

Pilot Project for the Promotion of Social Dialogue in the Southern Mediterranean Neighborhood

Regional Seminar on Business and Human Rights

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Gefinor Rotana-Beirut-Lebanon

BACKGROUND PAPER

Introduction:

The Universal Declaration on Human Rights, in its preamble, proclaimed that “every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.”¹ Although it does not specifically mention business, this reference indirectly alludes to the role that a variety of participative actors in any given society can play in upholding human rights.²

In his final report to the Human Rights Council under the 2005 mandate, the Special Representative of the Secretary General on Human Rights and Transnational Corporations (TNCs) and other Business Enterprises recognized both the positive and negative impacts that companies can have on human rights. He observed that: “The root cause of the business and human rights predicament today lies in the governance gaps created by globalization - between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to

¹ <http://www.un.org/en/universal-declaration-human-rights/>

² http://www.ohchr.org/Documents/Press/HC_contribution_on_Business_and_HR.pdf



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narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge.”³

The private sector is an increasingly vital force in enabling the economic and social development that is so inextricably connected with human rights and security. Companies – sometimes intentionally, but more often inadvertently – can also impede the realization of human rights, directly or indirectly, as a result of their own actions.⁴

International human rights standards have traditionally been the responsibility of governments, aimed at regulating relations between the State and individuals and groups. But with the increased role of corporate actors, nationally and internationally, the issue of business’ impact on the enjoyment of human rights has been placed on the agenda of the United Nations.⁵

The process of globalization and other global developments over the past decades have seen non-state actors such as TNCs and other business play an increasingly important role both internationally, but also at the national and local levels. The growing reach and impact of business enterprises have given rise to a debate about the roles and responsibilities of such actors with regard to human rights.⁶

Additionally, in order to address the inadequacies of the traditional resource pool for development, the post-2015 Agenda and, consequently, the Sustainable Development Goals (SDGs), focused on the private sector as a key partner in financing and driving development. The SDGs specifically aim to “encourage and promote effective public, public-private and civil society partnerships, building on the experience and resourcing strategies of partnerships” (Goal 17, Target 17).⁷

Several aims of the SDGs deserve praise for incorporating sectors that are historically marginalized in development plans such as health, gender empowerment, access to water and sanitation, sustainable industrialization and consumption, conservation and sustainable management of marine and terrestrial ecosystems and building peaceful societies. However,

³ http://www.ohchr.org/Documents/Press/HC_contribution_on_Business_and_HR.pdf

⁴ http://www.ohchr.org/Documents/Press/HC_contribution_on_Business_and_HR.pdf

⁵ <http://www.ohchr.org/EN/Issues/Business/Pages/BusinessIndex.aspx>

⁶ <http://www.ohchr.org/EN/Issues/Business/Pages/BusinessIndex.aspx>

⁷ <https://sustainabledevelopment.un.org/?menu=1300>



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the silence of the 2030 Agenda on the ravaging consequences of a neoliberal path of development will have severe repercussions on the ability to attain the SDGs.⁸

The SDGs contain commitments in addressing the needs of the population basic social services as well as in accessing economic resources to enable them to live a dignified life in a sustainable manner. However, the very same governments that have approved the SDGs are still committed to the perpetuation of a neoliberal development path driven by free trade agreements that will strengthen the rights of corporations over the welfare of the population.⁹

In the Arab region, the outsourcing of public services, public-private partnerships (PPPs), and privatization has become an increasingly popular means to finance and operate infrastructure projects and public services.¹⁰ For example, the Guide on Public-Private Partnership in Lebanon published by the Higher Council for Privatization, claims that PPPs are the only available means to fund and develop the Lebanese infrastructure, even linking it to the question of combatting unemployment and brain drain.¹¹

However, in reality, private sector involvement in development has had a mixed track record. There are many cases of PPPs (in which infrastructure or public services are provided by the private sector), for instance, that have poorly prioritized and squandered development resources. Many have harmed the best interests of local communities rather than involving them in meaningful sustainable development.¹²

In the current environment, regulation of the private sector falls largely legally on the state. The absence of legal, civil and administrative mechanisms in many nations to hold the private sector accountable is troublesome. In light of a lack of democratic oversight and regulatory frameworks throughout the states of the Arab region, time and time again exploitative private

⁸ "CORPORATE CAPTURE of the International Development Agenda and why the SDGs cannot stop it," CPGSD & IBON, 2015, <http://peoplesgoals.org/corporate-capture-of-the-international-development-agenda/>

⁹ "CORPORATE CAPTURE of the International Development Agenda and why the SDGs cannot stop it," CPGSD & IBON, 2015, <http://peoplesgoals.org/corporate-capture-of-the-international-development-agenda/>

¹⁰ ANND, *Mutual Accountability Manual*, ANND, March, 2016, <http://www.socialwatch.org/sites/default/files/392-annd-eng.pdf>

¹¹ "Guide on Public Private Partnerships in Lebanon," Higher Council for Privatization, 2013, http://www.hcp.gov.lb/pictures/pdf/News0.9128229_final%20guide_13Feb2014_website.pdf

¹² ANND, *Mutual Accountability Manual*, ANND, March, 2016, <http://www.socialwatch.org/sites/default/files/392-annd-eng.pdf>



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sector initiatives have failed to deliver satisfactory benefit to the public. Issues adverse to development goals have arisen, including labor exploitation, gender inequality, landgrabbing, profiteering, misinformation, limited appraisal impacts (e.g. economic and social impacts assessments) and the neglect of indigenous peoples, amongst others.¹³

Many projects that involve little regulatory oversight have failed to guarantee basic standards for social services that the state is obligated to provide to its citizens. TNCs in particular have often operated with disregard to human and environmental rights with relative impunity. Furthermore, resources and profits have often been shifted away from those most in need into the hands of corporations and corrupt elites. Unfortunately, in this environment financial paybacks outweigh the desire to hold the private sector accountable to citizens.¹⁴

Without mechanisms for private sector accountability, the Arab region will continue to be burdened with projects that fail to produce real development benefits and fail to promote democratic ownership of development, human rights, and socioeconomic equality.¹⁵

Business Accountability towards Human Rights: HRC's Guiding Principles

In June 2008, the lead UN intergovernmental human rights body, the Human Rights Council, adopted a resolution in which it stated that: “transnational corporations and other business enterprises have a responsibility to respect human rights.”¹⁶ For the first time, States, which bear the primary obligation for the realization of human rights, recognized that business must also play its part.¹⁷

On 16 June 2011, the Member States of the UN Human Rights Council unanimously endorsed the UN Guiding Principles on Business and Human Rights,¹⁸ with overwhelming support from

¹³ ANND, *Mutual Accountability Manual*, ANND, March, 2016, <http://www.socialwatch.org/sites/default/files/392-annd-eng.pdf>

¹⁴ ANND, *Mutual Accountability Manual*, ANND, March, 2016, <http://www.socialwatch.org/sites/default/files/392-annd-eng.pdf>

¹⁵ ANND, *Mutual Accountability Manual*, ANND, March, 2016, <http://www.socialwatch.org/sites/default/files/392-annd-eng.pdf>

¹⁶ Human Rights Council Resolution 8/7, 18 June 2008.

¹⁷ http://www.ohchr.org/Documents/Press/HC_contribution_on_Business_and_HR.pdf

¹⁸ https://www.unglobalcompact.org/docs/issues_doc/human_rights/A.HRC.17.RES.17.4.pdf



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civil society organizations and the global business community. The Guiding Principles were designed to clarify the roles and responsibilities of companies and States in addressing business-related harm, functioning like a blueprint to guide efforts by governments and companies to improve their practices.

The Guiding Principles are grounded in recognition of:

- (a) States' existing obligations to respect, protect and fulfill human rights and fundamental freedoms;
- (b) The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights;
- (c) The need for rights and obligations to be matched to appropriate and effective remedies when breached.

According to the decision, “[these] Guiding Principles apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure.”¹⁹

The “Protect, Respect, and Remedy” Framework rests on three pillars:

- 1) The State duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication.
- 2) The corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved.
- 3) The need for greater access by victims to effective remedy, both judicial and non-judicial.²⁰

Foundational principles of the Guiding Principles:²¹

- 1. States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to

¹⁹ http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf

²⁰ http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf

²¹ http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf



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prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.

2. States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.
3. In meeting their duty to protect, States should:
 - a. Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;
 - b. Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;
 - c. Provide effective guidance to business enterprises on how to respect human rights throughout their operations;
 - d. Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.

Beyond the Human Rights Council, the Framework has been endorsed or employed by individual Governments, business enterprises and associations, civil society and workers' organizations, national human rights institutions, and investors. It has been drawn upon by such multilateral institutions as the International Organization for Standardization and the Organization for Economic Cooperation and Development in developing their own initiatives in the business and human rights domain. Other United Nations special procedures have invoked it extensively.²²

According to the Guiding Principles, under the heading of "The Corporate Responsibility to Protect Human Rights," the foundational principles state that business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved. This refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labor Organization's Declaration on Fundamental Principles

²² http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf



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and Rights at Work. It should apply to all enterprises regardless of their size, sector, operational context, ownership and structure.²³

According to Margaret Jungk, Chairperson, UN Working Group on the issue of human rights and transnational corporations and other business enterprises at the 70th session of the General Assembly, “the 2030 Agenda for sustainable development and the SDGs provide significant opportunities for increased implementation and measurement of the Guiding Principles ... To put it bluntly, we don’t want companies building hospitals and health centers to help ensure access to healthcare, while at the same time undermining their workers’ health with unsafe labor conditions or the surrounding communities’ health with unsafe emissions. In our view, the Guiding Principles must be the *‘first, do no harm’* dictum which lies at the heart of the SDGs. And this must include the measurement effort and the setting up of indicators at global and national level that accompany SDGs’ implementation.”²⁴

The Human Rights Council Forum on Business and Human Rights Fourth session on 16–18 November 2015²⁵ recommended several tools for measuring State implementation of the Guiding Principles, such as national action plans on business and human rights and national baseline assessments. It was also argued that the universal periodic review (UPR) process of the HRC could be one mechanism to monitor State implementation. SDG indicators could also be a tool to measure such actions. In this respect, human rights institutions and CSOs in general could play a greater role in engaging with States.

The Forum also examined the practical implications of the reference to the Guiding Principles in the 2030 Sustainable Development Agenda for the involvement of business in implementing the SDGs. Participants underlined the importance of:

- (a) Responsible business conduct standards, notably the minimum expectation in the Guiding Principles that all business activities respect and do not undermine human rights;
- (b) Incentives and disincentives for companies to respect human rights when supporting sustainable development efforts;

²³ http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf

²⁴ <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16660&LangID=E>

²⁵ http://www.ohchr.org/Documents/Issues/Business/A.HRC.FBHR.2015.2_AEV.pdf



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- (c) The links between tax payments and business respect for human rights, and the adverse effects on human rights, such as the rights to health and to education, of corporate tax avoidance;
- (d) Accountability mechanisms, and the guidance provided in the Guiding Principles in this regard.

The UN Human Rights Council, under paragraph 12 of its resolution 17/4,²⁶ decided to establish a Forum on Business and Human Rights under the guidance of the Working Group on the issue of human rights and transnational corporations and other business enterprises to:

“discuss trends and challenges in the implementation of the Guiding Principles [on Business and Human Rights] and promote dialogue and cooperation on issues linked to business and human rights, including challenges faced in particular sectors, operational environments or in relation to specific rights or groups, as well as identifying good practices.”

As per Human Rights Council resolution 17/4, the Forum is open to all relevant stakeholder groups, including States, the wider United Nations system, intergovernmental and regional organizations, businesses, labor unions, national human rights institutions, non-governmental organizations, and affected stakeholders, among others. The 2016 UN Forum on Business and Human Rights will take place in Geneva between 14 and 16 November 2016.²⁷

Maastricht Principles on Extraterritorial Obligations in the Area of ESCR:

One important aspect of the foundational principles that impacts developing countries in particular is the extraterritorial obligations (ETOs) of states with regards to the activities of business enterprises domiciled in their territory and/or jurisdiction. Despite the universality of human rights, many States still interpret their human rights obligations as being applicable only within their own borders. This attempt to limit obligations territorially has led to gaps in human

²⁶ http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/17/4

²⁷ <http://www.ohchr.org/EN/Issues/Business/Forum/Pages/ForumonBusinessandHumanRights.aspx>



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rights protection in various international political processes and a lack of adequate regulation for the protection of human rights.²⁸

These gaps have become more severe in the context of globalization over the past 20 years. They include:²⁹

- 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 fulfill ESCRs abroad, inter alia through the obligations of international cooperation and assistance

Without ETOs, human rights could not assume their proper role as the legal bases for regulating globalization. With ETOs, an enabling environment for ESCRs can be generated, the primacy of human rights can be implemented, climate and eco-destruction can be stopped, the dominance of big money broken, TNCs regulated, and IGOs made accountable.³⁰

The underlying principles were carefully researched and finally formulated as the “Maastricht Principles on extraterritorial obligations in the area of ESCR” – on 28 September 2011 by a conference of experts from universities and organizations located in all regions of the world.³¹

The Maastricht Principles reiterate the obligations of States to take deliberate, concrete and targeted steps, separately, and jointly through international cooperation, to create an international enabling environment conducive to the universal fulfilment of ESCRs.

The Principles lay down the States obligations to respect, protect and fulfill ESCRs extraterritorially. States are obliged to refrain from any action that would impair or nullify the enjoyment of ESCRs of those also living extraterritorially. Furthermore, States have the obligation to protect individuals ESCRs by regulating non-state actors, including the regulation

²⁸ http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23

²⁹ http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23

³⁰ <http://www.etoconsortium.org/en/main-navigation/our-work/>

³¹ <http://www.etoconsortium.org/en/main-navigation/our-work/>



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and/or influence the business sector in order to protect those affected by them outside their territory. The Maastricht ETO Principles also identify international tax cooperation as a duty of states. Additionally, several principles laid down in the Maastricht Principles on ETOs are relevant in the field of corruption. Cases connected to the financial crisis, high-level fraud and corrupt practices in investment trading have a clear damaging cross-border consequence.

Towards a Legally Binding Instrument:

On 26 June 2014, The United Nations Human Rights Council (HRC) at its 26th session adopted, through a vote, a historic and significant resolution to start a process for an international legally binding instrument on TNCs, officially entitled “Elaboration of an international legally binding instrument on Transnational Corporations and other Business Enterprises with respect to Human Rights” (A/HRC/26/L.22).

The resolution provides for the establishment of an open-ended intergovernmental working group (IWG) that is mandated with elaborating an international legally binding instrument to regulate, in international human rights law, the activities of TNCs and other business enterprises.

The resolution also makes reference as well to the important role of civil society actors in “promoting corporate social responsibility and in preventing, mitigating, and seeking remedy for adverse human rights impacts of transnational corporations (TNCs) and other business enterprises.”³²

The first meeting of the open-ended intergovernmental working group on TNCs and other business enterprises with respect to human rights, established by the Human Rights Council in its resolution 26/9 of 26 June 2014, took place between 6 and 10 July 2016. The Deputy High Commissioner for Human Rights opened the first session by stressing that, since the introduction of the Universal Declaration of Human Rights, international human rights law had

³² http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/9



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been evolving with the increasing awareness that non-State actors have a responsibility to ensure accountability and access to remedies when rights have been abused.³³

Most NGOs at the meeting highlighted that a treaty was a unique opportunity to empower local communities to take charge of their own development. They argued that communities must be able to participate in the working group, and that feedback was needed at each stage of the drafting process. Some NGOs underlined that the principles were based on self-regulation and that such an approach was illusory, as shown by the recent economic and financial crisis. It was also noted that a treaty should focus on the indivisibility and universality of human rights and therefore should have an extraterritorial scope. Most NGOs argued that a legally binding treaty should provide for companies to be held liable. It was noted that, while TNCs benefited from strong enforcement mechanisms, such as investor-to-State arbitration tribunals in international investment treaties, no international mechanism existed to ensure access to justice for the victims of those abuses. The need to redress this asymmetry in international law was highlighted.³⁴

Other issues brought up by NGOs included:³⁵

- The treaty's scope is limited to gross human rights violations and that it should expand to prevent and remedy violations before they became gross abuses;
- The need to cover all rights, particularly the right to food and nutrition – also noting that evictions, the depletion of fish stocks and forests, harm to health and the destruction of food, crops, animals and seeds had an impact on the right to self-determination and ability to achieve an adequate standard of living.
- The treaty needed to protect workers' rights and that a legally binding instrument should clearly outline the duty to ensure their rights to a safe and healthy working environment, and that it should strengthen the work of ILO.
- A gender-sensitive approach should be adopted throughout the process, as women were particularly affected by working longer hours and receiving lower salaries, and were often subjected to domestic abuse and gender-based violence.

³³ http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Documents/A.HRC.31.50_E.docx

³⁴ http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Documents/A.HRC.31.50_E.docx

³⁵ http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Documents/A.HRC.31.50_E.docx



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- The need to protect the negotiation process from corporate capture and ensure an effective participation of victims and affected communities.

It was also noted that the treaty process offered an opportunity to clarify issues, such as the principle of parent company liability, mandatory human rights due diligence requirements, and the steps that States should take to regulate the extraterritorial activities of businesses domiciled inside their jurisdiction.

On 1 May 2016, the Global Alliance for a Binding Treaty issued a statement entitled “UN Treaty Must Address Corporate Capture”, calling on CSOs to take action to combat corporate capture and to demand “that the forthcoming United Nations (UN) binding treaty contain strong provisions that prohibit the interference of corporations in the process of forming and implementing laws and policies, as well as administering justice, at all national and international levels.”³⁶

The Treaty Alliance also urged CSOs everywhere to safeguard against any potential for corporate capture of discussion at the national, regional and international level on the pathway to establishing the treaty. During the gathering those assembled reaffirmed that corporate capture in the process of forming and implementing regulation and policies strongly undermines human rights and protection of the environment.

Seminar on Business and Human Rights

As part of the Pilot Project for the Promotion of Social Dialogue in the Southern Mediterranean Neighborhood, in collaboration with ITUC and other partners, ANND will hold a regional seminar on Business and Human Rights to discuss issues related to the business community’s responsibility in upholding human rights. The seminar will take place in the first week of September 2016.

The seminar will bring together human rights experts and defenders as well as representatives of CSOs and Trade Unions from the Arab Region to look at human rights challenges under the specific economic, social, and political environment and the contribution of social dialogue to

³⁶ <http://www.treatymovement.com/>



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improve human rights compliance. In particular, the seminar will look into the role of CSOs in upholding human rights standards in PPPs, other partnerships, and privatization initiatives.



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