Financialization of development cooperation

ETO responses

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Introduction

Today's finance industry is inherently global and beyond borders – in the European Union, the free movement of finance capital between its Member States even received the rank of one of the four 'fundamental freedoms' (to the extent that all restrictions on capital movement are prohibited since the entry into force of the Treaty of Maastricht, in 1994). For finance industry, national states and jurisdictions today only have an economic strategic value for the construction of investment and finance chains and webs by playing off territorial regulations on taxes, investments, or transparency against each other. This characteristic makes the case for an ETO approach and increases the relevance of extraterritorial human rights obligations (ETOs) in human rights work today. After a short historic overview of the process of financialization (1920 to today), this chapter applies an ETO lens on two different aspects of financialization: its impact on substantive human rights and related (extraterritorial) obligations, as well as its impact on procedural human rights and related (extraterritorial) obligations. The chapter draws on evidence from cases the human rights organization FIAN has been working on in recent years. Special focus will be given to the role of public development cooperation and its financialization process. The final section will provide some insights and reflections on the responses from affected communities and the human rights scene, like 'follow the money' and 'investment chain mapping' initiatives.

A short history of financialization

Once upon a time, there were regulations...

The deregulation of finance and the reduction of controls over international movements of capital are closely linked to the end of the so-called Bretton Woods monetary system in the 1970s. This system had been put in place after the Wall Street Crash in 1929, which was followed by the banking crisis and the Great Depression. Among other things, the Glass-Steagall Act (1932) in the US and similar laws in Europe limited the possibility of banks to use state or private money, i.e., peoples' savings, for their own speculative activities and separated commercial and investment banks.

It created a period of relative financial stability, which lasted up to the 1970s. At that time, the USA started to take a number of measures that dismantled this system and reduced control over international movements of capital. In 1971, the USA ended the gold standard – the international convertibility of the US dollar to gold (i.e., a material and limited resource). A number of new laws followed, repealing the separation of commercial and investment banks, and opening the doors for new ways of financial speculation. Most notably in the US, the Garn–St. Germain Depository Institutions Act of 1982 by the Reagan administration, and especially the Gramm–Leach–Bliley Act of 1999 repealed the separation between commercial and investment banks. The end of fixed convertibility of the US dollar to gold also led to the emergence of new financial centres and the re-shaping of the entire global financial architecture. In the national jurisdictions of the Global South, neoliberal deregulations were implemented dominantly by the Structural Adjustment Programs of the International Monetary Fund and the World Bank (so-called Washington Consensus).

The deregulation of financial markets was a response to a crisis of accumulation of capital, i.e., difficulties of business actors, especially banks, to generate ever-increasing surplus/profits from their investments. In order to respond to such crisis, it was necessary to allow for the creation of more finance capital, and of new possibilities for those who owned this money to ‘invest’ it, including in and by development cooperation, as we will show below.

The financial crisis of 2007–2008, which caused a broad global economic crisis, was the result of financialization and has contributed to further deepening it. The crisis was triggered by speculation in the housing and real estate markets, in particular in the USA and Europe. With rising real estate prices, banks gave mortgage loans to non-creditworthy (sub-prime) customers and then sold these as securities on financial markets, passing on the risk to a number of actors that participated in this speculation. When the bubble burst and real estate prices fell, several banks and other financial players faced bankruptcy. However, this did not compel governments to address the underlying issues, but rather increased the power of finance capital. First, several governments bailed out banks and other financial actors – as well as their shareholders – in order to end the contagion in financial markets. Second, the decrease of real estate prices (and the prices of other ‘assets’, such as agricultural commodities) in the aftermath of the crash, led financial actors to look for new areas of investment and speculation, such as farmland – with substantive implications on human rights as underpinned by the vast body of literature coined under the phrase ‘land grabbing’ (Hall 2015; Borras 2020).

From financing development to development finance

This whole development also implicated a shift in the area of development cooperation. In a bit more than ten years, finance industry has gained considerable importance in development cooperation. Interestingly, the main development cooperation actors themselves do not reject such criticism by civil society organizations (CSOs), but use different names for it. Donors, development banks, and implementing organizations talk about development finance, financial inclusion, leveraging public development aid, blended finance, ‘maximizing finance for development’ or ‘finance for all’ (World Bank 2018 and 2008).

Data show that this development took off especially from the financial crisis onwards (cf. Figure 16.2). This then has been reinforced by the narrative heavily advocated for within the Sustainable Development Goals (SDGs) frame: the need of massive private finance to reach these sustainable development goals. Thus, finance industry – the ‘bad guys’ of the financial crisis – in a somehow miraculous way turned from problem to solution.

A variety of indicators demonstrate the structural significance of financialization of development cooperation, as the example of Germany underlines (Herre 2020). Four indicators will be highlighted below: the role of funds and fund management companies, the funding of financial intermediaries, the increase of market-based funding of official development assistance (hereafter: ODA), and the impressive growth of development banks (or Development Finance Institutions, DFIs).

Development cooperation itself started establishing outsourced fund-management companies, to set up and manage investment funds and assets with (sub-)objectives related to development policy: through the International Finance Corporation (IFC), the World Bank founded in 2009 the IFC Asset Management Corporation (IFC-AMC). At the end of 2018, this corporation managed 13 funds with a book value of \$10.1 billion (IFC-AMC 2019). The EU set up the European Development Finance Institutions (EDFI) Management Company (ElectriFI and AgriFI), and the Dutch FMO set up FMO Investment Management, which as of December 2019 managed four funds with assets of approximately \$600 million.

Even without institutionally outsourced investment companies, fund investments by development cooperation are expanding rapidly. The German KfW development bank, which is actually mandated for financial cooperation with state institutions in developing and emerging countries, currently has investments in 43 investment funds with a book value of €1.6 billion. Some of these funds were set up by KfW itself (KfW, n.d.).

A substantive share of DFIs' investments flows to the finance sector typically summarized as financial intermediaries. In 2019, IFC invested 40 percent of its portfolio – \$17.8 billion – in the finance sector (IFC 2019). The German DFI *Deutsche Investitions-und Entwicklungsgesellschaft* (DEG) already facilitates 57 percent of its business through financial intermediaries (DEG 2021). In addition, the number and volume of finance provided through Offshore Finance Centres has risen significantly in recent years. In 2017 alone, DEG held shares of companies in these financial centres – or secrecy jurisdictions (see section 4.6) – worth €372 million; from 2008 to 2017, its shareholdings in companies in the Cayman Islands and Mauritius alone rose from €50 million to €263 million (Deutscher Bundestag 2018).

Another indicator is the market-based funding of ODA. Governments committed and recommitted to contribute 0.7 percent of the national GDP to development cooperation. The commitment is measured by ODA quota. Research on the German ODA quota shows that especially since the global financial crisis, a substantive part of Germany's ODA has been delivered by loans that have been only channelled by state actors: a good ten years ago, German development cooperation used negligible funding borrowed from private market to pass on to so-called development countries. In the meantime, this funding has literally shot through the roof. The market-based funding of development cooperation in Germany has increased 18 times within 10 years to €3.6 billion and now accounts for a significant share of the state development funding ODA (Figure 16.1).

Finally, DFIs, that provide finance for the private sector, have seen impressive growth rates of an average annual rate around 10 percent over the last 10–20 years: 'Since 2002, total annual commitments by all DFIs have grown from \$10 billion to around \$70 billion in 2014 – an increase of 600 percent' (Savoy et al. 2016, p. V). In comparison, the overall ODA volumes have only grown slowly in the same period, i.e., some 20–30 percent between 2002 and 2014 (Ahmad et al. 2020). The same is true for the European DFIs organized under the EDFI. From 2005 to 2018, their portfolio of committed investments had grown from €10.9 billion to €46 billion (EDFI 2016 and 2019). Those indicators illustrate the substantive approximation of development cooperation to global finance industry – and its logic – with implications for human rights.

Figure 16.1 Increase in market-based development funding in Germany compared to the BMZ budget 2006–2016.

Source: Own calculation, based on BMZ annual report format ‘Source of funds’.

How financialization impacts the enjoyment of human rights

Today’s finance industry penetrates almost all aspects of life – health, culture, or food, to name some (Seufert et al. 2020). It thus exerts substantive influence on the enjoyment of a broad array of human rights. The interaction of financial actors with multiple states and their jurisdictions/regulations, highlighted again and again by leaked information like the Panama Papers or the recent FinCEN Files, today is a central part of their profit-making strategy (for e.g., aggressive tax evasion by creative bookkeeping between two or more states/jurisdictions). Financialization is therefore an important area for ETO analysis. While it is clear that development finance is a rather small actor in the world of finance, the complex web of specific responsibilities and accountabilities is slightly reduced as it directly addresses state actors as duty-bearers. Moreover, the obligation to respect human rights beyond borders in the context of development cooperation is more or less accepted by states – often addressed under the term ‘do no harm’ (see ETO Principle 13 (ETOP 13): ‘Obligation to avoid causing harm’).

We focus on rather emblematic cases to illustrate how financialization comes along with increasing exploitation and dispossession of communities, people, and their livelihoods, above all land and natural resources – and impunity of international (financial) actors involved. As a starting point for such a strategic approach, the following section will apply an ETO lens to two different – but closely interwoven – human rights aspects of financialization: its impact on substantive as well as procedural human rights in the context of development cooperation.

How financialization impacts substantive human rights & obligations

Development finance and the right to food

Zambian peasant communities are struggling to defend their livelihoods against the financial investor Agrivision Africa. The investor is based in Mauritius and owned by the World Bank’s IFC, the Norwegian Development Finance Institution (Norfund), and the South Africa-based investment company Zeder. The overall plan of Agrivision Africa is to aggregate 100,000 hectares

of land in Zambia and its neighbouring countries. By the end of 2019, Agrivision acquired at least 7 farms in Zambia amounting to 19,219 hectares (Zeder 2020).

In Mkushi Province, Agrivision expanded its industrial farming to an area that has, for many years, been cultivated for food production by the local community, Ngambwa. Through the expansion, this community has lost most of its agricultural land and has been threatened several times with eviction by the private security forces of the company. A community member complains: ‘Now they come and take the land [...]. Where shall we cultivate our food now? We want our children to have to eat!’ (interview conducted by the authors in 2016). In May 2017, the UN Special Rapporteur on the Right to Food visited the community. She concluded in her report ‘that the people ate barely once a day, that sometimes they were forced to make soup from local green plants to feed their families and children, and that they were under the constant threat of eviction [...]’ and demanded that the authorities ‘take all measures necessary to guarantee the affected families’ right to food, including their access to land’ (Human Rights Council 2018, p. 9).

In August 2011, the Africa Agriculture Trade and Investment Fund (AATIF) invested \$10 million in Agrivision Africa. The AATIF is a public-private financing structure based in Luxembourg and established by the German *Ministry for Economic Cooperation and Development* (BMZ and its financial assistance branch, KfW Development Bank) in cooperation with *Deutsche Bank AG* (DB). The Fund’s stated mission ‘is to realize the potential of Africa’s agricultural production, manufacturing, service provision and trade for the benefit of the poor’ (AATIF 2012, p. 8). Major shareholders include BMZ, KfW, DB, European Commission, the Austrian development bank OeEB, and unknown private investors. By March 2019, the fund disbursed \$300 million, which generated \$52 million interest income on the loans and fees in Luxembourg (FIAN Germany 2020a).

This case illustrates a broad array of ETO-related violations of the right to food in Zambia. The ownership structures link ETOs to many donor countries: the executive directors of the World Bank are representatives of member states (ETO Principle 11 also highlights state responsibility when acting jointly with other states), and Norfund is fully owned by the Norwegian Ministry of Foreign Affairs. The investment of AATIF is another ETO component, which has been inquired by FIAN Germany for multiple years. Germany (through BMZ with KfW, the latter chairs the AATIF board) accepted some responsibility related to the case. They have taken up critique, including commissioning a ‘beacon identification exercise’ in 2017. However, response to the critique had substantive limitations from an ETO perspective: it focused on property rights (with all its own issues related to the land law in Zambia), thus excluding a human rights analysis based on the right to food of the local population. Moreover, it was not understood as an obligation based on the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and related to the affected people in Ngambwa, but rather as an act to deal with critique inside Germany, including from parliament.

Financial inclusion and the right to land

Public development institutions also support and promote microcredits and the broader concept of so-called ‘financial inclusion’ as a strategy to empower poor people and trigger development impacts. However, research shows that microcredits can have serious adverse impacts on the right to land of rural communities. This can be observed in Cambodia, where a booming and poorly regulated microfinance industry has put thousands of, mainly female, borrowers at risk of losing their land, which forms the basis of their economic and cultural life. In Cambodia, land titles are routinely collected as a collateral for the microcredits, and there is evidence that

Figure 16.2 Financial flows between actors in the case of the Microfinance-Fund MEF, helping to unpack obligations.

aggressive debt collection practices by microfinance lenders result in stress sales or coerced land sales to repay loans. The loss of land is a massive problem for the local people: ‘We are living on the land, we do everything on the land. We are not able to live in the sky’, as one affected puts it (LICADHO 2019).

Local civil society has warned repeatedly that the economic crisis caused by the Covid-19 pandemic in 2020 could result in a wave of land dispossessions, particularly affecting women. In April 2020 for instance, 135 communities, labour unions, and human rights NGOs, called on the Cambodian government and microfinance institutions (without avail) to suspend all loan repayments and return land titles collected as collateral to the landowners. European and German development banks are major financiers of the microcredit sector in Cambodia. One example and financing vehicle is the Microfinance Enhancement Facility (MEF), an investment fund established in Luxembourg (Figure 16.2). Cambodia is one of the key countries of the fund. MEF is mostly financed by international donors including banks like IFC, KfW, and OeEB but also BMZ and SIDA (MEF 2020). In ten years, MEF generated an income from interest on loans and fees of \$350 million (FIAN Germany 2020b).

Despite multiple demands, European and German development banks have also so far not taken any substantive action to prevent this dispossession crisis. The question arises then to what extent Germany violates its ETOs related to access to and the right to land as enshrined under the ICESCR and the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP) and specified in the UN Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries, and Forests in the Context of National Food Security. As Germany is in a position to control and regulate MEF (e.g., KfW is chairing the MEF board of directors), it could, among others, prohibit the use of land as a collateral for the MFI they fund.

Blended finance and the right to water

The water sector provides for the basic needs of the population and was until recently a mostly publicly run sector. Comparable to the health sector, privatization efforts increased during the last two decades. Especially since the adoption of the SDGs, debates around the financial needs for a sustainable water sector have proliferated, generating products and vehicles for financial investments in the sector. One of them is a blended finance approach in development

cooperation. This can have substantive implications on the right to water (CESCR 2003; UN General Assembly 2010 and 2018). Through the integration of private, rent seeking finance, commercial interests become immanent, triggering human rights issues (Eurodad 2018). First, the complex governance of blended finance risks eroding local ownership, decision-making, and accountability; and second, it risks diverting attention from water and sanitation services that reach especially most marginalized to commercial interest, which might lead to violations of the right to water.

Under such blended finance constructs, states are in a complex position where they have not only an obligation to respect the right to water (ETO Principle 20), but also to protect by ensuring that the involvement of private (investment) actors does not impede on the right to water (ETO Principles 24 to 26), as well as to fulfil by prioritizing the rights of marginalized groups (ETO Principle 32). The questions arise then, how this complex state role is institutionally anchored in a blended finance instrument, and how such a role conflicts with the economic aims of the common finance vehicle?

Financialization and its implications for procedural human rights & obligations

Within the scope of solely publicly led development cooperation, a state's accountability can be easily established in the case of extraterritorial human rights violations resulting from the implementation of specific development cooperation measures or policies.

Yet, as seen above, in many cases of (public) policies – be it in development cooperation or others – the huge variety of actors involved adds a serious set of obscure layers, when it comes to identifying actors to be held accountable or liable for human rights violations. Clapp (2014) describes that amplified financialization of the global food politics leads to an increasing two-fold ‘distancing’: first, the rising number of various types of actors involved in global food chains and, second, the transformation of food as a common good into ‘highly complex agricultural commodity derivatives that are difficult to understand for all but seasoned financial traders’. This means that financialization undoubtedly also brings about ‘distancing accountability’ (Michèle, Fyfe and Slot-Tang 2017).

What share of human rights obligations and – in case of violations – responsibility has each of the actors involved in complex investment webs? In the context of financialization, projects or policies count a manifold set of actors involved in different ways, whose respective (share of) responsibility is difficult to identify. It is therefore key to examine the relationships between inter-connected corporations, finance flows, and the degree of control that states exercise over them.

Transparency and accountability vis-à-vis finance intermediaries

Most DFIs adopted similar financing instruments and mechanisms, as highlighted, involving a diverse set of financial actors commonly following comparable schemes. In order to expose related transparency and accountability issues, we will illustrate this with examples from Germany and its development finance.

As seen above, the DEG today facilitates well over half of their investments via financial intermediaries. Regularly, requests for information on environmental, social, and human rights impacts are turned down with reference to banking secrecy.

One of these investments goes in the specialized bank Latin American Agribusiness Development Corporation (LAAD). DEG holds 9 percent of the bank's shares and frequently gives loans to the bank harboured in Curacao. LAAD is a specialized bank that ‘finances and develops

private agribusiness projects in Latin America and the Caribbean'. In its annual reports, LAAD does not list the investments they make; it just highlights countrywide investment volumes. In its 2015 report, LAAD explains that it invested 'US\$13.4 million to 11 projects in the cattle industry, 3 in the Chaco region' in Paraguay (LAAD 2016, p. 6). The Paraguayan Chaco has undergone a massive eco-destruction and deforestation in the last few years, especially due to cattle ranching, triggering many, sometimes violent, land conflicts with local indigenous groups as well as small-scale food producers. Moreover, land concentration is extremely high and an issue of concern for the CDESCR. In its 2008 concluding observations, the Committee 'notes with concern the concentration of land ownership in the hands of a very small proportion of the population' (CDESCR 2008, p. 3). Overall, such investments have a high human rights risk.

In this context, the German parliament asked the Government in a written request about the human rights implications of these investments for development. The government explained it had no further information beyond the annual report (Deutscher Bundestag 2019). This raises substantive concerns about the German government's capability to adequately address its extraterritorial human rights obligations in such investment constructs, not to speak about the parliament – as the government-controlling body – that is left without information. An interesting side note: due to public pressure, DEG introduced a transparency guideline that in case of investments include land over 5,000 hectares, environmental and social action plans will be published. In the case of LAAD, research revealed that one investment in the Chaco is a farm holding 13,500 hectares of land. Due to indirect funding via LAAD, the guideline will not be triggered however.

Such cases are examples of a 'distancing accountability' strategy, that – by intention or not – erode extraterritorial obligations with regard to human rights principles of transparency and accountability (ETO Principle 2 and 32 c). Moreover, domestic non-judicial accountability mechanisms (in our example the German parliament) are severely hindered in their monitoring role (see ETO Principle 40).

ETO responses to financialization

This section looks into possible avenues to approach financialization in ETO work. We propose to distinguish between tools and strategies that help identifying duty-bearers through 'lines of obligations' in the complex and opaque webs of development finance, and the ones that help holding a state identified this way accountable to the respective obligation. Some of them are already more systematically applied by academics, NGOs, and affected communities. In practice, a combination of different tools and strategies may be the best option for applying ETOs.

Unpacking 'lines of obligations'

Piercing the corporate veil

Holding states accountable, in contexts of development finance through shareholding and financing of private companies, will require deconstructing complex holding structures that obscure specific and distinct obligations. Corporations often have limited liability and consequently, as such, are difficult to be held accountable for adverse human rights impacts of their actions. Courts make moves in order to hold natural persons accountable, be it the corporation's director(s) and/or shareholders. Affected communities and supporting CSOs regularly face obstacles when it comes to identifying who the decision makers within a project, an activity or a company are. Yet, the shareholders of a given company are not always exclusively natural

persons but also other types of private actors. The Feronia case (Figure 16.3) illustrates how the holding and shareholding structure of the private palm oil company Feronia controlling over 110,000 hectares of land in the Democratic Republic of Congo (DRC) unveils: (a) the shareholding of many public development banks in different countries, and (b) that they indeed are – through African Agriculture Fund and CDC Group – majority owners of the company. Thus, the respective states through their development banks are not only in a strong position to

Figure 16.3 Feronia's investment web: Shareholding and financing structure.

Source: Authors' own elaboration. The data gathered in 2016 is from different sources and years. Thus, the figure does not reflect the precise current situation. However, this does not impede the purpose of the figure, which is to illustrate the complexity of the investment webs surrounding development finance.

regulate the company (ETO Principle 24), but they must also respect human rights in a context of ‘direct interference’ (ETO Principle 20).

Investment chain mapping: ‘follow the money’

From an ETO perspective, mapping of investment chains is producing an explicit and distinct chain of obligation. This mapping can be very complex and time-consuming. Often, information about the various actors can be difficult to find – sometimes by design. This means that specialized research is often needed to get access to trade and financial databases to unravel the complex web of backers of harmful investment projects. As a result, a systematic web of investors, financiers, and buyers behind projects unveils lines of obligations that often lead to other states than the one where a project is physically implemented. Such research can identify, *inter alia*: i) shareholders of companies or entities involved at all levels of a project; ii) loans, bonds, and other debt instruments that provide funding throughout an investment chain; iii) international financial institutions, such as the World Bank Group, contributing funding to a project; iv) buyers of products, suppliers of raw materials or providers of equipment essential to the operations of a project.

In a second step, points of leverage can be analyzed and, subsequently, advocacy strategies be developed to support communities in defending their rights.

The Feronia case (Figure 16.3) exposes the lack of transparency and accountability with development finance. As it can be seen, the enterprise operating in the DRC belongs to Feronia Inc. which was domiciled in Canada at that time. A wide set of public DFIs as well as banks and holdings from different countries funded Feronia Inc., for its palm oil activities in DRC leading to land conflict. Holding and financing structures lead to at least eight public development finance institutions of seven different countries. Public DFIs should uphold their extraterritorial human rights obligations, and states are also obliged to protect human rights from the interference of private actors they are in a position to regulate (ETO Principle 24).

Institutional Conflict of Interest

Institutional Conflict of Interest (ICOI) can be a relevant tool/approach for applying ETOs in the context of development cooperation. ‘Institutional conflicts of interest arise when an institution’s own financial interests or those of its senior officials pose risks of undue influence on decisions involving the institution’s primary interests’ (Lo and Field 2009).

Let us look at the German development bank DEG. Its statutes define that profit seeking should be only a secondary aspect of the banks conduct: ‘The company pursues exclusively and directly charitable purposes’ (§2(1)) and ‘[the] company is selflessly active; it does not pursue primarily self-economic purposes’ (§2(7)) (DEG 2017; *authors’ own translation*). An ICOI can arise, when for example an investment’s environmental and social risk mitigation increases to such an extent that the whole project is at risk to fail. Therefore, the development mandate and the aim to generate profits and growth may come into conflict. Here are two examples that indicate the relevance of ICOI, a structural one and a case-related one: in case of conflict between profit (or substantial losses) and social and environmental impacts.

- The growth of DEG has been massive in the last years. The investment volume grew from EUR 343 million in 1999 to EUR 1,866 million in 2018 – a staggering 540 percent growth in 20 years. This growth is based on retained profits out of development projects. Being largely tax exempted through its ‘charitable’ status is of help.

- In 2011, DEG invested USD 25 million in the dam construction project Barro Blanco in Panama. The impact on land and environment, especially land rights of indigenous people, generated many years of protest and local opposition. In February 2015, the national environmental agency (*Autoridad Nacional de Ambiente, ANAM*) temporarily suspended the dam construction. As a longer construction stop would implicate substantive financial losses, DEG together with other lenders pressured the government to proceed with the dam project. In their letter to the Panama Minister of External Affairs, they argue:

As lenders of the Barro Blanco Project, but more importantly, as lenders to projects in Panama in general, we fear that actions such as the one taken against GINESA may weigh upon future investment decisions, and harm the flow of long-term investments in Panama. We ask the relevant authorities, including ANAM, to take prompt actions in search of reaching a favourable agreement by all stakeholders involved in the Barro Blanco Project (DEG, FMO and EICE 2015).

The letter has been interpreted as blackmail by powerful development banks. While it is impossible to detail the impact of this letter, it is a fact that quickly afterwards, in May 2015, the project was resumed. With massive growth of development banks and funds, ICOI related to financial interests – or ‘rent seeking pressure’ – is undoubtedly on the rise. Attributing ICOI to a specific entity or units inside a development bank/fund could be an additional avenue for affected communities and supporting organization to identify actors that can be held accountable for specific acts or omissions. Where COI-policies are in place, it should be checked if they have adequate scope for human rights related ICOI.

Pathways for holding states to account

The role of donor embassies

ETOs include ‘institutional obligations’ (Pribytkova 2021) to create efficient accountability mechanisms to hold violators responsible, and to ensure an effective remedy for victims. This is of special relevance when accountability and remedies in the state, where violations occur, are unavailable or inefficient.

As has been illustrated in the cases above, especially the Zambia cases, financialization makes donor involvement in specific cases opaquer. We use the example of German embassies. On the one hand, German embassies sometimes do not have knowledge about funding activities mandated by Germany’s official development assistance, especially when financial intermediaries and regional funding vehicles are deployed by ODA. On the other one, embassies are hesitant to pro-actively monitor complaints about human rights violations. This can be related to different reasons: first, embassies explain that a clear mandate for such conduct is missing; second, they argue that they do not have capacities and/or thematic competence to deal with specific human rights issues (for example applying the *UN Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* to assess land conflicts); third, assessing human rights conduct of companies that are supported by development cooperation can create a conflict of interest between the embassies and their capital-based foreign ministries they are subordinated to, when it comes to support economic actors from their home country.

One way forward could include proposals and demands for formalized institutional arrangements in embassies that are responsive to human rights risks and indications of violations (ETO Principle 36). German embassies for example explain that a directive (*‘Weisung’*) from the capital

to actively monitor human rights violations that are linked to German actors could be an appropriate step to mandate embassies. Moreover, it would be key that mechanisms exist to inform embassies if indirect funding via financial intermediaries occurs in the country where the embassy is based.

A role for of the Optional Protocol to the ICESCR?

The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR) allows people whose economic, social, and cultural rights have been violated to bring a complaint (communication) to the international level, i.e., to the CESCR. To do so, two prerequisites need to be met: first, the concerned state must be a Party to the OP-ICESCR (OP-ICESCR, art. 1.2) and, second, available domestic remedies must have been exhausted (OP-ICESCR, art. 3.1). Can the OP-ICESCR also be a tool for alleged victims to submit a communication to the CESCR if the violating state is another state as the one they are living in? At first sight, the OP-ICESCR seems to be silent on this issue. Yet, in its article 2, the OP-ICESCR stipulates that '[communications] may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party' (OP-ICESCR, art. 2; authors' emphasis). As Coomans argues, the mention of the term 'jurisdiction' is interesting as 'there was no reason to include a jurisdictional limitation clause in the Protocol because the ICESCR does not use that term' (Coomans 2011, p. 5). The *Maastricht Principles* thus explain how jurisdiction should also be considered extraterritorially (ETO Principle 9). In the case of public development banks or development funds, state entities are in a position to 'exercise authority or effective control', including in supervision board positions, and thus clearly part of the states' jurisdiction. Furthermore, Scheinin argues the use of the word 'jurisdiction' should be 'read as referring to the admissibility conditions that require a sufficient factual link', so also extraterritorially (Scheinin 2012, p. 228).

The International Court of Justice (ICJ 2004, paras. 111–113) took the view that, next to the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC), the ICESCR is applicable extraterritorially 'in respect to acts committed by a state in the exercise of its jurisdiction outside its territory' (Courtis and Rossi 2016, p. 50). In addition, the inquiry procedure (OP-ICESCR, art. 11) applies to acts and omissions of a State Party leading to violations of rights of individuals outside this state's territory, and may create the possibility to develop the jurisprudence about a state's extraterritorial obligations, regarding foreign operations of private companies domiciled under its jurisdiction, and that this state is in a position to regulate. Sullivan (2016) has significantly detailed the strong potential in this regard. Using the OP-ICESCR provisions to establish the infringement of a state's extraterritorial obligations would definitely advance the jurisprudence – and help affected communities to use a further avenue to get redress for the harm done (see also example, section 4.6). An important obstacle remains the fact that up to now, only 24 out of the 171 state Parties to the ICESCR have become parties to the OP-ICESCR.¹

Parallel reporting to the ICESCR

The reporting procedure under the ICESCR has already been used by civil society to raise ETOs. In its 2018 parallel report complementing the 6th Report of the Federal Republic of Germany on the ICESCR, German civil society brought to the attention of the UN Committee

the cases highlighted above (AATIF and LAAD), including their financial opaqueness. Civil society, under the German *Forum Menschenrechte* (Forum Menschenrechte 2018), recommended that the Committee calls on the state Party to:

- Commission independent HRIAs prior to its development financing and financing by state-owned banks. Areas with high human rights risks like large-scale agribusiness, large-scale mining, and infrastructure projects should have priority. All reports should be published;
- Fully disclose loans and investments of state-owned banks and actors with a public mandate such as DEG, KfW Entwicklungsbank, and AATIF before the project's start;
- Publish project information, environmental, social, and HRIA as well as plans of action and monitoring reports on all funded projects of all branches of the KfW Group;
- Give embassies a formal directive and resources to monitor the impact of those investments on the enjoyment of ESCR;
- Establish an independent complaint mechanism for the whole KfW Group following the example of the independent complaint mechanisms of the World Bank, the European Investment Bank (EIB), or the DEG.

The distinct use of ETOs in such reporting mechanisms could be an important pillar to further the practical application of ETOs, not only by academics and civil society but also by states.

Conclusion

Compared to the dominant financial actors like asset management companies or pension funds, the financial volume of development cooperation (e.g., DFIs, development funds) is 'relatively' small; yet, the volume of activities of 450 public development banks worldwide amounts to USD 2 trillion per year (Finance in Common 2020). Additionally, these development actors have become increasingly intertwined with, and are often part of, the finance industry.

Tackling those developments with a human rights lens requires some financial expertise. This is not frequently found in the human rights field, especially among local communities and human rights organizations dealing with development cooperation. Alliances with finance experts from academia and civil society can provide strategic help.

On the other side, the topic of financialization has 'arrived' in UN Treaty Bodies, periodic state reviews, and Special Procedures (cf., e.g., 'Guideline no. 12: Ensure the regulation of businesses in a manner consistent with state obligations and address the financialization of housing', Human Rights Council (2017)). However, the link between financialization and development cooperation is a somehow orphan issue – also because of the high opaqueness of public and publicly mandated development finance. Moreover, governments frequently dodge assigned ETOs with their own lack of knowledge of actors and impacts on the ground when making use of financial intermediaries.

This highlights the urgent need for Governments to implement ambitious and effective disclosure laws, obliging them to pierce the corporate veil, i.e., making it possible for people whose rights have been infringed to get a full picture of the private actors and their 'backstage' financiers – as all of them have a certain, but distinct responsibility when it comes to human rights abuses. In the case of development finance where private actors are involved, this will prevent states from claiming to have no responsibility. Other possible pillars of such a strategic approach include, *inter alia*, but not exclusively: 1) to unpack the lines of obligations through actions aiming at piercing the corporate veil and making in-depth analyses of investment webs (investment

chain mapping, ‘follow-the-money’, and the use of institutional conflict of interest), and 2) to hold states accountable through different ways (be it the role of donor embassies, exploring promising avenues through the OP-ICESCR and/or parallel reporting to the ICESCR, and other UN treaty bodies). The true test then for ETOs in development cooperation should be: can a state be effectively held accountable (including remediation) for human rights violations related to its development finance?

In the field of development cooperation, a timid ETO approach can be observed at state level – such as the ‘do no harm’ one in Germany. But states are still more than reluctant to fully accept – and spell out – their obligations extraterritorially, despite important advancement of ETOs within different treaty bodies in the last decade. However, the wide array of cases and examples in the field of development cooperation can be used in order to further ETOs and formulate concrete answers – including feasible ways of accountability – in case of human rights violations through development cooperation.

Note

1. Situation on 22 October 2020.

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