitations, and hampers free pursuit of their economic, social and cultural development. By supporting this money system, States do not enable the peoples to flourish to their full potential. They fail to sufficiently provide and maintain circulation of "State issued debt and interest free money" (hereafter: "sovereign money"). To the detriment of peoples they actively promote general use of "commercial debt money" (hereafter: "bank money") instead. Bank money consists of privately issued money claims on commercial banks ("bank deposits" — which are loans given by depositors to banks, which are exempt from regular financial transparency rules such as prospectus requirements). Naturally, such money claims cannot trade at par on a nominal footing, considering their inherent credit and market risks. To enable use of these money claims as money however, States compel society to take them at nominal value anyway,' thereby blocking due market processes for acceptance, allocation and mitigation of risk. This enables financiers to pass on the costs and shocks of private risk taking to society.

General use of bank money burdens society with "systemic debt", which relates to the amount of bank money in the economy. Systemic debt is accompanied by a systemic debt burden, which consists of the net interest the banking system charges on the bank money in circulation, and the pay-back obligation attached to it. *Systemic debt unduly limits society in its ability to raise living standards.* As debt levels increase, credit risks for banks increase too. This reduces their willingness to lend, thereby unduly limiting monetary expansion and allocation. To avoid stagnation in a debt laden society, the bank money system depends on inflation to re-enable bank credit extension by reducing default risk.

In the bank money system, the currency is a function of bank balance sheets, making it prone to runs, risks and commercial exploitation. Indeed, direct operation of the present monetary system is left to private commercial exploitation, which gives leeway to a feudal monetary order that competes with democracy. Monetary reform seeks to change this and make the monetary power serve the peoples, by encapsulating it as a separate (4th) power of government, in the democratic order.

State support of bank money is embedded in law, mainly via State sanctioned central banking, prudential oversight, deposit guarantee schemes and use of bank money by the State itself.

Despite all downsides, State support for bank money made sense in the past, because it enabled payment over distance, albeit at increasing social costs, given excessive growth of the bank money supply, and the corresponding systemic debt. Today however, the disadvantages of general use of bank money outweigh the benefits. In the present, State support for bank money is particularly not justified because the state of technology no longer requires bank money to enable payment over distance.

States are bound not to hamper economic development, unless by law and in promotion of general welfare. Moreover, States are duty-bound under international human rights law, to expeditiously take (technical) steps, to achieve the *full realization* of ESCR (to the extent described in the Maastricht Principles) including peoples' right of self-determination. Thus, a legal obligation arises for the States to replace the present bank money system, with sovereign money systems. Conversion of bank money into sovereign money is a precondition to release the peoples of systemic debt, and enable States to protect and stabilize the monetary system efficiently.

States supporting the prevailing bank money system needlessly spread debt among all peoples, make them vulnerable, hamper their development and compromise their self-determination. Because bank money implies in their currencies the urge to yield a return and squeeze financial revenue from its utilization, they also enhance environmental degradation and social disintegration. Systemic debt rests disproportionately on the poor and is, as most currencies are, not confined to national borders. States with strong currencies (like Euro and USD) are most liable for the impact of their currencies on the peoples, both domestic and abroad, and to be addressed to reform their money system, in the interest of all peoples, both domestic and abroad.

The discussion was very rich and complex. Here are some moments, starting with additional inputs of the speakers on and beyond what they presented in their respective one-pagers:

Oral Intervention 3.1: The Presentation of Wachstumswende

Helmut Federmann, Netzwerk Wachstumswende

Economic growth has become a political dogma, spread by neoliberal ideals and ideologies, i.e. the free market capitalism.

Jamie Peck wrote a book on “Constructions on neoliberal reason”. He spread the idea of neoliberalism not only as an ideology, but as a process that has been spread all over the world. It focuses on the rules of the market and globalisation.

Neoliberalisation is not just affecting the private sector but has crept into the public State institutions. This is important when talking about the movement of degrowth, that degrowth is not the opposite of growth. It is a social movement that involves many people and is not just about reducing a nation's GDP. It stands for a social change.

Wachstumswende is a network of persons from Germany and all over Europe, coming from different professions (mostly economists) who challenge orthodox economic thinking and work for new ways in economics and politics.

In the 1920s, we already had a global economic crisis. Ideas and books from back then can be re-used so as to re-think for our future. In the 1970s, environmental economics became popular. It is different from ecological economics. The “cap and trade” approach is one of the results.

Oral intervention 3.2: How to Exit the Growth Imperative?

Oliver Richters, Carl-von Ossietzky Universität Oldenburg

Why can we not stop clinging on to growth? What is the growth imperative? Yes, today there are still problems with social inequalities: poverty remains.

Continued growth activities were proven to have negative effects on the environment. Growth has had effects on destruction of the commons etc. The question is if we, in industrialised countries, still *need* growth or if we still *want* growth?

We want to escape from this dilemma: to create a society without growth. Most of the degrowth debate is about reshaping lifestyles and systems. Do we have to reconstruct all our institutions of society to reduce throughput?

The growth imperative means that we have no alternative to growth, that growth is needed to sustain the income we need. Process and product development is evolving fast in today's society; this threatens the incomes of entrepreneurs and employees. Human labour is replaced by machines and resource use by the clever use of technology and human capital. This process threatens the income of employers and workers. States are forced to “push” for growth, in their run for competitiveness and in order to keep people employed.

Do we have to reshape everything to achieve de-growth? Certainly not! Markets and the economy need good rules: limiting the use of resources at international level, making the price of natural resources higher, limiting accumulation, limiting the size of economic power. This includes limits on accumulation and therefore debt as they are inevitably intertwined.

Oral intervention 3.3: Steps towards Changing Today's Economic Systems

Maurizio Degiacomi, Vollgeld Initiative

We need to change today's economic systems in four steps:

1. Take our money away from the banks
2. Create money (money without debt, "real money" not "debt money")
3. Put money into the "real economy" rather than in e.g. property bubbles
4. Stop privatisation of money and make it a public good again

The monetary system is an accounting system that affects almost every aspect of human life. It is a set of rules created by humans for humans. Since the great financial crisis and its aftermath everyone knows that the system is broken and needs to be fixed. Adapting the set of rules in order to create a system that rather works for and not against society is only a question of will.

Oral intervention 3.4: Refuting Systemic Debt

Edgar Wortmann, Ons Geld

The current monetary system is a giant administration of unpaid (interest-bearing) debt ('systemic debt'). The money ('monetary objects') to settle this debt is non-existent. This is a gross negligence of the States, that omit to provide adequate quantities of debt and interest-free money society needs to prosper. Consequently, society reverts to commercial debt-money instead, which hampers peoples' self-determination and sustainable development and enhances environmental degradation and social disintegration. The bank money system comes at huge societal costs as it imposes 'systemic debt' on society and exposes the money system to runs and risks.

Historically, dominance of the bank money system can be explained (and justified) because it produced liquidity and enabled payment over distance. At the time, this could only be done by creating quasi monies (claims to money) and operating a payment system based on transfer of '*monetary value*' (settlement of money claims), instead of transportation of '*monetary objects*', which at the time consisted of gold and silver coins only.

Thanks to digital technology we no longer need to rely on the quasi monies created by the bank money system to support our economies. Today, States can provide liquidity and enable payment over distance based on publicly issued intangible monetary objects ('digital cash'), which is not constrained by the availability of any physical or financial asset. Instead it is constrained by sound, transparent and accountable governance of the public monetary system under democratic control, by a 4th separate power of government (a Monetary Authority that is not a bank), that serves society by providing sufficient liquidity buffers well spread throughout society at all times, and that is bound by a zero-inflation policy, and in tune with the productive power of the economy.

By migrating to a debt-free money system based on intangible monetary objects ('digital cash'), States can eliminate systemic debt to the extent the public voluntarily converts bank money into state issued debt-free money ('physical and digital cash').

Unfortunately, States don't show any effort to migrate to a debt free money system. Instead, they devise exceedingly complex laws to uphold a bank money system undermines peoples' self-determination and the long-term viability of our planet. By confronting the current monetary negligence of the States, human rights' activists can direct their attention to a major underlying cause of human rights infringements.

Short and simple: With today's technologies, we can settle debts over distances, from peer to peer, without involvement of any balance sheet other than those of payer and payee.

The bank money system is imposing upon us systemic debt. Laws are made to sustain this system. These laws should now be declared unwanted. We need to use real money, not debt-money. Debt is not the solution. Our current money system is a violation of the right to self-determination.

Discussion

The discussion first focused on the difference in the approaches presented by Federmann and Richters. It was said that despite the (half-hearted) delinking efforts of Germany in the past 15 years, the only year of decrease in Germany's GHG emissions was 2009 – that was also the only year where the German economy contracted and its GDP decreased. Against this background, it was said that until now only technological solutions had been promoted to mitigate climate change without touching the level of consumption and the way the economy operates. Can we really do that? This doesn't work. We need to go further. Degrowth is still very far from the current political debate. The need for new technology is there. We have to re-direct technical progress into a different direction. Perhaps it is useful to formulate solutions closer to our current economic reality and paradigm. Richters maintained that there are policy options even within the current paradigm or close to it. They need to be undertaken. For this to happen, there is a need not just to limit abuse of economic power, but to limit economic power itself.

Another comment on degrowth came with a tongue in cheek and as a provocation: With a view to Federmann's criticism of neoliberalism, it was said that neoliberalism in fact "succeeded" in bringing growth (almost) to an end. A full "success" was not achieved, mainly due to China and a few oil-rich countries. The background to this "provocative" question was the austerity policies imposed by neoliberalism and its shift from profit to financial extraction.

The discussion then turned to alternative money in relation to human rights. Are bitcoins a solution or just shifting problem? In Federmann's view, the bitcoin idea builds on a technology that is in the hands of one country. Hence, we are not just talking about money but also currency. Wortmann responded that we need direct monetary management by the State in the public interest, instead of by the banks and for private profit. Sovereign money can be bound by a zero inflation policy with money having fixed value. It is about what money represents and how money is brought into circulation.

Oliver Richters raised some doubts about money fully in the hands of the State, pointing to the respective concentration of power. Edgar Wortmann said that the monetary power exists, whether we like it or not. It currently is unchecked and in 'invisible and unaccountable hands'. Like we entrust the monopoly on force to the state, we should entrust the monetary power to the state. Without it we have a fake democracy that is subject to an unaccountable private monetary power. The public monetary power need not be a monopoly on money creation. It would not exclude parallel local money, or any private monies. It does exclude however support from the central government for any kind of money it has not issued itself.

The discussion ended with the question what human rights law can contribute to this discussion? What is the role of soft law? Is a changed competition law part of the solution? Care has to be taken of the right to work and to an adequate standard of living – and to self-determination.

4. Financialisation, Land Grabbing, Microfinance

Written Contribution 4.1 - Infrastructure finance and ETOs

Nicholas Hildyard
The Corner House

Infrastructure provides the physical sinews of society that underpin the public realm. In order to meet their human rights obligations, States have to safeguard accessible infrastructure where it exists – and establish it where it doesn't. The right to adequate housing cannot be fulfilled

without housing, heating, lighting and the like; the right to clean and safe water depends critically on sewage treatment plants, piped water, reservoirs and water harvesting technologies; and, for those who do not have direct access to land on which to grow their own food, the right to food requires crop storage facilities and roads to transport food from field to marketplace.

Infrastructure, in short, provides the physical underpinnings that make the fulfilment of many human rights possible. Who builds infrastructure, how it is financed, whose interests are promoted or undermined in its construction, who gets to decide what is built and who gets access to it when completed are thus important determinants of who gets to enjoy the full panoply of their human rights.

Some state-funded infrastructure projects have long been a source of human rights conflicts: mega-dams are an example. The same is true for States outsourcing infrastructure to private companies and funding (as in water services). But current attempts to move towards greater private sector finance adds a new dimension to the threats for peoples' human rights. To entice private finance into infrastructure, governments (often under pressure from institutions such as the World Bank) are re-engineering infrastructure to provide investors with above average profits – typically a jaw-dropping 25% a year – mostly at the public's expense.

Key to such reengineering are an array of publicly-backed guarantees on offer to infrastructure investors - from guarantees on loan repayments, rates of return and minimum income streams to guarantees against currency exchange rate risks and compensation should new environmental, public health, labour or other legislation affect an investment's profitability.

The trajectory is not only towards increased inequality as public money is looted for the 1%: it is also profoundly undemocratic, elitist – and unstable. Undemocratic because a handful of fund managers and rich investors increasingly determine what gets financed and what does not. Elitist because the facilities that would most benefit the poor do not get built – a report by the NEPAD-OECD Africa Investment Initiative candidly admits that it is 'futile' to seek private investors for rural electrification projects 'due to the low returns on investment'. And unstable because infrastructure-as-asset class has become an inflated bubble – and many in finance are warning that the bubble is about to burst.

The threat then is not only of increased austerity as states come to the rescue of investors – but also of human rights being undermined as states sign up to PPP contracts that severely curtail their ability to legislate in the public interest. The guarantees provided by States to private investors also create liabilities that may translate into debt, if triggered in the future.

Campaigns against the push for greater private sector financing of infrastructure could benefit greatly from highlighting the extraterritorial obligations (ETOs) of States and how they are breached by the promotion and support for PPPs and other instruments for transforming infrastructure into an asset class, either directly or via the World Bank and other international financial institutions. Relevant ETOPs breached include the obligation to avoid causing harm (ETOP13); the obligations of States as members of international organisations (ETOP15); the obligation to refrain from indirect interference (ETOP21) and the obligation to regulate financial institutions (ETOPs 24 and 25c).

But enforcing ETOs depends on States that are committed to upholding human rights against private interests. The struggle to ensure infrastructure that supports human rights must therefore embrace a wider struggle to disrupt and unsettle the neoliberal settlement that has seen states increasingly transformed into agents of capital.

Written Contribution 4.2 - The case of pension funds⁴ investments into land globally

*Roman Herre & Maja Magnusson
FIAN International*

Over the past years, land has become a new and relevant target under the “investment” portfolio of the financial world. And pension money plays a relevant role. The case of the two land investment funds TIAA-CREF Global Agriculture I LLC and II LLC (TCGA I & II) is emblematic in this regard.

Both funds have collected **5 billion USD to acquire land globally**.⁵ While such massive financial investments are problematic everywhere⁶, this is especially the case in Brazil where the aggressive expansion of the large scale, capital intensive agro industrial agriculture goes hand in hand with severe eco-destruction and **serious and systematic human rights violations**, including violations of the right to food, to water, to health and to housing of local communities.⁷ Here the funds have acquired almost 300,000 hectares of agricultural land via complex and dynamic company structures. Two **European pension schemes** invested in these funds: the Second Swedish National Pension Funds (AP2) and the German regional doctors pension scheme Ärzteversorgung Westfalen-Lippe (ÄVWL).

In this case FIAN is engaged in an international network of organizations many of them coming from the home countries of the funds’ investors.⁸ **Opportunities** to further ETOs arise especially due to this network and CSO efforts in different counties to implement ETOs. Furthermore, chances arise because pension scheme investments (a) typically are a relatively high regulated investment type, (b) often already have state bodies, including parliaments, that form part of monitoring these investments and (c) because pension scheme members might be relevant allies in this regard.

A key **obstacle** to further ETOs is the level of resistance of the financial world (including related state bodies like ministries) against regulation. In addition existing regulation and monitoring relates (almost) exclusively on financial risks, excluding social, human rights and environmental risks. Decision makers so far have been resisting to integrate those aspects. In the context of Germany, while the doctors’ assembly (Deutscher Ärztetag) already decided, that investments of their pensions shall be ‘ethically just’, such decisions of members of pension schemes are not binding and have been rejected by the schemes. According to the Swedish funds’ investment regulation “the funds should take into account ethical and environmental issues without compromising the overall objective of high revenue.” No further guidance regarding the content of the directives is provided; the funds are themselves responsible for the interpretation and application of the directives.

Key **activities** to strengthen Sweden’s and Germany’s ETOs:

- Since 2009 FIAN Sweden has been presenting the case in Brazil and other cases related to land issues to parliamentarians, ministries and the National pension funds in order to advocate for stronger regulations. This has developed to a campaign that now collects 13 NGO:s. The main demands are 1) change in the framework law “human rights before revenue”, 2) obligatory human rights impact assessment, 3) transparency and 4) independent monitoring mechanism.

⁴ For the purpose of this discussion we use pension funds and pension schemes interchangeably.

⁵ https://www.tiaa.org/public/assetmanagement/about/news-events/news/gen1507_401.html

⁶ See for example ECVC, TNI, FIAN (2011) „Land concentration, land grabbing and people’s struggle in Europe“

⁷ See for example <https://www.grain.org/e/5336>, https://www2.warwick.ac.uk/fac/soc/pais/people/richardson/publications/ethical_sugar_-_violations_of_labour_and_environmental_law_by_sugarcane_mills_in_sao_paulo.pdf or http://www.fian.org/fileadmin/media/publications_2015/2009_06_Monocultures_and_HumanRights.pdf

⁸ Mainly from the USA, Sweden, Germany and Canada.

- Based on the **submission by FIAN Sweden**, the CESCR found a “*lack of systematic control by the State party of the investments made abroad by enterprises domiciled under its jurisdiction, including by the Swedish National Pension Funds, which weakens the ability of the State party to prevent negative impacts from such investments on the enjoyment of economic, social and cultural rights by local populations.*”⁹
- For several years FIAN Germany has been **engaging with the state institutions** mandated to control the pension schemes (federal state parliament, the federal state chancellery) and the pension scheme and the doctors themselves. Key demands have been human rights accountability, withdrawal from the land funds and regulations that integrate human rights in risk assessments and duties for oversight of state institutions.
- FIAN Germany has integrated this case in the *List of Issues* of the ongoing CESCR procedure on Germany. A longer shadow report/ submission with a strong ETO lens will follow.

In addition, FIAN conducted a Fact-Finding Mission to the regions where the funds acquired land. This mission finished recently. The finding will contribute to the submission of FIAN Germany, the overall public documentation of extraterritorial human rights impacts of financial investments and the urgency for human rights based regulation of this sector.

Written Contribution 4.3 - Financialisation: Reconsidering jurisdiction, and public procurement

Tomaso Ferrando
University of Bristol Law School

With this short contribution, I would like to: a) briefly discuss what I consider to be the most distinctive element that the financialisation of land and food chains introduces from the point of view of extraterritorial States obligations; b) propose three areas of further engagement, one of which is particularly new and timely because is connected with a EU Directive that entered into force in January 2017.

Reconsidering jurisdiction and multiplication of spaces of intervention

The most important character of the financialisation of land and food is that it adds an extra level of intervention compared to the traditional geography of the violation. We should not only focus on where the harm to human rights is suffered, but also (if not mainly) on where the human rights abuse is located and where the benefits of that abuse are harnessed. I am not talking exclusively about the place where the financial actor has its headquarter, but also where its shareholders are located. This poses a double legal dilemma: a) separate personality (corporate veil) and b) jurisdiction.

The US lower court in the Wiwa-Shell case (first instance) recognized that certain capital-raising activities undertaken in the U.S., such as “mailing information about the defendants to thousands of individuals and entities throughout the United States, and organizing meetings between officials of the defendants and investors, potential investors, and financial advisors,” were fundamental for the global activity of the defendants as a v whole, and not territorially limited to the State of New York. Thus, the Court recognized its jurisdiction.

According to the Maastricht ETO Principles, a State has the obligation to respect, protect and fulfil economic, social and cultural rights in any of the following: a) situations over which it exercises authority or effective control, whether or not such control is exercised in accordance with international law... If this is the case, could every State where financial actors exercise capital-raising activities and fundamental operations (i.e. retail banking, concluding insurance

⁹ CESCR (14th July 2016) E/C.12/SWE/CO/6

contracts, etc.) recognize their jurisdiction over the financial actor for abuses of HR committed abroad?

Position to influence & Public Procurement

A second aspect that emerges with the interaction between finance and ETOs is that of public procurement. Social and environmental requirements should be integrated in public procurement procedures even when they concern the conclusion of financial services. In the EU, there is considerable flexibility for contracting authorities to include social, labour law and environmental criteria in the stages of the procurement process and during contract performance. This does not appear to be enough and should be strengthened in the future. However, a recent case of the UK 2016 public procurement note that challenged the introduction of HR based arguments by local authorities (concerning the violations of HR in Palestine) reveals that there are strong conflicting interests.

Finally, it is important to think at the link between the idea of sustainable finance recently introduced in the EU by Directive 2014/95/EU and the ETOs. I think there is the possibility of tracing a link with Principles 14 (Impact assessment and prevention), 24 (Obligation to regulate) and 36 (establish systems and procedures for the full and thorough monitoring of compliance with their human rights obligations).

According to the Directive, which has been implemented in all Member States but Spain,¹⁰ large companies with more than 500 employees and public interest entities shall (or must) communicate relevant and useful material information that is necessary to understand their development, performance, position vis a vis at least four areas of interest (environment, human rights, socio-labour standards, anti-bribery and corruption) and the impact of their activity. This covers approximately 6,000 large companies and groups across the EU, including listed companies, banks, insurance companies and other companies designated by national authorities as public-interest entities.

According to the discipline, companies have to disclose the materiality of non-financial information by referring to information 'to the extent necessary for an understanding of the [...] impact of (the company's) activity'. This means that they are expected to disclose material information on potential and actual impacts of their operations on right-holders.

Two examples provided by the EU Commission in its 2017 Guidelines are relevant for this discussion:

- A bank may consider that its own water consumption in offices and branches is not a material issue to be included in its management report. In contrast, the bank may assess that the social and environmental impacts of projects that it funds and its role in supporting the real economy of a city, a region or a country are material information.
- A company having impacts on land use and ecosystem change (for example deforestation), directly or through its supply chain, may consider appropriate disclosures on the due diligence applied.

There are several interesting aspects that should be discussed:

- Is flexibility compatible with ETOs?
- Are visibility and publicity sufficiently promoted in order to respect the aim of the Directive and the ETOs?
- Is there a possibility for the civil society to utilize the communication against the entity that produces it (consumers' protection; financial markets' regulation; or the Directive itself)

¹⁰ https://ec.europa.eu/info/publications/non-financial-reporting-directive-transposition-status_en

- How are individual states exercising their control and authority? Are they providing adequate procedures and spaces to challenge them? Are public prosecutors looking at this piece of legislation and its implementation?
- How are states defining ‘public interest entities’? Italy also considers private equity funds, investment funds, etc. It is independent from their size.

Overall, there is the question of whether we can rely on financial motives, financial mechanisms and financial rationale to assess the problems generated by finance. Valdis **Dombrovskis**, the Vice-President responsible for Euro and Social Dialogue, Financial Stability, Financial Services and Capital Market Union, seems to provide a negative answer when he says that: “*Europe needs to take the lead in making economies greener and more sustainable [and therefore neither effectively green or sustainable]. This is why we are today proposing flexible guidelines to boost corporate transparency across all sectors [and therefore not binding or strict rules]. By providing relevant information on their environmental and social credentials, companies are doing themselves a favour and helping their investors, lenders and society at large [i.e. financial investors moved by profit maximization will save us].*”

Written Contribution 4.4 - Microfinance

Philip Mader¹¹

IDS University of Sussex

Microfinance and financial inclusion are overlapping practices, built on the **same idea**: financial dealings with the poor create a win-win arrangement of profits for financiers, and poverty alleviation and development.

Microfinance is a **finance-development hybrid** that mainly does high-interest credit (35% average). As a ~\$100 billion financial industry, it generates significant asset streams for investors; as a development intervention it generates narratives of poverty reduction and inclusion. Transactions are small but many, and the fees earned are high.

Microfinance grew under **structural adjustment**, and is implicated in the privatisation of access to public services (WaterCredit, education loans, micro health insurance, etc.).

The idea of a “**Human Right to credit**”, promoted by Muhammad Yunus, is a fallacy: credit is neither a universal human need, nor ever unconditional.

Several **microcredit crises** have occurred, most famously with debtor suicides and violence in India.

Disappointing results of impact studies have also led to a toning-down of the hype. But microfinance has been allowed to continue essentially unchanged under the new label “financial inclusion”.

Financial inclusion also widens the scope. It opens up poverty financing so that not just microfinance institutions, but all financial actors (e.g. large banks, credit card companies, mobile networks) should work with the poor, because the poor need to be “fully financially included”.

In financial inclusion, **credit** remains the main revenue source, but **digital accounts and payments** are increasingly important. Digital technologies are supposed to reduce transaction costs.

¹¹ The views expressed are the author’s own and do not necessarily represent those of IDS or any other institution.

In order to drive the payments business as part of financial inclusion, the **G20** has created several **lobby platforms**, which advocate financial inclusion and an end of cash payments. This will create a new captive market that generates transaction fees, rich data, and new possibilities of social control.

What are some of the **key problems** with microfinance and financial inclusion?

1. Rhetorically and practically turning poverty into a problem of finance means **misdirecting public funds** toward private financial development, and neglect of public goods and infrastructure investments.
2. A regressive “**financialisation of poverty**”, as the poor must pay the wealthy for their chance to experience development. If they don’t, they are to blame for remaining poor.
3. Weak/implausible **theories of change** – macro: financial systems as drivers of growth; micro: financial transactions as facilitating better money management to escape from poverty.
4. A clear **lack of evidence** that they reduce poverty – average estimated impact is “zero”.
5. Well-documented inbuilt **risks/harms**, including: debt traps, socio-economic vulnerability, bloated informal sectors, intra-community stress, household violence.
6. Allegations of systemic **predatory lending** in some markets: land-grabbing in Cambodia, under-age labour indenture in Bangladesh; collaboration with loan sharks in India.

In response to **ethical challenges**, the microfinance industry has instituted systems for “social performance management” and standards of “responsible microfinance”, but they are voluntary and focused on processes rather than outcomes.

The entry of **new global players** through the financial inclusion space raises new challenges of regulation and ethics – who oversees the conduct of MasterCard, Visa, or Vodafone with the poor?

Financial inclusion (as a programme promoted by DFIs, IFIs, and the G20) relates to **ETOs of states** in a number of ways:

- Firstly, using **public/development funds to build private financial sectors** may undermine economic, social and cultural rights, if essential public services are neglected as a result (ETOP 13).
- Second, **unsound financial services lead to a denial of rights**, particularly with predatory lending, but also surveillance via financial data; states should ensure that the financial service providers which they support fulfil a duty of care, particularly toward precarious and illiterate populations (ETOP 20).
- Third, states must **ensure debtors enjoy legal recourse and regulatory protection**, not just freedom of choice to use financial services (ETOP 24).

The discussion was very rich and complex. Here are some moments, starting with additional inputs of the speakers over and beyond what they presented in their one-pagers.

Oral Intervention 4.1: Infrastructure Finance

Nicholas Hildyard, The Corner House / Rolf Künemann, ETO Consortium

Nicholas Hildyard could not attend the conference but sent a one-pager that was presented by Rolf Künemann. Rolf also gave an example, from Nick Hildyard’s book “*Licensed Larceny. Infrastructure, financial extraction and the Global South*”, of a public-private partnership around a hospital in Lesotho run

by a private consortium, while the State of Lesotho carries the risks - and higher cost compared to a public hospital (which is denied by the consortium).

Oral Intervention 4.2: Pension Funds and Opaque Investment Webs

Roman Herre, FIAN Germany

FIAN Germany is specifically looking into the role of Germany (private and public sector, many times mixed funding and projects, e.g. PPPs) in the land sector. ETOs are a key part of the work and considered from a more pragmatic perspective.

Discussion on financialisation of land:

The Principles on Responsible Investment (PRI): 1700 companies have signed these principles. There was an assessment made: per 14 billion USD managed by these companies, they hire one social and environmental assessment staff.

Financial investors are growing rapidly and land has become a new interesting asset class with severe dynamics. Some examples: the two biggest financial investors Blackrock and Vanguard increased their assets by 60% in only 3 years (from 5,1 trillion in 2014 to 8,6 trillion in 2017); the TIAA pension fund in the US installed 2 funds to collect land assets globally. They are also acquiring land in Brazil, where land grabbing is rampant and leading to eco-destruction, etc.

From an ETO-angle, we see a plurality of actors which therefore implies duties for all of them. The plurality of actors makes accountability more difficult but also opens up opportunities for ETOs. There are many different actors from different countries we could address when we support the implementation of human rights obligations.

FIAN does fact-finding missions to find out causalities. In 2016, FIAN Sweden investigated investment of a Swedish pension fund into a US pension fund (TIAA) linked to land grabbing companies in the MATOPIBA region of Brazil. FIAN Sweden included this case in their parallel report and brought it to the UN-CESCR. The concluding observations by the UN-CESCR were clear: Sweden should implement systematic human rights impact assessments (HRIAs) prior to investment, and ensure remedial measures. These concluding observations are something we can build on. FIAN Germany is currently in the process of putting together a parallel report to further push for the recognition of ETOs at UN level and in Germany. We can work on these cases from different countries because financially they are so interlinked. There are severe problems in the existing regulation of funds. Generally, they only talk about financial risks but not about human rights; e.g. board members of such a fund talk about pulling out of investment, but as this could cause financial losses, they fear being persecuted under national law).

Oral Intervention 4.3: Defining Nationality and Jurisdiction to Hold Investors Accountable

Tomaso Ferrando, University of Bristol - School of Law

Financialisation of global economy is deeply rooted and reaches the micro-aspects of lives and society. This affects all of us. In his first job, he was member of a pension fund in the UK (which invested in Monsanto and companies which produce cluster bombs or are involved in land grabs). He protested and the only thing that could obtain was to pull out, because of the tension between the profit mandate of the pension fund (expressed by the economic interpretation of fiduciary duty) and the general conception that social and environmental criteria are just an add-on that may be considered in very limited cases.

Moreover, finance is behind land grabs and international investments. The Tanzanian government had been sued by some people about an investment. Then, Sweden (home country of the investor) sued Tanzania. Behind every investor, there is a government, e.g. via Bilateral Investment Treaties (BITs). There is a combination of risks and who benefits, and the need to identify the linkages between root causes of human rights violations and financial return. The complexity lays there.

This is illustrated by the massive increase in development finance and green bonds in particular (which are a way of redefining infrastructure projects and identifying new names for old procedures), which are supported by the World Bank, the regional development banks and by financial hubs like the City of London and the London Stock Exchange. The dynamics of debt production is increasing and it is central to the strategy of monetizing climate change and adaptation.

The blending, a combination of public and private money, added a layer of complexity. When we look at the responsibility of the State, the level of accountability and transparency is even worse. States are involved in multiple ways, not just acting through investors, but they give guarantees – as borrowers – and are profiting. These considerations lead to a series of points that must be taken seriously and put at the centre of a reconsideration of the relationship between law, finance and the global economy:

- The concept of nationality must be re-discussed. What nationality is Blackrock? It is impossible to answer, but follow the money and check the beneficiaries and trace connection with the multiple places where they are generated.
- Engage with a notion of jurisdiction to be more compatible with ETOs.
- Understand the social and daily implications of finance and try to work at the micro-level as much as at the macro level
- Pay attention to the expansion of development finance and the development of blending mechanisms and private platforms to channel capital to ‘green’ projects. Because of the North-South trajectory, there is a lot that the ETOs can say in order to guarantee the respect of human rights and the socio-ecological justice of these investments (including blocking them if they are not compatible).

Oral Intervention 4.4: Microfinance to Fight Inequalities?

Philip Mader, IDS, University of Sussex

Human rights are used to address inequalities created by the capitalist system. There is the idea that microfinance is a kind of hybrid that brings win-win to both the investor and the creditor.

Microfinance transactions are small, but fees are high. The financialisation of poverty is happening through microfinance. New power relations are being created.

Microfinance grew under SAPs, and has mushroomed to include water credit, micro-health insurance, etc. Poor people learn that these government services are not accessible to them. They should therefore be individual entrepreneurs.

A credit is not a human right, unless you make it a pre-requisite for the realization of human rights.

There is also the question of the right not to repay (cf. movements in India, Nicaragua, and across Africa; the work of CADTM).

“Financial inclusion” is a new label for microfinance. The Alliance for Financial Inclusion targets better access to quality financial services for the poorest populations, whereas the Better Than Cash Alliance advocates for the end of cash. Last year, India underwent demonetization. An end of cash payments would bring new possibilities of control – and an entry of new global financial players.

A closing question: who controls Visa and MasterCard?

5. Regulating TNCs (and other Business)

Written Contribution 5.1 - Regulating TNCs? - Learnings from the court rooms

Claudia Müller-Hoff
European Center for Constitutional and Human Rights

Access to remedy is fundamental for those affected by human rights abuses. Some of the obstacles may be addressed by regulating ETOs:

Recommendations for States:

1. Guarantee rights to information, public scrutiny and legal review of states' export finance activities.

CASE EXAMPLE: KFW-IPEX (South Africa): Export-financing bank finances new coal power plant that generates polluting emissions.

The German State must not contribute to human rights violations of third parties. But who can monitor this critically and, if needed, file a complaint? An important step to regulate ETOs here would be to ensure those affected and relevant interested parties have access to the relevant information and access to legal review of a state's export financing activities. (refers to ETOP 21)

2. Provide not only individual but also collective legal remedies.

CASE EXAMPLE: LAHMEYER (Sudan): Hydropower dam builder does not intervene against flooding of settlements without evacuation.

Victims abstained from filing a civil action against the company, because under German procedural rules, they would have had to file several thousand parallel individual actions. For lack of resources this was impossible. (refers to ETOP 37)

3. Ensure that persons and groups affected by human rights abuses and public interest groups have legal standing in all relevant proceedings.

CASE EXAMPLE: HECKLER & KOCH (Mexico): Weapons producer sells weapons that are suspected to have been used for excessive police violence.

Victims or potential victims are not entitled to participate in criminal or administrative proceedings about compliance with weapons export rules as these are considered to protect the public interest and not individual private interests. (ETOP 37, 38)

4. Adjust procedural rules to address the power imbalances between victims of human rights abuses as plaintiffs and corporate defendants, in particular by addressing the burden of proof.

CASE EXAMPLE: DANZER (DRC): Subsidiary of transnational timber company accused of having paid police for excessive police violence and then is sold.

Regulation should establish a presumption that a company which holds virtually all share capital of a subsidiary, can be held liable for conduct of that subsidiary, unless the contrary is proven by the defendant. (refers to ETOP 37, 25c)

The European Center for Constitutional and Human Rights, ECCHR, conducts legal interventions against human rights abuses of Europe-based transnational corporations, in home and host states, using a broad variety of tools. More information at: www.ecchr.eu/en.

Oral Intervention 5.1: Access to Remedy for Victims of Human Rights Abuses by TNCs

Claudia Müller-Hoff, European Center for Constitutional and Human Rights (ECCHR)

In her talk, Müller-Hoff pointed out that access to remedy is fundamental for those affected by human rights abuses by TNCs. Current procedures generally come with a number of limitations that hamper access to remedy.

From an ETO perspective, she recommends home States to:

1. Guarantee rights to information, public scrutiny and legal review of States' export finance activities. Affected and other interested parties should have access to relevant information to critically monitor human rights violations and abuses and file complaints if needed.

2. Provide not only individual, but also collective legal remedies. There are now cases of victims abstaining from filing a civil action against companies because procedural rules only allow individual action, which is often not an option due to lack of resources.
3. Ensure that persons and groups affected by human rights abuses and public interest groups have legal standing in all relevant proceedings.
4. Adjust procedural rules to address the power imbalances between victims of human rights abuses as plaintiffs and corporate defendants, in particular by addressing the burden of proof. Plaintiffs now have to show that the parent company was in control of a subsidiary and are often administratively overburdened by the companies. Putting the burden of proof on the defendant would alleviate procedures, leading to a fairer judicial process.

Müller-Hoff illustrated each recommendation with ETO case examples and linked them to specific ETO principles.

Oral Intervention 5.2: Reclaiming peoples sovereignty and dismantling corporate power by a Binding Treaty on TNCs and Human Rights

Brid Brennan, Transnational Institute

The great diversity of cases and the struggles of affected communities against the operations of TNCs presented here at this conference show an extensive asymmetry of power between people, the state and the privileged position of corporations. I want to refer to the speech by the Chilean President Allende on this issue of corporate power at the UNGA in 1972, which made it to the front page of the New York Times and where he foresaw that with the emerging power of TNCs as economic and political actors “the entire political structure of the world is being undermined”. Yesterday, the front page of the New York Times, covered a story on corporate power in South Africa. In fact, during the intervening years, corporate power and corporate capture of the institutions of the State has grown exponentially. But the good news in our narrative is that resistance to this corporate power and the violations of human rights has also been sustained and is now converging in a counter power being built from the ground and demanding a Binding Treaty on TNCs and Human Rights.

Our campaign for a UN Treaty on TNCs, as currently under discussion in Geneva, can be categorized under three main inter-related pillars:

1. Reclaim peoples’ sovereignty
2. Dismantle corporate power
3. Stop corporate impunity

First of all, the campaign itself is a convergence of more than 200 movements and organisations and therefore a great manifestation of peoples’ sovereignty, working together to articulate the rights of people affected by the operations and practices of corporations. However, dismantling corporate power and stopping impunity come with huge complexity, including in the juridical front with specific challenges related to ETOs, as corporations are reinventing themselves (legally) all the time.

The 6 main subjects of the campaign are:

1. Focus on transnational corporations
2. ETOs
3. Obligations related to supply chains - both production and labour chains
4. Role of international financial institutions and trade and investment regulation
5. Instrument of enforcement - need for a body to deliver effective access to remedy and justice
6. Rights of affected peoples: recognition and protection of their rights - facilitating not impeding their demand to end corporate impunity

These are elaborated in the Campaign's Treaty Text Proposal - https://www.stopcorporateimpunity.org/wp-content/uploads/2017/10/Treaty_draft-EN1.pdf

The challenge of building a Binding Treaty demands a huge public education effort in our societies to move away from the neoliberal mantras that 'corporate rule is OK'. It also demands the sustained engagement of new thinking from academe and experts in the fields of international law and human rights law. Crucially, this is a geopolitical struggle where peoples' mobilisation and engagements with their governments will be a decisive factor. From the beginning, the EU has been undermining the treaty negotiations in Geneva—a most disturbing aspect of this is the trend of 'bloc' positioning as EU rather than taking specific government responsibility. An important part of the strategy is to move all the governments to understand that they have specific global responsibilities, and that this is not only about Ecuador and South Africa who initiated the process towards a Binding Treaty.

Oral Intervention 5.3: Treaty Alliance Struggling for a Binding Treaty on TNCs and Human Rights

Anne van Schaik, Friends of the Earth Europe

Why do we need this treaty? It is important to talk with each other and ask ourselves these questions. Why are the current voluntary arrangements not working? Many NGOs are still working with these and are part of multi-stakeholder dialogues, only waiting for them to fail. We need a united front. There needs to be something people can turn to if all other options fail. We hope the treaty will create a momentum to take measures.

On the 6th point mentioned by Brid Brennan (Rights of affected peoples; facilitating and not impeding rights of affected communities), Van Schaik calls for a world court, which should not replace regional and national courts and should be directly applicable to companies.

How on earth can we get this treaty? It is actually in reach, but we need to continue doing advocacy. Governments are still very convinced of voluntary arrangements. Friend of the Earth Europe published a report with SOMO to explain why these arrangements are failing. We need to mobilize, educate ourselves, and inform on what is happening in Geneva. We do a lot of work on cross-over in this campaign, like linking ourselves with trade campaigns.

EU Member States voted against the treaty, were not involved at all in the beginning and refused to negotiate. But now, they are slowly moving and engaging in the content of the treaty. The EU needs a visionary approach and this treaty could just be the vision that the EU needs, championing human rights.

Oral Intervention 5.4: Commenting CSO Contributions

Jernej Letnar Čerňič, Graduate School of Government and European Studies, Kranj

Jernej Letnar Čerňič made a number of comments on the CSO contributions. He said these contributions were inspiring.

One of the big issues in debates about business and human rights is that there is no agreement on the meaning of accountability. It depends on the social and legal context, public pressure and media pressure. What is the accountability of people working in institutions? What are their links to business? We also have to talk about individuals. Example: Where did Ruggie move on after establishing the guiding principles on business and human rights? Who are the duty bearers? We often forget other actors besides corporations.

Jernej Letnar Čerňič is disappointed about CSOs for considering ETOs merely as a North-South issue. We should also take into account ETOs from a South-South perspective or otherwise.

He furthermore is of the opinion that it is very utopian to think that a UN treaty would immediately bring us advantages for victims' access to justice. For improvements in the field of business and human rights, he suggests to learn lessons from the national level concerning access to justice, mentioning best practices in South Africa, India, Colombia and other countries. He also does not want to discard the Guidelines of the UN and OECD, which can also lead to positive results.

Discussion

What are your hopes about standard settings at the UN? Social movements can set the agenda, but States take over in standard-setting phase.

Brid Brennan: The agenda setting is extremely important. It is just one cycle in a long struggle towards a system that is fair to people and the planet. What will it bring what is not there already? In a way, it is just old wine in new bottles. The treaty will rely on existing human rights obligations. Access to justice is the key element.

Anne van Schaik: We do not know yet what will be in the document exactly. Are we not too optimistic? Maybe, but ten years ago we could not even discuss these issues. In the 1990s, companies said they did not have any responsibility over their supply chains. We do have a momentum now. The treaty is not a golden bullet. Even if the treaty is not concluded, we might get something else that is better than what we have now, as governments are moving to prevent the treaty from happening.

Claudia Müller-Hoff on scepticism that the treaty is a utopian thing: we should not only look at the outcomes of the process. The treaty is an expression of hope and ambition, positive energy and dignifying experiences of victims and affected communities. The process already works to end impunity by political mobilisation.

Question: Multinationals are usually asked to be "good citizens", in accordance with standard corporate social responsibility (CSR) practice. But where is the demand that TNCs can be judged in court, considering their ways to impede that they can be brought to court? Why is this not part of CSR?

Claudia Müller-Hoff: I do not want to waste time on CSR. I am focused on more accountability.

6. Kicking Regimes: Investment & Trade

Written Contribution 6.1 - The conflicts between human rights and the investment protection regime

Cecilia Olivet
Transnational Institute (TNI)

What is investment protection?

There are around 2660 International Investment Agreements (IIAs) in force worldwide (this includes Bilateral Investment Treaties and Free Trade Agreements with investment chapter). Most of these include a mechanism for settling disputes between investors and States that allow investors to sue governments at international arbitration tribunals when they feel their interests and profits (including expected future profits) have been undermined by

government actions. The possibility of suing includes due to government's regulations and laws in the public interest and to protect human rights.

As a result of this mechanism, there are 767 known investment arbitration disputes worldwide, mainly filed by multinational companies from Europe and the US against countries in the Global South. The financial cost of investment disputes is extraordinary. It is common to see demands by investors for 100 million USD and many investors are suing for at least USD 1 billion. Awards against states have been increasing reaching up to USD 50 billion. As for legal costs, on average each side will pay USD 4.5 million per case, but the cost can be much higher.

How does the investment protection regime clash with human rights?

There are at least two ways in which international investment treaties undermine human rights:

1. States have the duty to fulfil basic human rights, but investment treaties constrain the State regulatory space.

Investors have sued for millions of USD using IIAs when governments have tried to protect:

- *Affordable public services* (right to water and electricity): Bechtel vs Bolivia or Suez vs Argentina
- *Labour rights*: Veolia vs Egypt
- *Public health*: Philip Morris vs Australia/Uruguay, Eli Lilly vs Canada
- *A healthy environment* (bans on harmful chemicals, bans on fracking, bans on mining).

The financial cost of investment disputes is so high that many times governments restrain from advancing regulation to protect human rights in order to avoid lawsuits. The risk of what is usually called *regulatory chill* has been long proven.

The investment regime not only does not promote human rights but, on the contrary, it punishes States that take measures aimed at meeting their human rights obligations.

2. States have a duty to protect against human rights abuses committed within their territory by businesses, yet investment treaties limit the capacity of State to regulate companies.

There are many examples how IIAs undermine the State's duty to regulate businesses. IIAs give investors the right to sue states when governments would, for example, impose performance requirements (hire certain number of locals, contribute to local industry, etc.). Investors have also sued in cases when governments demanded that companies clean up environmental disasters or when governments aimed to force companies to accept measures that would improve the economic situation of minority populations or when the government would withdraw a permit to operate when there is wide indigenous/local opposition to an investment project.

Investment agreements only provide rights to investors but no obligations. Therefore communities or individuals affected by businesses abuses of human rights have no possibility to access the international arbitration system. Therefore, IIAs reinforce a power imbalance in favour of corporations.

What are we campaigning for?

Our campaign is twofold:

3. **Stop the expansion of investment protection.** Currently, there are some major IIAs being negotiated which would lock in investment protection and increase the chances of investors lawsuits. We are resisting the signing of RCEP and EU FTAs (with Myanmar, Philippines, Indonesia, Mexico for example) and the ratification of CETA.
4. **Roll-back current IIAs.** Most countries are in a position to unilaterally terminate their Bilateral Investment treaties (BITs). Some countries have started to do so already. These are the cases of South Africa, Indonesia, Ecuador, India and Bolivia for example. But

most BITs are still in place, so we advocate for countries to carry out a cost-benefit analysis/auditing of the existing BITs to determine whether they have contributed to the country's development vs the risks they pose.

How does the investment protection regime relate to ETOs?

IAs not only run counter to commitments on human rights made by governments. It also conflicts with many ETOs (for example 13, 17 and 24, among others). Even though International human rights law - including international labour law and international environmental law - is hierarchically superior to IAs, arbitration tribunals deciding the lawsuits brought by investors do not take into consideration the commitments to human rights made by the government being sued. Let alone States ETOs. This is why some commentators have argued that investment rules are an emerging form of supra-constitutionalism.

In this context, ETOs can be used to strengthen the argument that governments need to review/audit their commitments in IAs vis-à-vis the commitments they made to other international instruments.

Written Contribution 6.3 - The challenge of trade and investment agreements for the ETOs

Burghard Ilge
Both Ends

One of the main concerns of CSOs working on trade and investment agreements is the fear that these treaties reduce the policy space for governments to implement policies aiming at public policy objectives like environmental protection or social justice - many of them linked to ESCR. While the limitation of policy space is inherent to all international treaties, the reason why trade and investment agreement merit special attention is that they are the only treaties that have a strong enforcement mechanism.

Breaching trade and investment agreement can have severe fiscal and economic consequences for states. For example the final WTO decision in the EU US Banana case allowed the USA to apply punitive trade measures of US\$ 191.4 million per year against the EU. International investment agreements (IAs) like Bilateral Investment Treaties (BITs) or investment chapters in trade agreement (like in CETA) have similar dispute settlement and enforcement mechanisms. Here it is the combination of dispute settlement provided in the treaty - usually Investor to State Dispute Settlement (ISDS)- with treaties like the ICSID conventions or the New York convention. Article 54(1) of the ICSID Convention for example provides that the award of a tribunal has to be automatically recognized and enforced in the courts of any ICSID Member State as though it were a final judgment of that State's courts. The compensation that governments have to pay can be substantive, in some cases reaching the level of 1-2% of their GDP.

The way how trade and investment treaties can undermine the ability of States to fulfil their *human rights* obligations are quite diverse. Well-known examples are the chill-effect of IAs, the ban of performance requirements for investment (e.g. like in the TRIMS agreement of the WTO), Art 24 of GATT and the so called Most Favorite Nation (MFN) Principle, liberalization and deregulation requirements in trade in services, disciplines on intellectual property rights or prohibitions to use economic policy tools that aim at economic diversification or the protection of infant industries in developing countries.

Some specific ETOs of relevance might be the obligation to "interpret and apply the international agreement in a manner consistent with their human rights obligations" (ETO 17), the obligation to "prioritize the realization of the rights of disadvantaged, marginalized and vulnerable groups"

(ETO32a), or the “obligation to create an international enabling environment conducive to the universal fulfilment of economic, social and cultural rights” (ETO 29)

There is hardly any public debate about trade and investment agreements in Europe. While TTIP at least has helped to raise public awareness about the specific problem of ISDS, also here current reform efforts are falling short of what would be needed.

An important blind spot in the current IIA reform debate is that International Investment Agreements are strongly unbalanced since they exclusively tend to focus on investors right and do not address any disputes that might be caused by the infringement of the investment or investor on the rights of others stakeholders (like local communities). We for example witness the persistent problem that promises made by investors to local communities are not kept. Such promises for example include commitments to limit environmental pollution, or to provide access to drinking water, healthcare or school education. Such promises are frequently made to silence local opposition to an investment and to ensure the consent of local rights holders at a relevant time of national decision making in the host country.

In our view the extra territorial obligation of States in the area of Economic, Social and Cultural Rights requires that investor obligations are also to be addressed in any discussion on IIA reform.

Oral Intervention 6.1: Investment Protection

Cecilia Oliver, Transnational Institute

There are around 2660 International Investment agreements (IIAs) in force worldwide (this includes Bilateral Investment Treaties and Free Trade Agreements with investment chapter). Most of these treaties include wide ranging rights for investors, and a mechanism for enforcing those rights. This mechanism known as ISDS, allows investors to sue governments at international arbitration tribunals when they feel their interests and profits (including expected future profits) has been undermined by government actions.

As a result, there are 817 known investment arbitration disputes worldwide, most filed by multinational companies from Europe and the US against countries in the Global South.

The financial cost of investment disputes is extraordinary. It is common to see demands by investors for 100 million USD and many investors are suing for at least USD 1 billion. Awards against states have been increasing reaching up to USD 50 billion. As for legal costs, on average each side will pay USD 4.5 million per case, but the cost can be much higher.

When we look at the international architecture of global economic governance, there are some key instruments that have been put in place to favour global capital and lock in their power. International Investment agreements are a key one. These treaties, mainly signed during the 90s, were put in place to regulate the States and prevent them from taking any measures that would undermine capital.

There is a disproportional imbalance of the system that hinders the environment and human rights.

There are at least two ways in which international investment treaties undermine human rights:

- 1- States have the duty to fulfil basic human rights, but investment treaties constrain the State regulatory space.
- 2- States have a duty to protect against human rights abuses committed within their territory by businesses, yet investment treaties limit the capacity of State to regulate companies.

Investment agreements only provide rights to investors but no obligations. Therefore communities or individuals affected by businesses violations of human rights have no possibility to access the international arbitration system. Therefore, IIAs reinforce a power imbalance in favour of corporations.

Objectives of the campaign are twofold:

1- Stop the expansion of investment protection. Currently, there are some major IIAs being negotiated which would lock in investment protection and increase the chances of investors lawsuits. We are resisting the signing of RCEP and EU FTAs (with Myanmar, Philippines, Indonesia, Mexico for example) and the ratification of CETA.

2- Roll-back current IIAs. Most countries are in a position to unilaterally terminate their Bilateral Investment treaties (BITs). Some countries have started to do so already. These are the cases of South Africa, Indonesia, Ecuador, India and Bolivia for example. But most BITs are still in place, so we advocate for countries to carry a cost-benefit analysis/auditing of the existing BITs to determine whether they have contributed to the country's development vs the risks they pose.

Oral Intervention 6.2: Promoting Sustainable Investment

Elisabeth Bürgi, Bern University

International investment agreements should be improved. For instance, the notion to include investors' obligations into investment treaties is not yet accepted. This would mean to make protection of rights (of investors) dependent on the compliance with certain obligations. The investment treaties could eg. refer to international guidelines which seek to specify what responsible, human rights sensitive investment would entail, such as the FAO/CFS principles on responsible agricultural investment (CFS RAI-principles) or the UN Guiding Principles on Business and Human Rights. Also, a bridge to the tax justice / BEPS debate could be built, by making protection of rights dependent upon compliance with tax obligations. We also would need frameworks which ensure that investments are undertaken where they are most needed (e.g. almost half of Swiss FDI flows to offshore centres).

We also need to find ways on how to shape *trade agreements* (and not only the investor chapter) in a human rights and environmental friendly way. This goes beyond including human rights or sustainable development chapters into trade agreements. It is rather about the creation of the 'right', human rights conducive markets: To which extent do most vulnerable sectors need market protection, to which extent better market access (to Northern markets), and how can a trade agreement be triggered with sustainability incentives (by also distinguishing between production methods)? In order to come up with more nuanced and context specific, 'modulated' trade agreements, inclusive and evidence based negotiation procedures (and learning processes) are needed which ensure that the most relevant trade-offs are identified and that optimal trade options are sorted out. Thereby, while trade-offs are part of each economic development, the core content of human rights must be regarded. De Schutter put it nicely by arguing that "those who were most vulnerable before the development should never be losing out". In Switzerland, there are some interesting developments going on in the field of trade in agriculture, by combining sustainability criteria (including human rights criteria) with improved market access for 'Southern' countries ('fair food debate').

Concerning the ETO-Principles, it would be good to discuss whether the ETO-Community should cooperate more closely with the PC(S)D-community (s. OECD and Agenda 2030). This latter community tackles very similar questions as the ETO-community but uses different, non-legal language (since the involved experts often do not have a legal background). The human rights scholars in Switzerland dealing with ETO-issues often go for a PCD-language since it is understood by a broader community. There would be some untapped potential in this regard.

Oral Intervention 6.3: Investment Protection Impeding on Legislative Initiatives and Public Regulation

Burghard Ilge, BothEnds

An important difference between international investment agreements and environmental treaties is their “teeth”, their binding force.

The reason for this imbalance is the Dispute settlement mechanism in international investment agreements and the World Bank’s International Centre for Settlement of Investment Disputes ICSID. Dispute settlement in international investment agreements is a relevant issue that must be better assessed, moreover in its impacts of the ability of states to full fill their ESCR obligations

For example, the ongoing case of Veolia vs Egypt results from claims arising out of disagreements over a contract entered into between Veolia's subsidiary, Onyx Alexandria, and the governorate of Alexandria to provide waste management services. The claims of Veolia also include financial compensation for the enactment of new labour legislation in Egypt that included a raise of the minimum wage. All the documents of this case are not public.

The current international investment agreements impose a chilling effect on the legislator that refrains from enacting legislation because of fear of possible dispute settlement claims.

Another relevant point is the Trade in Services Agreement (TiSA), a trade agreement currently being negotiated by 23 members of the World Trade Organization (WTO), including the EU. Together, the participating countries account for 70% of world trade in services.

TiSA is based on the WTO's General Agreement on Trade in Services (GATS), which involves all WTO members. The key provisions of the GATS – scope, definitions, market access, national treatment and exemptions – are also found in TiSA, However It is the purpose of TiSA to go much further than GATS and that it must lead to deeper liberalisation and to further reduce the ability of states to regulate.

Like international investment agreements the current international trade agreements also imply a negative effect on the ability to regulate, resulting in the limitation of the legislator space to only regulations limited to non-trade distorting measures or to run the risk that panels prosecute them because they didn't fullfill the requirements of the exceptions that might be given in the treaty. The supremacy of economic reasons over others concerns in trade disputes is illustrate by the general requirement to only allow states to take the "least trade distorting " measures to full another legitimate policy objective, including measures intended to full fill their ESCR obligations

Oral Intervention 6.4: Multilateral Investment Court et al.

Markus Krajewski, Erlangen University

We need to mention the opinion 2/15 of the Court of Justice of the European Union that underlines that the EU has exclusive competence to negotiate trade matters.

We also need to refer to the Multilateral Investment Court (MIC) that will be started to be negotiated in December 2017. Experts say it could be in place in 3 years.

Even if we do not negotiate more new agreements, the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS) will always be there to be applied. So, we must think on alternative agreements.

Furthermore, reference to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) must be made, and its inception history in the WTO.

The EU international trade agreements must be better structured. The sustainable development chapter present in some EU international trade agreements is not binding.

Discussion

Cecilia replies to questions

What is the role of local authorities in constructing a fairer trade model?

Thinking of the participation of local authorities is a good point, but there is a limitation there, because if the cities take measures they can face an Investor-state dispute settlement (ISDS) case.

Is there any possibility to develop the alternative trade mandate campaign?

The alternative trade mandate has finished as a project. With TTIP and CETA, this discourse was swallowed in the campaign. Now is the time to get back with this campaign again.

The EU Commission is preparing a document with an assessment of all active bilateral investment treaties of Member States.

Elisabeth replies to questions

Are the sustainable impact assessments enough?

We need context-based trade agreements. The CARIFORUM international investment agreement is a good example.

The sustainable impact assessments are interesting but very problematic because they are not very effective and are sometimes discretionary. The economic assessment and sustainable impact assessments are not connected. The international investment agreements are not shaped by the results of the sustainable impact assessments.

The EU's international trade and investment agenda must be more coherent with the 2030 agenda policy for sustainable development.

Burghard

CETA has been provisionally implemented.

Carving human rights carving out of EU's international investment agreements is not enough.

The human rights clause poses several questions to the effective protection of human rights.

Markus

The application of human rights clauses in the EU's international investment agreements should be complemented with the implementation of international human rights law, and moreover, case law.

Outcomes of the Working Groups

1. Economic Policy and ETOs

In this working group, participants discussed essentially public economic policies in the fields of tax, trade and development, and their impacts on human rights.

Maastricht Principle 29 on the “Obligation to create an international enabling environment” was much emphasised. Macroeconomic policies need to be compliant with human rights. And this compliance needs to be safeguarded. This calls for due diligence processes and thorough prior human rights impact assessments before implementing tax, trade or development policies.

With regard to tax policies and double taxation, international agreements have to include obligations to uphold human rights. This could be done through principles on the allocation of tax revenues to the improvement of education, health, education, etc.

It was noted that human rights were not explicitly mentioned within the Sustainable Development Goals (SDGs). Productivity growth and technological progress will result in a loss of jobs. An equity debate was called for along with a human rights based approach for the implementation of the processes realising SDGs.

The OECD initiative BEPS (Base erosion and profit shifting) was also mentioned.

„Base erosion and profit shifting (BEPS) refers to tax avoidance strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations. Under the inclusive framework, over 100 countries and jurisdictions are collaborating to implement the BEPS measures and tackle BEPS.”¹²

BEPS was considered an instrument to link taxation with human rights. Is this tool effective, though? As a recommendation, it was urged that lawyers should be more familiar with BEPS.

2. Financialisation and Eco-destruction

The participants of this working group tackled a wide range of topics that provide a fertile ground for future exchanges, activities and research.

One topic dealt with *risk management*. What are States’ or companies’ possibilities to sort out crises and engage in brinkmanship? In general, financial risks have been highlighted, as well as loss of information flow, poor understanding of where assets are held and how they move. The accountability of both States and private actors is overall very poor when it comes to human rights violations or abuses in the context of financialisation and eco-destruction. The lack of accountability is also observed in the context of food price speculation. In general, the risks are born by the larger public whereas the benefits flow into the pockets of the 1%.

For both financialisation and eco-destruction, *disentanglement* represents a key problem, i.e. the opaque web of actors involved in eco-destruction and financialisation needs to be unknotted and so as to be able to clearly identify the key actors involved and hold them accountable.

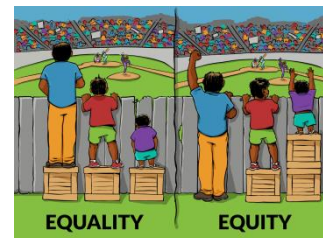
Both financialisation and eco-destruction were not seen as sustainable. Will sustainable economy come by disaster or by design? How would a legal framework that facilitates **designed sustainability** look like? While

¹² See <http://www.oecd.org/tax/beps/>

attitudinal changes are important, structural changes are fundamental. What is the role of human rights in such contexts? How can they be conceptualised as safeguards in this transition?

Structural change has to take place at domestic level, but possibly puts the transiting “progressive” State/States into a disadvantage towards other States. International cooperation may be required or would at least facilitate this process. Advanced ETOs may be important here.

The question of division and distribution comes up for *natural resources*. What should be the right approach? Shall resources be shared *equally* or rather *equitably*? What are the factors to take into account in this division of resources? Should historical injustices be such a factor? How to take into consideration the needs of *future generations*? Via human rights impact assessments? Who should be taken into account (equal or equitable amongst whom)? Should the environment also get a share? Would a Special Rapporteur for future generations insert greater consideration of these issues into policy debates? How does the human rights framework manage or account for the ‘time’ dimension and consider concepts of progressivity and immediacy?



What can we learn from the *Oslo Principles* on Global Climate Change Obligations? One concrete element highlighted from these principles was when States get sanctioned for excessive national carbon levels by curtailing their trade access. What are here the ETO implications?

It was noted that the exploitation of people correlates with the exploitation of the environment. Are rights for the environment a successful and promising approach?

Maastricht Principle 8 (*Definition of extraterritorial obligations*) states that ETOs encompass obligations of a global character. How can this be animated and used in struggles against eco-destruction and financialisation?

Could a precautionary principle (as in environmental law) be used for new financial instruments as well? Does this go far enough or is a shrinking of the sector required?

A case example was related from Paraguay showing the links between the human rights of local populations, the fate of future generations, financialisation and ecological issues: There is a remarkably high level of deforestation (with climate impact) in a region with a very high biodiversity (ecology) where indigenous communities live (human rights). The chopped wood is burnt to charcoal, and then sold to EU and Germany in particular (failure to implement protect-ETOs due to financialisation of governments involved).

3. Projects, cases, engagement

This workshop looked at different cases that CSOs and academics have been working and advocating on. The aim was also to identify common future (sensitising and/or advocacy) activities so as to make ETOs progress in general.

A first example was mentioned by CIEL (Center for International Environmental Law) on the *production and export of diesel fuel* in EU ports (and a related legal opinion). The respective type of diesel fuel is banned in the place where it is produced, yet sold elsewhere. Between 10 and 12 companies are shipping and exporting this diesel fuel. There is a need to develop a strong argument based on human rights and ETOs –

and also referring to the Bamako Convention¹³ and the Basel Convention¹⁴ – on why the Netherlands and Belgium have an obligation not to ship this fuel outside Europe.

Besides diesel fuel export, there is also the case of *pesticides export*. UN Special Rapporteur on the Right to Food, Ms Hilal Elver, published a report on the adverse impacts of pesticides on human rights¹⁵. There is the case of pesticides produced in France and then sold in the ‘overseas’. Furthermore, there is also the aspect of facilitating the use of pesticides through projects and development cooperation.

When it comes to pesticides banned in Europe, we should work on the exporting countries but also the importing countries, aiming at a ban of these products in the importing countries.

Related to this, is there an argument on different types of obligations and related violations of specific rights of people who are most vulnerable (people experiencing poverty, women...)?

Questions on this topic:

- Who is working or doing research on this issue? How can this work be supported?
- Could civil society organisations bring this issue to the Committee on Economic, Social and Cultural Rights (CESCR)? Having an ETO approach, would this Treaty body be the best one to do so? Could an action towards the European Court of Human Rights also be effective in this regard?

Besides the export issue, there are also cases with an ETO component when it comes to *importing products* to Europe. One case that is currently being looked at is the import of food (soy, meat, sugarcane) from Mato Grosso do Sul State, Brazil, to Europe and the correlated violations and abuses of the rights of indigenous peoples (Guarani Kaiowá). We also need to look at the standards that are used to generate environmental and human rights impact assessments. The collaboration between academia and civil society is important for these issues. CSOs need legal support of experts in order to expose the reverse normative hierarchy of the different legal orders. We must tackle the legal fragmentation and clearly point out that there are legal and political arguments for human rights as the ‘superior’ legal element. This would entail a grounded debate about the compatibility between trade and human rights.

Besides, we also need to look into *investment agreements* and carry out audits or reviews on them. So far, governments that did audits or reviews put the benefit on a cost analysis (benefits in terms of attraction of foreign direct investment and costs in terms of what this meant for local producers and consumers and how many times their States have been sued). An angle to be looked at is the compatibility between trade/investment agreements and human rights.

Can academic research contribute to this topic? Could law clinics be involved?

With regard to trade agreements and investment agreements, we can we also talk about the ETOs of the signing countries. States undertake sustainability impact assessments but no “*human rights compatibility assessments*”.¹⁶ These are very much needed for any new treaty that States plan to sign.

In this regard, the currently negotiated legally binding Treaty on TNCs and other business enterprises includes the superiority of human rights to investment treaties. This is ignored in Investor-State Dispute Settlements (ISDS).

An example of crucial democratic deficit is the EU-Singapore trade agreement. The competence for trade agreements lies at European Commission level; yet, the ratification of national parliaments will not be required anymore. Investors’ protection clauses have to be ratified, but the trade element of the agreement is

¹³ The *Bamako Convention* was negotiated by twelve nations of the Organisation of African Unity at Bamako, Mali, in January, 1991, and came into force in 1998. It is a treaty of African nations prohibiting the import of any hazardous (including radioactive) waste.

¹⁴ The *Basel Convention* on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal was opened for signature in March 1989 and came into force in May 1992. This international treaty that was designed to reduce the movements of hazardous waste between nations and specifically to prevent transfer of hazardous waste from developed to less developed countries (LDCs).

¹⁵ This report can be accessed here: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/017/85/PDF/G1701785.pdf?OpenElement>.

¹⁶ Editor’s note: We reproduce in this report the terminology that was used during the discussions, i.e. “compatibility”. A more appropriate term should be “compliance” – as this underlines the primacy of human rights, while compatibility could be read as relating to the coherence of two essentially equal areas of law.

not going to be ratified. We need to foster thorough arguments on the EU's ETOs with regards to trade agreements.

Another issue mentioned are human rights obligations in the context of *development cooperation* (cf. Addax Oryx case in Sierra Leone). How to best bring the ETO dimension into this policy field? Monitoring of development policies is urgently needed and they have to include prior human rights impact assessments and also incorporate an ETO analysis. Furthermore, it was highlighted that the dimension of *time* is crucial. How to expose human rights violations by States in the context of development projects supporting a company, when the State support has been stopped, but the company's human rights harm continues?

Discussions about future strategy

- ETOs must be brought to policy makers in a substantive way. Members of the European Parliament (MEPs) need to be reached. Furthermore, legislators (European Commission at EU level, but also national parliaments and governments) need to be influenced. The ETOs of the European Union need special argumentation, in order to be effective.
 - As an entry-point respect-obligations should be used (as the “do no harm abroad” is a principle that is easily argued in many countries. Obligations to protect and fulfil are more complex.
- In some resolutions of the European Parliament, ETOs have been referred to implicitly.
- We should define the role that academia can play, in collaboration with CSOs.
- We should advocate the issue with the Parliamentarians for Global Action. This group gathers members of parliament from all over the world engaged in the Rule of Law and Human Rights.
- One idea was to organise a seminar for Belgian and Dutch officials (on the topic of diesel fuel export).

Participants

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