



2014 Report – Executive Summary

# Global Business and Human Rights

Putting Germany to the Test



## Foreword



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Development will only be sustainable if it helps realise civil, political, economic, social and cultural human rights. This is why Germanwatch and MISEREOR are supporting partner organisations in countries of the Global South in resisting human rights violations in which transnational corporations (TNCs) are also involved. Blatant violations are occurring for instance in agriculture, in manufacturing and in the extractive industries.

These problems concern us all, and not just because human rights are indivisible. They also concern us because human rights are often abused in connection with goods that we use every day here in Germany – whether it be clothing, tropical fruits, coffee, toys, mobile phones or cars. Do we want to obtain our clothing from textile factories in Bangladesh or Pakistan whose workers are threatened by catastrophic fires or collapsing buildings? How are we responding to reports of slavery-like conditions among workers in the run-up to the FIFA World Cup in Qatar?

Adopted in 2011, the UN Guiding Principles on Business and Human Rights provide for the first time an internationally recognised set of recommendations for realising human rights in business. MISEREOR and Germanwatch followed the elaboration of these Guiding Principles very closely, and see them as a first component of a more comprehensive regime to protect human rights in business. The Federal Republic of Germany and the German business community are now called upon to implement these UN Guiding Principles comprehensively.

The Coalition Agreement of the new German Government includes a commitment to national implementation of the UN Guiding Principles, leading us to hope that Germany will tackle the issue more resolutely and firmly than hitherto. Germanwatch and MISEREOR will actively contribute to the forthcoming debate on a German action plan for business and human rights.

In this connection both organisations will be able to draw on their longstanding experience of working with partners from the Global South, and human rights work at the level of the United Nations. Equally, Germanwatch and MISEREOR will be able to contribute the lessons they have learned when supporting political processes and engaging in constructive dialogue with German enterprises in various sectors, both in bilateral cooperation and in multi-stakeholder forums.

Against this background, the present report should also be seen as a first comprehensive and joint contribution to this debate. In the future we plan to publish a report on business and human rights every two years, focusing on different topics each time. We hope this will help to take the debate forward.

Aachen and Bonn, February 2014

Handwritten signatures in blue ink. The first signature is 'Pirmin Spiegel' and the second is 'Christoph Bals'.

Mgr Pirmin Spiegel, Executive Director, MISEREOR  
Christoph Bals, Policy Director, Germanwatch

## Executive Summary

As the world's current third-largest export nation, and as both an importer and a source of foreign direct investment, Germany plays a prominent role in the global economy. Six of the companies listed as the world's 30 largest transnational corporations (TNCs) are German. The DAX 30-listed companies are particularly highly globalised: in 2012 they did only a quarter of their business in Germany and employed 60 per cent of their workforce abroad. For many German companies, although this strong orientation toward world markets harbours major potential for growth, it also creates major challenges, especially with regard to safeguarding human rights. This is particularly true of their activities and business relationships in low-wage countries where state institutions are weak, authoritarian or corrupt.

As the case examples in Chapter 2 demonstrate, over the last few years non-governmental organisations (NGOs) have documented numerous human rights violations in which German corporations were directly or indirectly involved. These involve primarily sectors that are also seen internationally as human rights hotspots such as the extractive industries, large-scale energy and other infrastructure projects, manufacturing and agriculture. The examples highlight the different forms this involvement can take: the import of metal and energy commodities extracted under conditions that are problematic from a human rights perspective; the planning, financing, insurance or export of machinery for dam projects for which local communities have been displaced or evicted; the purchase or leasing of cropland on which small farming families previously lived and earned their livelihoods; the import of textiles or agricultural products produced under exploitative conditions. These human rights violations are often found in sections of the value chain that used to be located in Germany, but in the course of globalisation over the last few decades have gradually been outsourced abroad.

### State Duties and Corporate Responsibility for Human Rights

Human rights violations in business have been on the international community's agenda since at least 1919, the year in which the International Labour Organization (ILO) was founded. Although labour rights in particular have been codified and described in conventions ever since

the ILO has existed, the international community has not yet succeeded in obliging business enterprises under international law to uphold human rights. Both the Code of Conduct proposed by the Center for Transnational Corporations in the late 1970s, and the UN Draft Norms on the Responsibilities of Transnational Corporations of 2003, failed to achieve this, in the face of resistance from business associations and disagreement among governments. There is thus a yawning gap between the risks of global economic activity, and the assumption of responsibility for those risks by business enterprises.

Since June 2011 the UN Guiding Principles on Business and Human Rights have for the first time provided a set of recommendations accepted by all governments on how to implement human rights in business. The Guiding Principles rest on three pillars. First of all they refer to the duty of states under international law to protect human rights, and therefore to protect people against human rights abuses by business enterprises. Secondly, according to the Guiding Principles, TNCs and other business enterprises are responsible for upholding human rights both in their own activities and in their business relationships along the entire value chain. Thirdly, states must ensure that victims of human rights abuses have access to effective remedy. Business enterprises must also create corporate grievance mechanisms that meet human rights standards.

While business associations and many enterprises operating worldwide have unanimously welcomed the UN Guiding Principles, the responses of civil society organisations have been divided. This stance is to be explained chiefly by the ambivalence of the UN Guiding Principles with regard to three key points:

- On the one hand the Guiding Principles basically leave no doubt as to the binding nature of the state duty to protect human rights. On the other hand, more detailed recommendations on implementing this duty to protect need to be developed, in order to ensure that states also meet their human rights obligations effectively.
- On the one hand the Guiding Principles require enterprises to carry out 'human rights due diligence' in their business relations. On the other hand there is only little indication as to how states should monitor compliance with this human rights due diligence.

- On the one hand the UN Guiding Principles refer to ‘strong policy reasons’ for states to discharge their duty to protect human rights also outside of their territory. On the other hand, the Guiding Principles remain cautious when describing the reach of extraterritorial duties to protect. Other UN special rapporteurs and representatives, and international law experts, go further. They already see the extraterritorial application of the state duty to protect human rights as inevitable, and interpret it in this extensive sense. However, the situation is less ambiguous in the case of a so-called state-business nexus – examples of which include state ownership or control of a business enterprise, public procurement and foreign trade promotion. In these cases, where states exert direct influence, with regard to their extraterritorial implications the Guiding Principles also imply that a duty to protect beyond state boundaries exists.

### German Action Plan Yet to be Drafted and Implemented

In many respects the UN Guiding Principles represent the lowest common denominator. This is why Germanwatch and MISEREOR believe it is all the more important for the German Government to implement all three pillars of the Guiding Principles without permitting any further compromises with regard to this minimum standard. When meeting its human rights obligations with regard to business, the German Government should also consider other reference documents such as the UN Guiding Principles on Extreme Poverty and Human Rights and the Maastricht Principles on Extraterritorial Obligations of states in the area of Economic, Social and Cultural Rights, which on a number of points go beyond the UN Guiding Principles on Business and Human Rights.

In a position paper published jointly with the CorA Network for Corporate Accountability and the German Human Rights Forum, Germanwatch and MISEREOR call for a number of things. These include binding rules for human rights due diligence by German companies, the tying of foreign trade promotion and public contracts to such due diligence, and the prioritisation of human rights in trade, investment and raw materials policy. Germanwatch and Misereor also see a need for action concerning access to effective legal remedy and other grievance mechanisms.

The last German Government, however, was not disposed to begin a systematic process of implementation

at the national level. The Federal Ministry of Labour and Social Affairs (BMAS) did commission and publish a report on possible steps for implementation. Nevertheless the commission was confined explicitly to the second pillar of the UN Guiding Principles, which is to say those measures that fall under the responsibility of business enterprises. So far, the German Government has not addressed its own duty to protect or the issue of access to legal remedy and grievance mechanisms. To date it has not responded to the call for a national action plan made by the UN Working Group on Business and Human Rights, the European Commission, German NGOs and member enterprises of the German Global Compact Network. During its term in office the last government did not even succeed in clarifying the issue of which ministry would be responsible for implementing the Guiding Principles. In its Coalition Agreement the new German Government has now made a commitment to implementing the UN Guiding Principles at the national level. We are confident that this will mark the end of the obstructive stance.

### The Duty to Protect Human Rights: Voluntary Commitments are no Substitute for Regulation

In many specific areas of application of the UN Guiding Principles, the previous German Government confined itself to promoting the voluntary commitment of business enterprises. While both the UN Guiding Principles and the Communication of the European Commission on Corporate Social Responsibility (CSR) of 2011 advocate a ‘smart mix’ of voluntary and binding approaches, during its term in office the last German Government got caught up in a supposed antithesis between voluntary and binding commitments. Accordingly, the German Government’s Action Plan for CSR of 2010 relates exclusively to corporate responsibility for upholding human rights.

As Chapter 4 demonstrates, in Germany there is still a great deal to do with regard to implementing the first pillar of the UN Guiding Principles, in other words discharging the state duty to protect against possible human rights abuses. The German Government has not yet conducted a comprehensive analysis of regulatory gaps regarding the protection of human rights in business. Nor is there any systematic human rights check that would review the compliance of proposed legislation or new policy measures with human rights in general, or the UN Guiding Principles in particular. The last German Government did take positive steps in this regard concerning develop-



**Protests against the Tintaya mine of GlencoreXstrata in Peru which is producing copper for the world market were violently repressed.**

ment policy. With its ‘human rights quality seal’, the Federal Ministry for Economic Cooperation and Development (BMZ) has undertaken to regularly review future projects and measures with regard to human rights. This can become a mechanism for assessing impacts on human rights that comes closer to the concerns of the UN Guiding Principles, and might serve as a model for other German federal ministries.

### *German Reservations Regarding EU Transparency Initiatives*

One key prerequisite for the effective protection of human rights is the ability of governments and consumers to scrutinise the activities of business enterprises and their possible consequences for human rights. The UN Guiding Principles therefore see it as part of the state duty to protect human rights that states should require business enterprises to report transparently on human rights risks and preventive measures. Over the last few years, the European Commission has launched two new regulatory initiatives in an attempt to oblige business enterprises to achieve greater transparency in this regard. The last German Government responded to both initiatives with scepticism, and in some cases open opposition.

The first of these two initiatives was the decision taken in June 2013 to reform the EU Accounting and Transparency Directive. Under the new directive, listed enterprises in the extractive sector and loggers of primary forests will in future have to disclose their project-related payments to governments worldwide. This reform is relevant to hu-

man rights in two respects. First of all, the population in the countries concerned will be able to see more easily which enterprise is actively involved in which extractive or forestry project, and will therefore also be able to more easily review whether these enterprises are respecting human rights. Secondly, the new directive will make it more difficult for enterprises or states to implement projects or take measures that might undermine respect for and the fulfilment of political and social human rights as a result of corruption, tax evasion or tax avoidance. According to NGOs and Members of the European Parliament, the last German Government blocked this initiative for a long time.

The second EU initiative is designed to oblige large enterprises to disclose non-financial information. According to a proposal of the European Commission of April 2013, large companies should be obliged to submit in their annual report a non-financial declaration containing information on environmental matters, social and employee-related aspects, respect for human rights, and anti-corruption and bribery issues. Prior to that date the then Federal Ministry of Economics and Technology (BMWi) and the Federal Ministry of Labour and Social Affairs had already expressly communicated to the European Commission their opposition to binding reporting duties. The last German Government also rejected the Commission’s proposal itself, arguing that it would increase bureaucracy and thwart creative CSR approaches and measures on the part of enterprises. We remain hopeful that the new German Government will take a more constructive stance in the current negotiations with the European Commission, Council and Parliament.

### *Special Responsibility in the State-Business Nexus*

Pursuant to their duty to protect human rights, according to the UN Guiding Principles states have a special responsibility regarding enterprises which they themselves own or control, or which they provide with substantial support – in other words, in cases where a state-business nexus exists. For the time being this applies to 111 companies in Germany in which the German Government holds a direct interest. Although the German Government emphasises that in these cases it is committed to responsible management of these business interests, the corresponding principles for managing them do not include any reference whatsoever to human rights. Moreover, supervisory board members are required only to report on those systematic violations of labour and human rights ‘which could have negative impacts on the company’. Accordingly, the German Government gives consideration to human rights risks firstly only when they occur systematically, and secondly only when they are relevant from an economic perspective. Evidently these risks are of less interest when no economic consequences are to be expected, for instance due to the weak organisational capacities of the people affected, or the distance between the company concerned and its market. Therefore, in this area Germany is failing to meet its core human rights obligations.

A state-business nexus also exists in cases where the German Government supports the foreign trade activities of German enterprises by providing export credit guarantees, investment guarantees or guarantees for untied financial loans. Particularly with large-scale projects such as the construction of dams, foreign trade promotion raises human rights issues time and time again. For the three instruments of foreign trade promotion mentioned above, social and ecological review criteria provided by the Organisation for Economic Co-operation and Development (OECD) and the World Bank do exist. However, the review mechanisms available so far fall short of the UN Guiding Principles: to date no explicit review of human rights due diligence has been prescribed. The social impact assessment included in the standards of the International Finance Corporation (IFC), a member of the World Bank Group, does cover a number of human rights risks, but far from all of them. A further problem is the lack of transparency concerning the granting of foreign trade support. This usually makes it impossible for the German Parliament and the general public to monitor compliance with human rights.

Public procurement is a third area of state activity in which there is a nexus between the state and business. Public procurement practice in Germany is currently far removed from the principle included in the UN Guiding Principles that any form of state support to business enterprises should be made dependent on the strict compliance of the latter with due human rights diligence. Although public agencies are now permitted to include social and environmental conditions, they are not required to do so under current legislation. In many cases procurement legislation at the level of the federal states goes further, for instance by prescribing environmental standards and compliance with the core labour standards of the ILO as binding criteria. However, achieving a Germany-wide regime for socially and ecologically responsible procurement that protects human rights would require clear political directives, and stronger support for implementing these directives from the Competence Centre for Sustainable Procurement.

### *Human Rights Coherence of Trade and Investment Protection Agreements*

According to the UN Guiding Principles, states should ensure that trade agreements, investment protection agreements and other treaties or contracts for investment projects maintain rather than constrain domestic policy space for protecting human rights. To date, however, this has not been fulfilled in the trade agreements of the EU or Germany’s 131 Bilateral Investment Treaties. Several case studies have for instance demonstrated that directly or indirectly subsidised EU agricultural exports have crowded out small farming families, or caused them to lose a considerable slice of their income, thus threatening their right to food. By proscribing import restrictions on EU agricultural exports, with few exceptions current EU trade agreements are constraining the domestic policy space of developing countries to protect their farmers’ rights to food. Human rights may also be jeopardised by the imposition of stricter conditions for intellectual property rights, and too broad an interpretation of investor protection.

Despite these risks the EU has not yet introduced any instruments or mechanisms to effectively pre-empt human rights violations caused by trade and investment agreements. So far the EU’s Sustainability Impact Assessments (SIAs) have paid barely any attention to human rights. The human rights clauses that have been appearing in the EU’s bilateral agreements since 1992 do require partner countries to comply with human rights standards. However,



**The collapse of the Rana Plaza building in Bangladesh caused over 1100 deaths.**

possible impacts of these trade agreements themselves are not covered by these clauses. Germany's investment protection agreement template takes as little account of human rights as did the position adopted by the German Government in a consultation of the European Commission on orienting the trade strategy. The last German Government responded sceptically to proposals made by NGOs and UN experts for introducing systematic human rights impact assessments and human rights revision clauses in trade and investment agreements.

### **Responsibility to Respect Human Rights: What German Companies are Doing – or Failing to do**

Chapter 5 deals with the so-called 'second pillar' of the UN Guiding Principles, which specifies details of corporate responsibility to respect human rights and human rights due diligence. According to the Guiding Principles, business enterprises should develop a human rights policy, identify and investigate at an early stage the human rights risks associated with their activities and business relationships, take appropriate measures, report transparently on the risks and the measures taken, and create grievance mechanisms for the victims of human rights abuses.

To analyse the implementation to date of the second pillar of the UN Guiding Principles in Germany, Germanwatch and MISEREOR surveyed the DAX 30 companies concerning the aforementioned human rights requirements, and studied their sustainability and CSR reports, as well as their websites. The companies' willingness to complete the questionnaire was high. We therefore conclude that they consider the topic to be an important one.

### **Corporate Human Rights Policies and Requirements Imposed on Suppliers**

Seven of the 30 business enterprises surveyed have adopted their own declaration of human right principles. Seven more have a social charter for their own enterprise that also includes key human rights issues. Thus just under half the DAX 30 companies surveyed have published their own declaration of principles concerning human rights. Only two companies also mention dilemma situations in their declarations, i.e. cases where for instance local law falls short of international human rights standards. Only one refers explicitly to the impacts on neighbouring communities, for instance in the vicinity of investment projects. Thus none of these declarations corresponds fully to the requirements arising from the UN Guiding Principles. Nonetheless, in their own corporate codes of conduct eight companies do refer to human rights, though in very different ways. Another four companies have not published any commitment to human rights above and beyond their membership of the Global Compact. Of the remaining four companies, one makes a statement on its website, the others make no publicly available statement on respect for human rights, and therefore do not even meet this fundamental requirement of the UN Guiding Principles. Several companies are currently revising their human rights positions and declarations, and it is to be hoped that the papers revised in the light of the UN Guiding Principles will then be more likely to meet the requirements contained in them.

However, business enterprises are required not only to set themselves comprehensive targets for respecting human rights, but also to take measures to ensure that these are coherently implemented within the company. Twelve of the companies surveyed indicate that the greatest challenge is ensuring that human rights are respected along their supply chain. This is also reflected in the respective corporate policies. A total of 25 companies have produced a code of conduct for their suppliers or adopted a purchasing policy that also includes human rights aspects. There are also major differences in content between these codes

of conduct. Though all companies have proscribed child labour, three do not insist on the right to form and join trade unions, while a further eight companies do insist on this freedom, but only where it is enshrined in the relevant national law. Twenty-three companies – more than two thirds – report that the human right principles contained in their codes of conduct or purchasing policies are made binding by corresponding clauses included in their written agreements with suppliers.

The real challenge however is to ensure that these codes of conduct are complied with. Most companies delegate responsibility for this to their suppliers. Only few of them report training measures for suppliers or incentive systems designed to ensure compliance with human rights standards. By contrast, 15 companies describe their auditing systems for reviewing labour standards among their suppliers. Common auditing practice to date is inadequate in that audits are usually based only on brief inspections of company premises and a review of formal criteria that are not able to capture the key aspects of human rights. None of the companies report programmes to promote free trade unions in supplier factories or other forms of labour representation that could work on the ground to improve conditions. So far, the companies studied have not yet called into question their own purchasing practices, which due to significant pressure on costs and time may also contribute towards human rights problems in supplier factories.

### *Human Rights Risk Analyses*

Over two thirds of the companies surveyed report conducting human right risk analyses. However, the responses indicate that most of the companies are very unclear as to what constitutes a human rights risk analysis. One company has conducted only a capacity analysis for human rights, eleven companies have integrated human rights issues into their existing risk analysis, four companies have performed a separate human rights risk analysis across the entire range of their corporate activities, four companies report ad hoc risk analyses, and a further four companies present their procedure for reviewing their suppliers in the course of audits as being their human rights risk analysis.

The responses suggest that it is questionable whether a large number of companies have so far conducted human rights risk analyses and human rights impact assessments that would meet the requirements formulated in the UN

Guiding Principles. One key criterion for a comprehensive human rights risk analysis is a survey of areas of possible risk that would also include consulting potentially affected groups. However, the company reports do not give any indication of an appropriate consultation process. So far it has been our impression that the majority of companies have performed their human rights risk analyses internally, within their own organisation. Nor is consulting German civil society organisations any substitute for surveying possibly affected groups locally.

Overall, the responses create the impression that the companies view the risks primarily from the perspective of their own company, but do not focus on the human rights impacts or consider the perspective of those possibly affected. Assessing the risk analyses is made more difficult by the fact that the companies usually do not publish either the risk analyses themselves, or the methodology on which they are based. This conflicts with the requirements of the UN Guiding Principles regarding transparent reporting.

### *Corporate Grievance Mechanisms*

Over 90 percent of the DAX 30 companies report having established grievance mechanisms such as a compliance hotline or an ombudsperson. These mechanisms are usually there for all kinds of complaints, and are not related specifically to human rights. The majority of companies report compliance instruments that have been set up for whistle-blowing in cases of suspected corruption or other irregularities. Some of these complaint procedures are designed only for members of the company workforce, who are then able to report matters internally. Although more than half the companies report that outsiders can also submit complaints, in some cases they can only do so by using the contact form on the website.

One third of the companies report external procedures, for instance involving an external lawyer or another ombudsperson. This can help make a procedure more equitable, because the company itself, which is an interested party, does not itself receive the complaint, and ideally will not be involved in arbitrating it. Only four companies have developed more extensive grievance mechanisms. However, none of these grievance mechanisms meet the criteria listed in the UN Guiding Principles (legitimacy, accessibility, predictability, equitability, transparency and rights-compatibility) comprehensively; often they meet them only with respect to certain criteria.



Indigenous people in Brazil protest against the Belo Monte dam project.

As a basic principle we note that the development of a human rights policy, the conduct of risk analyses, the creation of grievance mechanisms and transparent reporting can make an important contribution towards preventing or remedying human rights violations. With regard to the effectiveness of this contribution, however, what is important is how a business enterprise deals with the risks that it has identified and the problem cases known to it. As the concrete cases of human rights violations involving a number of DAX companies described in Chapter 5 demonstrate, a problematic gap is often evident between the aspirations formulated by the enterprise, and the reality on the ground.

### Effective Remedy: Judicial Means and Grievance Mechanisms for Victims of Human Rights Violations

Effective remedy of business-related human rights abuses means taking steps to investigate, punish and redress them. According to the UN Guiding Principles, state-based judicial and non-judicial grievance mechanisms should form the foundation of a wider system for remedy of these violations. Chapter 6 deals with the judicial grievance mechanisms under civil and criminal law, and the extrajudicial OECD grievance mechanism.

According to international law, access to courts and effective legal remedy is a key prerequisite to realising human rights. The third pillar of the UN Guiding Principles contains recommendations on how this access can be ensured for business-related human rights abuses. In the first instance, any state on whose territory a human rights abuse takes place is obliged to guarantee this access. However, experiences of NGOs and human rights defenders in-

dicade that in many developing countries, governments and judiciaries are often not meeting this responsibility. To ensure that the victims of human rights abuses by TNCs obtain their rights in such cases in spite of this, it is important that business enterprises can also be prosecuted in their home country. Against this background, Chapter 6 of the present report looks at the extent to which the Federal Republic of Germany guarantees victims of human rights abuses involving German companies adequate and effective access to courts and non-judicial grievance mechanisms. The report identifies considerable gaps in victims' access to legal remedy before German courts. One focus of the chapter is therefore on proposals for reform that aim to close these gaps in civil law.

If foreign plaintiffs wish to sue German companies, their subsidiaries or suppliers for damages and remediation before a German civil court, they face a number of legal hurdles. For instance, while German courts are usually responsible for actions against human rights violations in other countries involving German parent companies, they are usually not responsible for actions against subsidiaries or suppliers because these companies are not domiciled in Germany. German law provides neither for a joinder of actions, nor for a *forum necessitatis*. In other words, German courts are not responsible even if for various reasons those affected in the host country will not receive a fair hearing. A further major problem results from the fact that human rights abuses committed by subsidiaries outside the country are not ascribed to the partner company, because the two are treated as separate legal personalities. And even if a German court accepts an action for human rights abuses abroad, usually it may not apply German law; it must apply the law of the country in which the loss occurred. Some of the aforementioned hurdles are attributable to German law, some to European law.

Various options for reform to remove the obstacles to legal remedy are currently being discussed. For instance, in 2010 the European Commission proposed a *forum necessitatis* in cases where no other court that could guarantee a fair hearing is responsible, and where the dispute is sufficiently linked to the member state in question. A further option would be the instrument of the joinder of actions, which exists in the Netherlands and the UK. Through this instrument, actions against parent companies can be combined with actions against subsidiaries, provided that a court is competent for at least one of the defendants, and links to the other defendants are sufficiently close that it seems reasonable to treat the actions as a single case. However, the last German Government expressed firm opposition to the proposals for the introduction of *forum necessitatis* and the joinder of actions, and rejected a relaxation of the principle of separation in cases of human rights abuses by a subsidiary.

Furthermore, there are a whole range of procedural and practical hurdles to effective remedy. Unlike in the USA, for instance, in Germany the unsuccessful party must meet the entire costs of the proceedings and – in the case of non-European plaintiffs – must even deposit the entire amount as security when the proceedings begin. For most victims of social human rights abuses this is likely to prove impossible. Moreover, in Germany plaintiffs bear a heavy burden of proof, yet German law does not provide for financial assistance to prepare the evidence for a case, which is often costly and complex. And finally, persons affected cannot file a class action in cases where many people have had their rights violated in the same way by the same action of a company. This means those affected are unable to save costs and expenses.

Options for reform are also being discussed for this type of obstacle. These include the assumption of a lower value of the claim when calculating the costs of human rights actions, and the provision of legal aid for preparing cases. In both instances, the initial assumption is that a lack of financial means should not prevent access to legal remedy. The introduction of class actions or a right of action by an association in human rights cases would also help those affected save costs and expenses, and at the same time remove obstacles to access to German courts.

In the debate on human rights actions against business enterprises, civil law claims for compensation play a central role. Yet in the case of particularly serious criminal offences, such as human trafficking, criminal law tends to

be the path of choice. The barriers to accessing German criminal courts are considerably lower than for civil actions. In Germany, however, there is no corporate criminal law as yet. Only natural persons, which is to say individual managers or staff members of a business enterprise, can be prosecuted under criminal law. However, a discussion is currently under way as to whether a corporate criminal law of this kind might also be introduced in Germany.

### *The OECD Guidelines as a Non-Judicial Grievance Mechanism*

Revised in 2011, the OECD Guidelines for Multinational Enterprises are currently the most important state-based non-judicial grievance mechanism. In the states that have ratified the OECD Guidelines, grievances can be submitted to the National Contact Points (NCPs). The National Contact Point in Germany has so far been based in the foreign investment division of the Federal Ministry for Economic Affairs and Energy. Twin roles of this kind create a potential conflict of interests, a fact that has also been criticised by the former UN Special Representative for Business and Human Rights, John Ruggie. The ‘Ministerial Group on the OECD Guidelines’ has not been able to improve the way in which the National Contact Point works significantly. A ‘Working Party on the OECD Guidelines’, which comprises various stakeholders, has been convened by the NCP just once a year so far. The working party has a very limited advisory role, and barely any influence over the work of the NCP.

Since 2000 the German NCP has received a total of 27 complaints. Experiences with the German NCP show that there are considerable shortcomings in the way it operates. So far it has gained a reputation for its restrictive interpretation of the OECD Guidelines. It has rejected 14 complaints, and regarding the complaints that have been accepted the complainants have repeatedly gained the impression that the NCP was adopting a one-sided stance in favour of the arguments put forward by the business enterprises. This way of proceeding conflicts with the quality criterion of equitability for non-judicial grievance mechanisms. According to NGO reports, the NCP has also violated other criteria for non-judicial grievance mechanisms listed in the UN Guiding Principles; in particular, these include the predictability, equitability and transparency of the procedure.

To systematically ascertain the need for improvement, first of all there should be a peer review of the OECD Guide-



**Can this worker count on the state duty to protect of the German government? This duty is no longer deniable if for example a company is (partly) owned by the state or if goods produced by a company are procured by public administrations.**

lines in Germany. This would involve the other National Contact Points assessing and evaluating the work of the German NCP. Germany has already indicated its willingness to undergo this voluntary peer review, but the review has not yet taken place. The OECD Guidelines might become more effective if violating them led to certain sanctions. The OECD Guidelines as they stand at least offer the potential for weak sanction mechanisms, for instance in conjunction with foreign trade support or public procurement. This potential is not yet being exploited in Germany.

## Outlook

Over the last few years business and human rights has moved much higher up the agenda, particularly since the UN Guiding Principles on Business and Human Rights were accepted by the Human Rights Council. Although these UN Guiding Principles are a compromise document emerging from a long contentious process at the level of the UN, they are nonetheless a first essential element in an international regime governing corporate responsibility to respect human rights. The key aim now is to achieve effective implementation of the UN Guiding Principles. Unfortunately, in Germany this process has yet to gain momentum. To prevent the UN Guiding Principles from becoming a paper tiger we need a clear will to implement them swiftly, both at the political level and among business enterprises.

The company survey conducted as part of this report revealed that implementation of the UN Guiding Principles by the companies concerned is still in the early stages. However, there are many indications that they are being taken seriously, partly due to the explicit support being

provided by business associations and the German Global Compact Network. Almost all the DAX 30 companies took part in the survey. Several indicated that they were revising their codes of conduct and sustainability strategies in line with the UN Guiding Principles. First human rights risk analyses have taken place, and provided companies with an understanding of what action they each need to take. Although there are still major differences in practical implementation of the UN Guiding Principles, even among the DAX 30 companies, there are grounds to assume that corporate processes will pay considerably more attention to human rights in the future than they have to date.

It is also clear, however, that voluntary initiatives by companies will not suffice. Global business requires a human rights framework at the national and international levels. Compliance with human rights must not lead to a competitive disadvantage. The UN Guiding Principles on Business and Human Rights provide a first sound basis for establishing the level playing field needed – in other words, a common regulatory framework that is applied worldwide. However, this can only be achieved when states take their duty to protect human rights seriously, and close the existing gaps in regulation and implementation to protect human rights and ensure access to remedy. Germany must not balk at establishing a smart mix of voluntary and mandatory measures. It must not continue to rely only on voluntary measures and on implementing the second pillar of the UN Guiding Principles. As an economically prosperous nation, Germany has a special responsibility to lead the way in creating a framework for business and human rights, both nationally and within the European Union.

The governing parties' commitment in the Coalition Agreement to implement the UN Guiding Principles nationally gives grounds for hope. Systematic implementation will require an analysis of the gaps in regulation that need to be closed in order to protect against business-related human rights abuses. And it will require a comprehensive national action plan, which must be developed through a process of consulting all the relevant stakeholders. Existing proposals for implementation should be included in this process.

# IMPRINT

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