



Women rights without borders: Combatting inequalities within and among countries is key to women's empowerment

by Barbara Adams and Karen Judd

The economic empowerment of women is the priority theme for the 2017 UN Commission on the Status of Women with special attention to the empowerment of indigenous women.

The struggle to empower women and to combat gender inequality goes hand in hand with the struggle for women's human rights. The increasing application of human rights instruments from local to global continues to be the hallmark of organizing that crosses sectors, policy tracks and borders. The work of human rights advocates and defenders has required establishing new rules and systems as well as removing discrimination and bias in the application of existing ones. This is as relevant across territorial borders as within them and the gap between transnational economic activities and global economic governance can magnify inequalities or nullify measures to overcome them. As economies are operating across or without borders so too must the human rights instruments and frameworks - the norms and standards that apply equally to the powerful and powerless.

Cross border responsibilities for women's rights: CEDAW at work

The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), adopted in 1979 and now ratified by 187 countries, is breaking new ground. Increasingly, women's rights advocates are using the Convention and other human rights instruments to confront ways in which activities of rich countries and non-state actors—constrain the ability of other countries to achieve development goals and honor their human rights obligations. Several important submissions indicate new efforts to

demand accountability from both state and non-state actors to extraterritorial obligations in such critical areas for women's human rights as arms exports, tax havens and the extractive industry. CEDAW, to which all but a handful of countries have signed on, is a particularly valuable instrument through which to hold states accountable to their extraterritorial obligations.

Swedish arms exports

In a step forward for the recognition of extraterritorial obligations in human rights law, in March 2016, the CEDAW Committee became the latest human rights body to remind states of their responsibility towards their impact on the rights of persons outside the borders of the state. A submission from the Women's International League for Peace and Freedom (WILPF) addressed the impact of Sweden's arms exports on gender-based violence and the actions of Swedish corporations violating human rights abroad. The CEDAW Committee recommended that the government "uphold its due diligence obligations to ensure that companies under its jurisdiction or control respect, protect and fulfill women's human rights when operating abroad."¹

Swiss tax havens

In November 2016, CESR, Alliance Sud, NYU Law School Global Justice Clinic, Public Eye, and the Tax Justice Network argued that, as a party to CEDAW, Switzerland is obligated to prevent private sector activities that might undermine women's human

¹ With regards to arms exports, the Committee has recommended to: "ensure that the new legislation to regulate export of arms includes a strong and robust gender-specific perspective." (<http://wilpf.org/cedaw-committee-recognises-extraterritorial-obligations-towards-human-rights-for-sweden/>)

rights outside its borders; in this context it cited the obligation to prevent corporate tax abuse, which restricts the ability of other countries to mobilize sufficient revenues to fulfill their human rights commitments. Although Switzerland has publically condemned the impact on developing countries of illicit financial flows, describing them as “nefarious,” and has pledged to join an international effort to eliminate the causes of such flows, the submission pointed out that Switzerland has failed to conduct an independent assessment of the ways in which its own policies encourage overseas tax abuse, including bank secrecy laws, corporate tax privileges, and weak reporting standards.²

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

As the Tax Justice Network highlighted, “[t]he groundbreaking outcomes of CEDAW’s review of Switzerland indicate what can be achieved when human rights and tax justice advocates join forces to use these mechanisms to challenge cross-border tax abuse as a violation of human rights.”³

Canadian overseas mining activities

Two submissions to CEDAW in 2016 addressed a major Canadian industry - the mining industry. According to the Canadian Government, over 50 percent of the world’s publically listed exploration and mining companies were headquartered in Canada in 2013. A shadow report submitted by a coalition of human rights groups (EarthRights International, Mining Watch Canada) cited a 2009 study that found that “since 1999, Canadian mining companies were implicated in the largest part (34%) of 171 incidents

alleging involvement of international mining companies in community conflict, human rights abuses, unlawful and unethical practices or environmental degradation in a developing country”.

The submission noted that under Article 2(e) states parties are obligated to “take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise”, and emphasized that this extends to acts of national corporations operating extraterritorially, to ensure that women have access to effective remedies. Hence, states must “take steps to prevent, prohibit and punish violations of the Convention by third parties ...and to provide reparation to the victims of such violations.” States also have a due diligence obligation ‘to prevent, investigate, prosecute and punish...acts of gender-based violence.”

Pointing out that “for more than a decade, UN human rights bodies and the Inter-American Commission on Human Rights (IACHR) have criticized Canada’s failure to regulate the extraterritorial activity of Canadian corporations,” the submission added that as far back as 2002 the UN Special Rapporteur on Toxic Waste raised concerns over the lack of extraterritorial regulation of its corporations operating abroad. Since then, four UN treaty bodies have expressed concerns about the impacts of Canada’s extractive sector corporations operations abroad – the Committee on the Elimination of Racial Discrimination, the Committee on the Rights of the Child, the Human Rights Committee, and the Committee on Economic, Social and Cultural Rights.

In a series of case studies (Papua New Guinea, Tanzania, Colombia, Guatemala), it detailed instances of rape, gang rape and sexual assault against women, particularly indigenous women and girls, by security guards and police working for the mines.

A shadow report submitted by WILPF and the International Platform Against Impunities also brought the Committee’s attention to the ongoing violation of women’s human rights, particularly in indigenous communities, by Canadian mining companies in Latin America, where it reports that more than 80% of mining companies in the region are Canadian. In addition to the failure of the Canadian government to address these violations it also points to its failure to establish “effective administrative and judicial mechanisms to ensure access to justice” for such violations. The submission cites a 2014 report from the CSO network Working Group on Mining and Human Rights in Latin America, that showed companies’ “systematic practice of human rights

2 Swiss Responsibility for the Extraterritorial Impacts of Tax Abuse on Women’s Rights, 2 November 2016; http://www.cesr.org/sites/default/files/downloads/switzerland_cedaw_submission_2nov2016.pdf

3 UN criticises Switzerland and pressure mounts over human rights impacts of tax havens.” Tax Justice Network, 12 December 2016.

violations of the community members”, including the denial of consultation and “prior, free and informed consent”. It adds: “A constant feature identified in the 22 cases featured in the [Working Group] report is that the Canadian Government is aware of the problems and that it “has nevertheless continued to provide political, financial and legal support to companies that violate human rights.”⁴

A Canadian government policy called “Strategy Corporate Social Responsibility” for transnational extractive sector companies, revised in 2014, obliges extractive companies operating outside Canada to respond human rights standards, including those contained in the UN Guiding Principles on Business and Human Rights. However, as the WILPF submission notes, “the only consequence for breaching the policy (CSR Strategy) is the loss of Canadian government’s trade advocacy support.” Canada also set up an “Office of the Extractive Sector CSR Counsellor” to advise businesses and act as a mediator to resolve conflicts between mining companies and communities, but as the submission points out, participation is voluntary and “at any time of the dispute resolution process, the parties can leave the mediation table”.⁵

Addressing the reports’ findings and recommendations the CEDAW Committee expressed its concern about “the negative impact of the conduct of transnational companies, in particular mining corporations, registered or domiciled in the State party and operating abroad on the enjoyment of the rights enshrined in the Convention by local women and girls,” and the “inadequate legal framework to hold all companies and corporations from the State party accountable for abuses of women’s human rights committed abroad.”⁶

It recommended that Canada strengthen legislation governing the conduct of corporations in relation to their activities abroad, and require corporations to conduct human rights and gender impact assessments prior to making investment decisions. Its recommendations also included: the establishment of effective mechanisms to investigate complaints filed; the establishment of an Extractive Sector Ombudsperson, with the mandate to, inter alia,

4 “Creating an International Gender and Peace Agenda: Impact of Canadian Mines in Latin America,” 2016, p.4; http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/CAN/INT_CEDAW_NGO_CAN_25493_E.pdf

5 Ibid. p.5

6 http://www.etoconsortium.org/nc/en/main-navigation/library/documents/detail/?tx_drblob_pi1%5BdownloadUid%5D=194

receive complaints and conduct independent investigations; facilitating access to justice by women victims of human rights violations; and that trade and investment agreements the state negotiates “recognize the primacy of its international human rights obligations over investors’ interests, so that the introduction of investor-State dispute settlement procedures shall not create obstacles to full compliance with the Convention” (para 18).

Human rights experts also go beyond borders

A number of UN human rights experts are addressing global systemic constraints to the respect, promotion, and protection of human rights. Their findings and recommendations are regularly reported to the Human Rights Council, and also to the UN General Assembly. As the Office of the High Commissioner for Human Rights (OHCHR) points out, they are “sometimes the only mechanism that will alert the international community to certain human rights issues, as they can address situations in all parts of the world without the requirement for countries to have had ratified a human rights instrument”. As of September 30, 2016, there are 43 thematic mandates and 14 country mandates.⁷

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

Investor-state dispute mechanisms are available to investors only, not to states, and allow investors to challenge states for alleged violations of their rights to profit within binding arbitration mechanisms. Such mechanisms include the International Centre for Settlement of Investment Disputes (ICSID), the UN Commission on International Trade Law (UNCITRAL), the Stockholm Chamber of Commerce, and the International Chamber of Commerce. The report draws on the work of a number of UN human rights investigations, illustrating the intrusion of investment and trade agreements into different facets of women’s lives. These include investigations by: the

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<http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx>

Independent Expert on promotion of a democratic and equitable order on the adverse human rights impacts of international and bilateral trade and investment agreements; the Special Rapporteur on the right to food; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

The report on indigenous peoples addresses multiple effects of investment and free trade regimes, including the constriction of states' policy and legislative space, costs of governments defending themselves within investor-state dispute mechanisms, weakened rule of law, and the perpetuation of international power imbalances. It points out that some 78 percent of the known 608 investor-state dispute settlement claims brought against 101 countries have been against less developed countries, although a growing number are now being brought against developed countries as well. In 2014, for instance, 40 percent of new cases were against developed countries, brought mainly by investors in other economically advanced states, such as those in North America and in the European Union.

The report emphasizes the lack of coherence within international law, particularly with regard to international trade and investment treaties:

International investment and free trade law regimes have been developed as a separate strand of international law from human and indigenous rights standards. Despite the strong public interest issues at stake within international investment agreements and the customary legal status of many human rights principles, there are no formal enforcement mechanisms to ensure that trade and investment agreements uphold human rights.

In recommending that "States undertake robust human rights impact assessments" of all trade and investment agreements, the report states that these must ensure that "gender considerations" and "intersecting relationship with other sources of discrimination" are adequately integrated into the development of such assessments.

It recommends, in the context of the 2030 Agenda for Sustainable Development, that Member States "reconsider development paradigms that do not lead to sustainable and inclusive development and poverty reduction amongst all groups."

Indeed, while the report focuses on the impact of these agreements on indigenous peoples, who bear a disproportionate burden of a system that contains

"systemic imbalances between the enforcement of corporate investors' rights and human rights," it makes clear the relevance for women, indigenous and poor women in particular, faced with rising inequality, environmental destruction and the loss of public resources.

Economic, social and cultural rights across frontiers

In their General Comment on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities (E/C.12/60.R.1), the Committee on Economic, Social and Cultural Rights emphasized the "urgent need to prevent and address the adverse impacts of business activities on human rights", reflected in the Guiding Principles on Business and Human Rights. The General Comment seeks to clarify the duties of states under the International Covenant on Economic, Social and Cultural Rights (ICESCR) to "ensure that the activities of businesses contribute to and do not impede the realization of economic, social and cultural rights", within and across borders. In particular it aims to provide guidance on the international law obligations under the Covenant in order to assist states parties, including parliaments, domestic courts and national human rights institutions, in fulfilling their obligations. Under the Covenant, states are obligated to use the maximum level of resources in order to realize human rights, including the adoption of measures needed "to protect individuals from abuses of their economic, social and cultural rights by third parties, including business entities and to provide access to effective remedies".

While focused primarily on the obligations of states with regard to business activities, the General Comment also extends to non-state actors in the business sector, articulating that they "must take measures to ensure that not only domestic laws and policies but also non-state entities do not discriminate against any group". In this context, it specifies that "business activities broadly [to] include such activities of any business entity, whether they operate transnationally or whether their activities are domestic..."

Both within and across borders, the General Comment points out that: "Among the categories who are often disproportionately affected by the adverse impact of business activities are women and girls, indigenous peoples particularly in relation to extractive projects, and ethnic or religious minorities where they are politically disempowered."

It also details the threats to human rights defenders, “particularly in the context of extractive and development projects”.

Also noted is the growing trend towards privatization, particularly related to “social protection, water, sanitation, health, education and cultural life”, which hampers states’ fulfillment of their responsibilities to comply with their obligations, particularly with regard to access and affordability. This also impedes their obligations to achieve gender equality, since a disproportionate burden of those unable to pay for private services falls on women—as women’s groups have consistently pointed out.

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

This development, the Comment notes, raises particular challenges in accessing remedy given the way businesses are organized. Further, it states (para 45):

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

These observations echo the statements and reports of other UN human rights experts. The Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz, (A/HRC/33/42)⁸ and, the

⁸ Addressing Member States in their first session in July 2015 Victoria Tauli-Corpuz, said: “Fortunately, the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights go a long way to clarifying the application of law in this context, and will provide a powerful resource for the Intergovernmental Working Group to call upon for guidance.” Cited in ETO Consortium, “Human Rights Beyond

Independent Expert on the promotion of a democratic and equitable international order, Alfred-Maurice de Zayas⁹ have called attention to the international investor state dispute arrangements (ISDAs), which enable corporations to challenge legislation and policies introduced by the state in an effort to protect public health or the environment on the grounds of lost—or future—profits as well as damage to reputation. They have pointed to the adverse human rights impacts of such arrangements, which have had “a ‘chilling effect’ with regard to the exercise of democratic governance”¹⁰ and have called for the abolition of the ISDAs.

CSOs have welcomed the ICESCR General Comment and responded with several suggestions for strengthening it, primarily by expanding the definition of business actors and activities to “include global inter-governmental organizations and institutions related to finance and trade such as the WTO and the IMF, in order to ensure that the policies and decisions of those organizations conform to state obligations under the covenant”.

Extraterritorial Obligations for all

In today’s interdependent world, the human rights commitment to implement a “protect, respect and remedy” framework - and so reduce inequalities - cannot be fulfilled without also looking at cross-border dynamics. As spillover effects of policies and actions in or by one country impact on others and can constrain their ability to live up to their human rights and sustainable development commitments, attention is increasing on the need to address the “extraterritorial obligations” (ETOs) of Member States in protecting human rights.

The Maastricht Principles adopted in 2011 represent the first comprehensive effort in this direction. Its preamble states:

“The human rights of individuals, groups and peoples are affected by and dependent on the extraterritorial acts and omissions of States. The advent of economic globalization in particular, has meant that States and other global actors exert considerable influence on the realization of economic, social and cultural rights across the world. Despite decades of growing global wealth, poverty remains

Borders: The Maastricht Principles Turn Five,” 2016.

⁹ <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17005&LangID=E>.

¹⁰ Ibid., page 6.

pervasive and socio-economic and gender inequalities endure across the world. Moreover, individuals and communities face the continuing deprivation and denial of access to essential lands, resources, goods and services by State and non-State actors alike.”

Elaborating on these principles, the ETO Consortium, a network of over 140 human rights related CSOs and academics, pointed out in 2013 that “gaps in human rights protection have become more severe in the context of globalisation over the past 20 years.” Among these, they note are: the lack of human rights regulation and accountability of transnational corporations (TNCs) - the absence of human rights accountability of Intergovernmental Organizations (IGOs), in particular international financial institutions (IFIs) - the ineffective application of human rights law to investment and trade laws, policies and disputes - the lack of implementation of duties to protect and fulfil ESCRs abroad, inter alia through the obligations of international cooperation and assistance.¹¹

The Maastricht Principles constitute an international expert opinion, restating human rights law on ETOs. They were issued by 40 international law experts from all regions of the world, including former and then current members of international human rights treaty bodies and Special Rapporteurs of the UN Human Rights Council and of regional human rights bodies. They emphasized that the Principles were not an effort to establish new elements of human rights law, but rather, as the ETO Consortium points out, “to clarify extraterritorial obligations of States on the basis of standing international law.”

Over the last five years, these extraterritorial obligations have gained wider attention. Increased awareness of the negative impact on sustainable development of rising inequalities, within and between countries, has spurred greater attention to the ways in which actions of rich countries—and those of global corporations—severely restrict both revenues and policy space available to countries, particularly developing countries, seeking to achieve their own development goals.

11 ETO Consortium, “Maastricht Principles and the Extraterritorial Obligations in the Context of Economic, Social and Cultural Rights,” 2013. http://www.etoconsortium.org/nc/en/main-navigation/library/documents/?tx_drblob_pi1%5BdownloadUId%5D=23. Since then, the consortium has issued a number of useful brochures, including one called “Maastricht Principles on Extraterritorial Obligations of States in the Context of Eco-Destruction and Climate Change,” 2015.

The UN has been pressured to address the linkages of business and human rights standards, and this resulted in the adoption in 2011 by the Human Rights Council of the UN Guiding Principles on Business and Human Rights. While the principles are voluntary and operationalizing them proceeds unevenly and very slowly, they represent the first corporate human rights responsibility initiative to be unanimously adopted by UN Member States.¹²

Inequalities matter!

Women’s rights advocates have for years pointed out the negative impacts of inequalities – on women’s human rights, on economies and on societies. They have accompanied this analysis with dedicated determination to develop human rights instruments and commitments to promote and protect women’s human rights, often through a strategy of ensuring rights through global processes, working for legislation and application at the country level and robust accountability at all levels.

In recent years, particularly in the wake of the 2008 financial crisis and its response, there has been a substantial increase in the attention to the impact of inequalities (mainly income) on the economic, social and environmental health of societies.

In 2015 Member States formally recognized this enormous challenge. In adopting, at the highest political level, the 2030 Agenda for Sustainable Development, they identified “rising inequalities within and among countries” and “enormous disparities of opportunity, wealth and power” as an “immense challenge to sustainable development,” and that “Gender Inequality remains a key challenge.” The Agenda’s action plan covers 17 Sustainable Development Goals (SDGs) for all countries and identifies reducing inequalities within and among countries as a standalone goal (SDG 10). Importantly, Target 10.3 specifically calls for ensuring equality of outcome, a goal for which women’s rights groups have long advocated, particularly in CEDAW.

The annual World Economic Forum Global Risk Reports have cited inequality as a severe global risk since 2012, and in the 2016 report emphasized that “rising income and wealth disparity ranked as the most important trend likely to determine development across the world over the next

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http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

decade”.¹³ Economists and social science experts pointed to a growing body of evidence to show that “the populations of societies with bigger income differences tend to have poorer physical and mental health, more illicit drug use, and more obesity.” In addition, “More unequal societies are marked by more violence, weaker community life, and less trust. Inequality also damages children’s wellbeing, reducing educational attainment and social mobility.”¹⁴

The risks of inequalities have also received attention in the last few years from the IMF, which has highlighted the impact on gender equality and women’s empowerment. A 2015 study, using the multi-dimensional Gender Inequality Index (GII) finds that an increase in the GII is associated with an increase in income inequality (measured by the Gini coefficient) by almost 10 points.” The study found that gender inequality has a strong association with income distribution, especially in the top 10 percent income group, and argues therefore that in addition to redistribution a targeted policy response is also needed, “in order to ameliorate deeper inequality of opportunities, such as unequal access to the labor force, health, education and financial access between men and women, more targeted policy interventions are needed as a complement to redistribution”.¹⁵

These and other reports generally focus only on inequalities within countries and the consequences for their economies and peoples. This in-country approach has also been a primary focus of human rights advocacy, the vast majority of which has focused on in-country domestic obligations. Work at the global level has tended to be directed to fighting for and establishing global standards for women’s human rights, to be “operationalized” with domestic legislation, implementation and action. Advocacy and activism at the global level have also pursued robust accountability of the domestic response in-country, solidarity and network building, resource mobilization and campaigning. The reports cited here, in line with the standard and goals set by the 2030 Agenda are not only analysing the cross-border impacts of domestic policy; they are showing the universality of human rights - to ensure that women’s rights know no borders.

13 <https://www.weforum.org/reports/the-global-risks-report-2016>

14 <http://www.other-news.info/2017/02/our-collective-failure-to-reverse-inequality-is-at-the-heart-of-a-global-malaise-2/#more-13086>.

15 See K.E. Pickett and R.G. Wilkinson, “our collective failure to reverse inequality is at the heart of a global malaise,” February 2017

<https://www.imf.org/external/pubs/ft/sdn/2015/sdn1520.pdf>

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