

Position Paper

on Business and Human Rights – Expectations of a German Action Plan



PUBLISHING INFORMATION

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Executive Summary of the Position Paper

In the course of globalisation, the power and influence wielded by transnational enterprises has grown continuously. On the one hand their access to markets and the protection of their investments have been increased considerably by international agreements, and secured by arbitration courts. On the other hand, there is a lack of corresponding instruments that would oblige these same enterprises to fulfil human rights internationally, and would provide those affected by human rights abuses with access to courts. The UN Guiding Principles on Business and Human Rights, which were adopted unanimously by the UN Human Rights Council in 2011, are designed to close such regulatory gaps in the field of human rights.

The civil society organisations subscribing to this position paper expect the German Government and the German Bundestag to elaborate, on the basis of these UN Guiding Principles and other relevant documents and with the active participation of civil society, an Action Plan for Business and Human Rights, and to swiftly implement this within the next legislative period. Specifically, the German Government and German Bundestag should:

- Comprehensively review Germany's legal foundations to identify any regulatory gaps that make it more difficult to ensure effective protection against human rights abuses by private business enterprises.
- Ensure, through human rights impact assessments, reformed human rights clauses and the setting of new priorities, that EU investment and trade agreements and German raw materials partnerships do not constrain the fulfilment of human rights, but promote it.
- Work to bring about a comprehensive mainstreaming of human rights in the guidelines and operations of the World Bank, IMF and other international institutions.
- Develop implementation guidelines on human rights due diligence for business enterprises, also in relation to their subsidiaries, suppliers and distribution channels, and make these a legal requirement in Germany.
- Make all State support, e.g. in the form of foreign trade promotion or public procurement, dependent on strict compliance with human rights due diligence, and disclose this transparently.
- Enact legal reforms to ensure that liability for severe human rights abuses by a foreign subsidiary, supplier or distribution partner is transferred to the parent company.
- Enact legal reforms to facilitate the application of German law and corporate criminal liability in case of human rights abuses involving German business enterprises in other countries.
- Create the legal means for those affected in other countries to file proceedings in Germany, and reduce financial and procedural barriers.
- Systematically and comprehensively implement the new version of the OECD Guidelines for Multinational Enterprises, and provide for sanctions where these are violated.

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Introduction

In Bangladesh, textile factory workers burn to death because fire regulations have not been observed and the factory doors have been locked. In Uganda, the army drives small farming families off their land so that a coffee roasting company can establish a plantation there for export. In Colombia, indigenous communities are forced to resettle so that coal can be mined for export. In Brazil, international financial service providers and turbine manufacturers earn money from the construction of a dam that threatens to rob thousands of fishermen and fisherwomen of their livelihoods. In all these cases, German business enterprises or their subsidiaries are involved directly or indirectly as investors, importers or financial service providers.

These and other cases have therefore made the German public think, and raised their awareness of the fact that respect for human rights¹ cannot always be taken for granted – a fact that also applies to German enterprises and their business partners abroad. For a whole range of reasons, national governments and courts that hold primary responsibility for protecting human rights in their own country too often remain inactive. At the same time, legal obstacles prevent those affected from being able to claim their rights in Germany, or other countries where the parent enterprises, importers or financiers are domiciled.

This problem highlights a fundamental contradiction of economic globalisation. On the one hand structural adjustment measures, and trade and investment protection agreements, have made it considerably easier for enterprises operating internationally to access markets and raw materials worldwide, and have granted them very extensive investor rights. On the other hand, internationally and in the home countries of transnational enterprises, no effective mechanisms have been created to prevent human rights abuses associated with the activities of those enterprises, and to hold the guilty parties to account.

Thus regulatory gaps have arisen, or become wider, which make effective realisation of human rights more difficult, despite the fact that States are obliged to do so as a result of international agreements under international law that were negotiated through the United Nations (UN) and the International Labour Organization (ILO).

¹ Besides the Universal Declaration of Human Rights, human rights are laid down in the UN and ILO conventions, and are defined in more detail through general commentaries, the interpretive practices of the treaty bodies, and other relevant documents such as the Declaration on the Rights of Indigenous Peoples.

The UN Guiding Principles on Business and Human Rights

Closing such gaps in regulation is what the UN Guiding Principles on Business and Human Rights (hereinafter referred to as the 'UN Guiding Principles') set out to do. These UN Guiding Principles, which were adopted by the UN Human Rights Council in 2011, rest on three pillars:

- **The State duty to protect human rights:** States are obliged under international law to protect people against human rights abuse by business enterprises 'through effective policies, legislation, regulations and adjudication'. The State duty to protect 'lies at the very core of the international human rights regime' (Introduction, Paragraph 6).
- **The corporate responsibility to respect human rights:** It is the responsibility of business enterprises to respect human rights, and to put an end to and rectify any adverse impacts of their business activity.
- **Access to effective remedy:** As part of their duty to protect, States must provide those affected by business-related human rights abuses with access to effective remedy, both judicial and non-judicial, by taking steps to 'investigate, punish and redress' such abuses when they occur (Principle 25).

These three pillars are concretised through 31 principles that detail the fundamental obligations and responsibilities, and include specific recommendations to governments and business enterprises for their operationalisation. These Guiding Principles are expressly conceived not as the final word on all challenges associated with business and human rights, but rather as the 'end of the beginning' of a process, and as a 'common global platform for action' that does not foreclose any other longer-term measures (Paragraph 13).

Our expectations of the German action plan and the implementation process

In the spirit of this reading we, as German civil society organisations, do not see the UN Guiding Principles as the measure of all things. We see it as a first essential element that the international community has so far been able to agree upon. When developing and implementing national action plans for business and human rights, as called for by the European Commission in 2011, the UN Guiding Principles should therefore be taken as a minimum standard that must be applied comprehensively and uncompromisingly. Selective implementation, for instance focusing on only one of the three pillars, would therefore be unacceptable. To ensure that this can succeed the German Government must guarantee maximum transparency and participation by civil society in the process of developing and implementing a plan of action.

Moreover, the process of developing action plans should also incorporate other documents that specify State duties to protect with respect to business enterprises more precisely on the basis of international human rights agreements. Particularly relevant in this context are the UN Guiding Principles on Extreme Poverty and Human Rights, which were also adopted by the UN Human Rights Council in September 2012, and which include a number of important additional recommendations for business and human rights. Another document that should be included is the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, a legal commentary prepared by human rights experts from universities, the UN and civil society organisations.

Although the present position paper adopts the three-pillared structure advocated by the UN Guiding Principles, it also incorporates the contents of the other reference documents mentioned above. Besides a systematic implementation of the Guiding Principles in the German context, we also expect the German Government to actively support the UN Working Group on Business and Human Rights in its further work, and to promote capacity building in relation to the Guiding Principles, especially for disadvantaged groups.

1.1. The State duty to protect human rights

States are obliged under international law to protect people against human rights abuses by private actors such as business enterprises. The UN Guiding Principles therefore require States to ‘take appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulation and adjudication’ (Principle 1). Similar provisions requiring States to protect are included in the UN Guiding Principles on Extreme Poverty and Human Rights. According to the latter, States are also required to avoid conduct that would ‘create a foreseeable risk to the enjoyment of human rights by persons living in poverty beyond their borders’ (Paragraph 92).

Human rights-based regulation of corporate conduct

States have a duty to ensure that business enterprises respect human rights. To achieve this they must create and implement corresponding laws. Voluntary corporate measures can and should be promoted in order to complement this, but this is far from adequate for fulfilling the State duty to protect. This is emphasised not only in the UN Guiding Principles, but also in the Communication of the European Commission on Corporate Social Responsibility (CSR) of 2011.

A State’s obligation to protect does not end at its own territorial borders. According to the Maastricht Principles, wherever they are in a position to do so States must take measures to ensure that transnational corporations do not impair the enjoyment of economic, social or cultural rights (Principle 24). This applies for instance in cases where the harm or threat of harm originates on the state’s own territory, or where the corporation or its parent or controlling company is domiciled or registered in the State concerned, or has its centre of activity on that State’s territory (Principle 25).

So far, Germany has not met this obligation to protect human rights to a sufficient degree. In its concluding remarks on Germany’s efforts to implement the International Covenant on Civil and Political Rights in November 2012, the Human Rights Committee expressed concern that the measures taken by Germany to date were not sufficient to ensure that German enterprises abroad respect human rights standards and to provide those affected by human rights violations with access to redress.

As civil society organisations, we expect the Federal Republic of Germany to

- Ratify relevant international agreements, especially Convention No. 169 of the International Labour Organization (ILO) on the rights of indigenous and tribal peoples, and ILO Convention No. 94 on labour clauses in public contracts.

Comprehensively review Germany's legal foundations – for instance in company law, administrative law, criminal law, civil law, tax law and commercial law – to identify any regulatory gaps that make it more difficult to ensure effective protection against human rights abuses by private enterprises in Germany and abroad. After this review has been conducted for the first time, it should be repeated at regular intervals once during each legislative period, and should involve the German Institute for Human Rights and civil society. A report on the review should also be submitted to the German Bundestag.

- As a standard practice prior to the passage of new legislation, conduct a human rights coherency review with regard to the State obligation to protect against business-related human rights abuses.
- Legally oblige German companies to exercise human rights due diligence (see further specific demands for pillars 2 and 3).
- Support the current proposals of the European Parliament concerning corporate disclosure obligations for payment flows in the extractive and forestry industries, as well as infrastructure and telecommunications. Disclosure must take place on a country by country and project by project basis, and without exception.
- Contribute toward the effective provision of maximum available resources for realising human rights by taking effective measures to fight tax avoidance and evasion, corruption and money laundering at the national and international levels. This should include the necessary strengthening of tax authorities, tighter transparency requirements and duties of disclosure, and the introduction of rules for the automatic exchange of information between tax authorities of various countries and territories, including beneficial ownership disclosure.
- Work within the EU to bring about the introduction of binding obligations to disclose non-financial information as part of the reform of the EU Modernisation Directive. This obligation to disclose must include comprehensive information on the risks and impacts of business activity, on corporate practices with regard to e.g. human rights, workers' rights, corruption, environmental conditions and climate change. It must also include information on corporate structure, suppliers, production sites and resourcing of products and raw materials, as well as distribution channels and intermediaries en route to the customers. Those affected by labour and human rights violations must be granted the right to access all relevant information.

Tying the State-business nexus to human rights standards

When business enterprises that are owned, controlled or supported by a State commit human rights abuses, the State in question runs a particular risk of violating its own human rights obligations under international law (Principle 4). This may affect not only its duty to protect, but also its duty to respect, i.e. its obligation to do no harm to human rights. As the UN Guiding Principles emphasise, however, in these cases the State also has the greatest means to ensure – through policies, legislation and other forms of regulation – that human rights are complied with, and to monitor this compliance. In cases where public services are privatised, the State is not relieved of its obligation to fulfil the human rights associated with them.

As civil society organisations, we expect the Federal Republic of Germany to:

- Comprehensively and regularly review whether and to what extent it is meeting its own human rights obligations through the business activities in Germany and abroad of the enterprises that it owns, controls or supports. The German Government should demonstrate accountability on this to the German Bundestag and the public in the form of an annual report.
- Comprehensively review and demonstrate accountability on what State assistance, support and services it is providing to enterprises for their foreign business activities, what risks to human rights this entails, and what measures it is taking to prevent human rights violations.
- Tie all State foreign trade promotion in the form of export credit guarantees, investment guarantees or untied loan guarantees to obligations of maximum human rights due diligence and transparency. All projects must be reviewed for possible risks to human rights in relation to the international human rights agreements. Where risks to human rights are found to exist, independent ex ante and ex post human rights impact assessments must be carried out. An independent mechanism must be set up to receive and examine complaints by possible stakeholders affected by such projects and non-governmental organisations, and where appropriate to propose measures. Enterprises that breach their obligations of human rights due diligence must be excluded from all forms of foreign business support. To provide parliament with greater control over these important issues, regulations should be introduced not in the form of guidelines but in the form of a law.
- Refrain from realising any privatisation project unless it can rule out the possibility that the project might adversely affect its ability to fulfil social human rights. Particularly with regard to public services of general interest such as health, old-age provision, education, water and power supply, a comprehensive human rights impact assessment must have been conducted ex ante.
- Ensure that public agencies take the necessary contractual and institutional precautions to guarantee that the social and human rights associated with previously public services are also fulfilled completely after their possible privatisation. This will involve ensuring that the services in question remain affordable for poorer sections of the population, and that demo-

cratic oversight and control of the privatised or partly privatised enterprises are maintained. The conditions of employment of the workers in privatised enterprises must comply fully with human rights standards.

- Make the legal requirements for socially responsible public procurement mandatory, and develop effective and credible instruments and measures for their application and monitoring. When operationalising the corresponding EU Directive through German law, Germany must make maximum use of possible scope of interpretation for binding socially responsible procurement. The Competence Centre for Public Procurement at the Procurement Office of the Federal Ministry of the Interior should be further expanded. Its core tasks should include the random examination of corporate information in public invitations to tender, the further development of criteria for socially responsible public procurement, the development of a strategy to improve procedures for demonstrating corporate compliance with basic labour and human rights, and the development of support offerings for procurers.
- Ensure the necessary human rights due diligence in development cooperation, both within the Federal Ministry for Economic Cooperation and Development (BMZ) and the implementing organisations, and the private enterprises involved in implementing development projects through public-private partnerships. Where development cooperation projects are geared to the private sector, as is the case in the priority area 'sustainable economic development', operationalisation of the UN Guiding Principles should be a key component of projects and a focus of support measures such as technical assistance and capacity building. The BMZ's independent monitoring and complaints mechanism must ensure that the BMZ, implementing organisations and cooperation partners do not cooperate with enterprises that are responsible for human rights abuses.

Ensuring business respect for human rights in conflict-affected areas

Numerous business enterprises – including German ones – operate in areas around the world that are affected by warfare, armed conflict or recurrent violence which, although it remains below the threshold of what is defined as warfare, can rapidly escalate into a war or civil war. Time and time again, both State and private security forces are deployed in such areas to protect economic interests. Grave human rights violations, the militarisation of entire regions and the criminalisation of social protest movements and of human rights defenders are commonplace. In accordance with the UN Guiding Principles, States should help ensure that business enterprises operating in conflict-affected areas are not involved in human rights abuses (Principle 7).

As civil society organisations, we expect the Federal Republic of Germany to:

- Work actively to help create national and international frameworks requiring business enterprises to design a corporate policy that is sensitive to human rights and conflict, and to mainstream and operationalise this policy within the corporation through corresponding management structures.
- Take measures to sanction uncooperative enterprises accordingly, including their exclusion from the award of public contracts, loans, export credit (Hermes) guarantees or investment guarantees.
- Provide the necessary advice and support to business enterprises operating or intending to operate in conflict-affected regions: e.g. by relevant ministries and German and EU embassies gathering and making available information on the relevant conflict regions.
- Publicise existing instruments, and promote training measures on their content and possible application for ministries, embassy staff and interested enterprises. These instruments include the OECD Due Diligence Guidance for Responsible Supply Chains for Minerals from Conflict-Affected and High-Risk Areas, the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones, the Voluntary Principles for Security and Human Rights, the Human Rights Training Toolkit for Oil and Gas Industry, and the Conflict Sensitive Business Practice: Guidance for Extractive Industries published by International Alert in 2005. The UN Global Compact also offers specific assistance for business enterprises operating or wishing to operate in conflict-affected areas.
- Follow the good example set by Switzerland, which has been an active member of the Voluntary Principles on Security and Human Rights since 2011, and has already defined numerous targets and steps for transparent, credible and effective operationalisation of these principles.
- Actively follow up the pledge made in the Heiligendamm 2007 G8 Summit Declaration to step up dialogue with the BRICS states, and to include issues of corporate social responsibility (see Paragraphs 94 – 97).
- Actively support all efforts to achieve an internationally binding standard for conflict-sensitive conduct in compliance with human rights. A standard of this kind can and should create a level playing field worldwide for business enterprises.
- Work to achieve consistent arms export legislation with a legally mandatory human rights clause for all arms transfers, including dual use goods.
- Continue working, and vigorously so, toward the adoption of a comprehensive Arms Trade Treaty (ATT) that prohibits arms transfers where these would enable grave violations of human rights and international humanitarian law to be committed, or jeopardise poverty reduction in the recipient countries.

Ensuring human rights coherence in international agreements and organisations

The UN Guiding Principles on Extreme Poverty and Human Rights emphasise even more clearly than the UN Guiding Principles on Business and Human Rights that States ‘should take into account their international human rights obligations when designing and implementing all policies, including international trade, taxation, fiscal, monetary, environmental and investment policies’ (Paragraph 61). Before concluding international agreements and implementing policy measures, States must therefore ensure that these are in harmony with their international human rights obligations. The Maastricht Principles also require States to elaborate, interpret and apply all international agreements in a manner consistent with their human rights obligations (Principle 17). The Maastricht Principles seek not only to prevent negative impacts on human rights; they also aim to help create an international enabling environment that is conducive to the fulfilment of all economic, social and cultural rights (Principle 29). Coherent action for human rights is thus an imperative also incumbent upon States within international organisations.

As civil society organisations, we expect the Federal Republic of Germany to:

- Work within the EU for the systematic implementation of human rights impact assessments (HRIAs) ex ante prior to the conclusion of trade and investment agreements in order to identify and eliminate early on any provisions that are problematic from a human rights perspective. HRIAs must also be repeated ex post following a certain phase of implementation of an agreement in order to review its actual impacts. The draft Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements prepared by the UN Special Rapporteur on the Right to Food, Prof. Olivier De Schutter, should be used to guide these assessments. Until such time as HRIAs are institutionalised within the EU, the German Government should carry them out itself. It should also commission HRIAs for bilateral investment protection agreements and raw materials partnerships.
- Work within the EU for a revision of the standard human rights clause for trade agreements of 1992. The revised clause must explicitly stipulate the suspension or amendment of contractual provisions where these have proved a risk to human rights. In order to identify possible adverse effects on human rights, the clause should require regular HRIAs and the setting up of an independent and transparent complaints mechanism.

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- Work within the EU for a human rights-based review and revision of the current Trade, Growth and World Affairs trade strategy, the Common Agricultural Policy (CAP) and the Raw Materials Policy. Human rights obligations arising from international agreements and the Treaty of Lisbon must in the future be incorporated comprehensively into EU trade and agricultural policy, and into the trade mandates for each process of negotiation. According to the UN Guiding Principles, trade and investment agreements must never limit the policy space that States require in order to fully meet their human rights obligations (Principle 9).
 - Work within State or State-controlled financial institutions such as the World Bank, the International Monetary Fund (IMF), regional (development) banks and the KfW Group for the mainstreaming of human rights in the guidelines and operations of these institutions, in accordance with the BMZ strategy paper on human rights. In decisions made by the boards of directors of the World Bank and regional (development) banks, the German Government should tie its approval of projects to comprehensive human rights due diligence.
 - Work within the continuous revision of the World Bank's environmental and social safeguards for a comprehensive mainstreaming of human and labour rights, including the right to free, prior and informed consent (FPIC). In the future, the revised safeguards must be applied not only to investment projects but also to development policy lending for policy reforms, to sector programmes, the Program for Results (P4R) and other World Bank activities. To ensure that the safeguards are actually implemented in the future the German Government should work toward improving the World Bank's monitoring, complaints and accountability mechanisms.
 - Work for implementation of the EU Guidelines on Human Rights Defenders in harmony with the German Government's Action Plan for Human Rights, also as part of Germany's foreign trade policy, and suggest to business enterprises operating abroad that they do likewise. Individuals, groups and organisations of civil society have the right to point out human rights violations that result from corporate action and demand compliance with international human rights standards, without being subjected to repression.

2. The corporate responsibility to respect human rights

The UN Guiding Principles ascribe to business enterprises a responsibility to respect human rights. Although this does not constitute an obligation under international law, it is by no means non-binding. The UN Guiding Principles make clear that this responsibility to respect human rights refers to the rights expressed in the International Bill of Human Rights, and exists over and above compliance with national laws.

Business enterprises are therefore responsible for preventing their actions from having adverse effects on human rights, and in the case of human rights violations for rectifying and remedying these. This corporate responsibility relates not only to the impacts of these enterprises' own activities and human rights, but also to impacts directly linked to operations, products or services in their business relationships along the entire value chain, even if the enterprises themselves have not contributed to these impacts (Principle 13). Furthermore, the Guiding Principles use the term 'activities' to refer to both actions and omissions.

To meet their human rights responsibilities, business enterprises must first of all approve a statement of their human rights policy at the most senior level, publicly communicate this policy, and embed it throughout the enterprise. Secondly they must exercise human rights due diligence by identifying human rights risks, by conducting comprehensive human rights impact assessments in risk areas, and by taking on the basis of these HRIAs the necessary measures and providing accountability on them. Thirdly they must put in place mechanisms and processes to remediate all negative impacts on human rights that they have caused or to which they have contributed (Principle 15).

As civil society organisations, we expect the Federal Republic of Germany to:

- Develop, in cooperation with experts from academia and civil society, implementation guidelines for human rights due diligence that German business enterprises and financial institutions can use as a binding framework. These guidelines should be based on Principles 16 to 21 of the UN Guiding Principles. According to those Principles, business enterprises must perform human rights risk analyses of their activities and business relationships, conduct human rights impact assessments in areas of risk, and where negative impacts come to light take counter-measures and provide public accountability of these actions. In particular, the implementation guidelines should specify what measures German business enterprises must take in order to meet their obligation of human rights due diligence with respect to their subsidiaries, suppliers and distribution channels.
- Legally prescribe compliance with human rights due diligence in accordance with the implementation guidelines to be developed. When legislating to meet these demands it will be possible to build on the due diligence and traffic safety obligations that already exist under German law. These should be broadened to include corporate obligations with respect to human rights risks, especially including those associated with branch offices, subsidiaries, suppliers, distribution partners and foreign purchasers.

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- Make use of legal prescriptions for due diligence that already exist in Germany and in other countries, for instance in environmental and consumer protection law, as well as in anti-corruption, and their State control and sanctioning mechanisms. Use these as a model of how legislation can be used to regulate human rights due diligence for business enterprises.

3. The obligation to provide effective remedy and grievance mechanisms

The UN Guiding Principles emphasise that providing effective remedy against human rights abuses by business enterprises is one of the key State obligations to protect. To achieve this States must take appropriate steps to ensure, through administrative and legislative means, that human rights abuses are investigated, punished and redressed (Principle 25). According to the Maastricht Principles, to be effective remedies must lead to a prompt, thorough and impartial investigation; cessation of the violation if it is ongoing; restitution, compensation, satisfaction and rehabilitation; and they must guarantee non-repetition (Principle 38). According to the UN Guiding Principles, the focus must be on judicial and non-judicial mechanisms, though these should be complemented by non-State-based grievance mechanisms.

Strengthening State-based judicial mechanisms

According to Principle 26 of the UN Guiding Principles, effective remedy must be guaranteed primarily at the level of the State. Therefore, legal and practical barriers that might make access to remedy more difficult for victims of human rights abuses must be removed. This applies in the first instance to countries where business enterprises operate, but is equally necessary in those countries where the parent company or business partners are domiciled. In Germany, however, obstacles of this kind are currently almost insurmountable if stakeholders affected by the human rights abuses of foreign suppliers or subsidiaries wish to file a legal complaint. At the level of law, the due diligence of parent companies in relation to their subsidiaries and suppliers is not defined with sufficient clarity. In such cases it is therefore often difficult to establish any legal responsibility on the part of the parent company. Moreover, the legal separation of parent company and subsidiary in German company law is designed to rule out liability on the part of the parent group.

This principle of separation does not, however, reflect the reality of globalised economic structures. Parent companies do actually wield control over subsidiaries, and thus also influence conditions that may possibly lead to human rights abuses. The situation is also similar with regard to relationships with suppliers. Although the scope of influence wielded by the purchasing enterprise over suppliers is less than with its own subsidiaries, these enterprises do influence the conditions of production here, too, through pricing and terms of delivery.

As civil society organisations, we expect the Federal Republic of Germany to:

- Enact legal reforms to ensure that liability for severe human rights abuses by a subsidiary is transferred to the parent company, i.e. that in this case the principle of separation under company law is nullified.
- Legislate to ensure that the obligations of due diligence incumbent on business enterprises with respect to the human rights risks of their subsidiaries, suppliers and distribution partners that already apply under German law or have yet to be introduced (see pillar 1), can also be enforced through civil law in cases where the legal dispute is determined by foreign law (Rome II Regulation).
- Enact legal reforms to ensure that existing remedies under compensation law are broadened to include the legal rights ‘protection of livelihoods’ and ‘appropriate working conditions’. So far, essentially only the legal rights to life, health, property, personal liberty and protection against discrimination have been covered. Compensation law should also be extended to take greater account of non-material damage and non-pecuniary compensation. This would more accurately reflect the fact that individuals and (village) communities affected by human rights abuses often have no formal legal titles, but are nevertheless robbed of their livelihoods by environmental pollution or displacement. The rights of indigenous peoples and local communities, e.g. to free, prior and informed consent and collective land ownership structures, must be recognised.
- Enact legal reforms in Germany to introduce a criminal liability of enterprises, as has already occurred in many European jurisdictions in recent years. Implementing such a reform is also feasible in Germany, especially since there is scope for introducing a criminal liability of legal persons without nullifying the principle of guilt contained in German law.
- Enact legal reforms to create the possibility of legal action being taken against subsidiaries of German enterprises before German courts when human right abuses are committed in other countries, as is already the case for instance in the Netherlands. At the level of the EU, Germany should exert continued pressure in favour of amending accordingly the Brussels I Regulation concerning jurisdiction in civil and commercial matters.
- At the level of the EU, work to bring about a reform of the Rome II Regulation, pursuant to which in legal actions against business enterprises in the EU hitherto only the law of the country in which the damage occurred has been applicable. This means that at the moment, German law is not applied when such claims for compensation are raised. A reform should grant the plaintiff the right to choose which law should be applied in the given civil law dispute. This would be in accordance with the old provision in Germany’s Application of Law Act (Art. 40 EGBGB).

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- Reduce the financial barriers to legal actions against human rights abuses, since for many affected stakeholders actions of this kind before German courts have so far been unaffordable. In the future, when the court costs are set the particularly vulnerable situation of those affected should be taken into account. The amount in dispute and the costs payable in civil proceedings should be reduced on a basis commensurate with the weak economic situation of the plaintiffs.
 - Enact legal reforms that allow collective proceedings in case of human rights abuses by business enterprises, because in cases like these large groups of people are often affected. In practice it is an obstacle to proceedings if out of a large number of affected stakeholders only a few are able to proceed with an action in Germany, because it is virtually impossible to file proceedings for several thousand individual plaintiffs. To prevent divisions within the community, those affected therefore often refrain from filing any proceedings at all.
 - Review whether and to what extent the existing options for easing or reversing the burden of proof in civil proceedings are applicable to proceedings filed by the victims of human rights abuses, and whether any amendment of existing legislation would be indicated.

Making State-based non-judicial mechanisms more effective

As well as judicial mechanisms in the strict sense, States are also obliged to provide effective and appropriate non-judicial mechanisms. In Principle 27 of the UN Guiding Principles this is explained by drawing attention to the fact that non-judicial mechanisms are more easily accessible to those affected, and that typical technical-cum-judicial requirements no longer apply, enabling claimants to achieve an improvement in their situation more rapidly.

As civil society organisations, we expect the Federal Republic of Germany to:

- Systematically and comprehensively implement the new version of the OECD Guidelines for Multinational Enterprises of May 2011, and develop the grievance mechanism associated with them into an effective instrument against business-related human rights abuses. The introduction of sanction mechanisms in conjunction with that is also an urgent imperative. Moreover, the independence of the National Contact Point (NCP) vis-à-vis the German Government must also be ensured, as is the case in the Netherlands and Norway. Alternatively, following the UK model a supervisory body could be introduced comprising equal numbers of representatives of trade unions, civil society, business enterprises and government.
- Make compliance with the OECD Guidelines a precondition for participation in invitations to tender for public procurement, and for the enjoyment of all foreign trade promotion measures. Business enterprises that violate the OECD Guidelines should then be excluded from public contracts and foreign trade promotion.

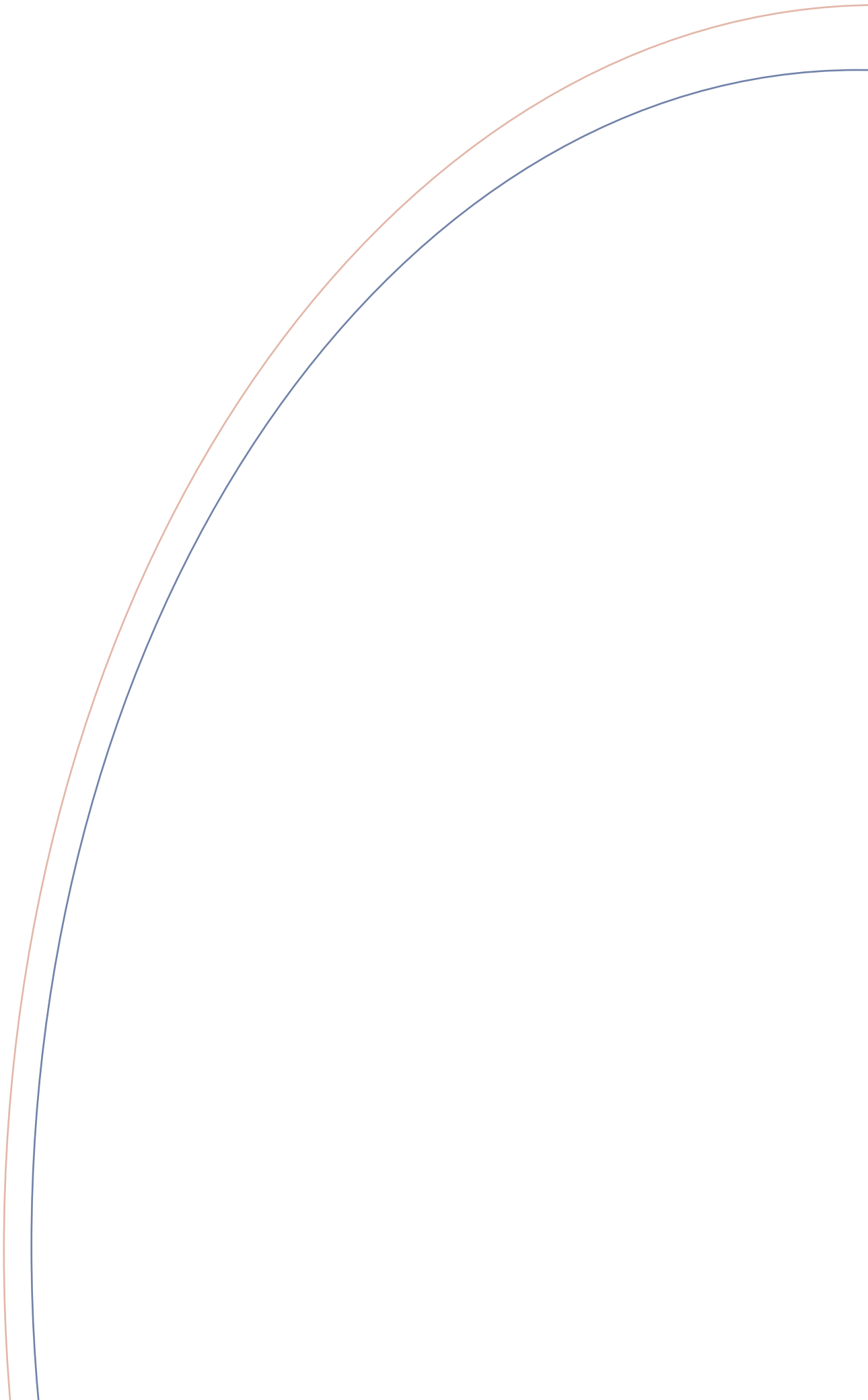
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- Set up easily accessible complaints offices at the German embassies for possible victims of human rights abuses involving German business enterprises; the complaints submitted should be forwarded to a fundamentally reformed NCP or to a grievance mechanism yet to be established. Moreover, the planned grievance mechanism for German development cooperation projects should be operationalised as quickly as possible and utilised systematically in cases where German business enterprises are involved in development cooperation projects.

Making non-State-based grievance mechanisms more effective

According to the UN Guiding Principles 28 to 31, non-State-based grievance mechanisms, for instance within business enterprises, may offer particular benefits such as speed of access and reduced costs for those affected by human rights abuses. These mechanisms can make it easier for business enterprises at an early stage to identify any negative effects of their own activities or business relationships on human rights, compensate those affected, and better exercise their human rights due diligence. In order to do so they must meet the effectiveness criteria specified in Principle 31. According to the latter, grievance mechanisms must be legitimate, accessible, predictable, equitable, transparent and rights-compatible. Non-State-based grievance mechanisms play a complementary role and must never be seen as an adequate substitute for State-based judicial and non-judicial grievance mechanisms.

As civil society organisations, we expect the Federal Republic of Germany to:

- Oblige business enterprises as part of their human rights due diligence to set up their own grievance mechanisms that fully meet the effectiveness criteria formulated in Principle 31. Trade unions must play a central role in designing and operationalising these. With State or State-supported business enterprises the German Government should actively promote the creation of grievance mechanisms, which can then serve as a model for other enterprises.



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