FORUM MENSCHENRECHTE

Implementation of ICESCR in Germany: Parallel Report of Forum Menschenrechte

(Extraterritorial Obligations)

complementing the 6th Report of the Federal Republic of Germany on the International Covenant on Economic, Social and Cultural Rights (ICESCR)

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The following organizations contributed to the Parallel Report on EXTRATERRITORIAL OBLIGATIONS

- Brot für die Welt/Bread for the World, https://www.brot-fuer-die-welt.de/
- CorA – Corporate Accountability – Netzwerk für Unternehmensverantwortung, https://www.cora-netz.de/cora/
- FIAN Deutschland: FoodFirst Information and Action Network, https://www.fian.de
- GegenStroemung - CounterCurrent / INFOE (Institute for Ecology and Action Anthropology), www.gegenstroemung.org / www.infoe.de
- Germanwatch e.V., http://germanwatch.org/de/startseite
- MISEREOR Bischöfliches Hilfswerk e.V., German Catholic Bishops' Organization for Development Coorperation, https://www.misereor.org/
- pbi: peace brigades international, https://pbideutschland.de/
- terre des hommes, https://www.tdh.de/
- urgewald e.V., https://urgewald.org/

Salvatorius Clause

The statements and demands expressed in this report are supported by the NGOs sustaining the report according to their respective assignments and objectives. The participating NGOs are united by the aim of a joint report from the perspective of civil society. Notwithstanding, not all of the participating NGOs are able to support every single opinion and recommendation expressed here.

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1. Preface

A cornerstone of international human rights law is the universality of human rights. In view of the strong interdependencies that exist between countries in today's globalized world, the universal realization of human rights can only be achieved through the concerted efforts and cooperation of all States. The United Nations (UN) Charter of 1945, which is legally binding on virtually all States, is very clear on this. Under Article 56, UN Member States pledge to "take joint and separate action in co-operation with the Organization" towards achieving the purposes of the UN, which include "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion" (Art. 55c). The Universal Declaration of Human Rights (UDHR) and subsequent international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) further elaborate on the individual and joint obligations of States to respect, protect and fulfil human rights, at home and in other countries. They require States to take steps to ensure that their policies and practices are compliant with and do not harm human rights beyond borders. They also place positive duties on States to cooperate with each other in creating the international framework conditions necessary for human rights to flourish (Art. 2(1), 11 ICESCR).[1] The General Comment No. 24 (2017) confirmed and specified the extraterritorial human rights obligations in the context of business operations. Following the doctrine of the extraterritorial obligation to respect, protect and fulfill, it defines that States Parties "must ensure that they do not obstruct another State from complying with its obligations under the Covenant" (para. 29); are required "to take steps to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities over which they can exercise control" (para. 30) and to "contribute to creating an international environment that enables the fulfillment of Covenant rights", e.g. by combating abusive tax practices (para. 37). However, the examples presented in this report show that Germany is still reluctant to prevent the violation of ICESCR rights by German-based business entities or its foreign trade and economic policies within the EU. The examples include, i.a. the lack of regulation regarding corporate due diligence, the difficulty for foreign claimants to gain access to justice in Germany, export credit guaranties without in-depth human rights assessments and high greenhouse gas emissions.

[1] Handbook: For Human Rights beyond Borders (2017) https://www.etoconsortium.org/nc/en/main-navigation/library/documents/detail/?tx_drblob_pi1%5BdownloadUid%5D=204

2. The implementation of the German National Action Plan on Business and Human Rights

Article of ICESCR: Art. 2(1) in conjunction with art. 6, 7, 8, 11, 12
Concluding Observations of the previous report: Recommendations No. 7, 8, 10
List of issues in relation to the 6th periodic report of Germany: Para. 2

Explanatory Note

1. From the perspective of civil society, the German National Action Plan on Business and Human Rights (NAP) has three major deficiencies. One is the absence of legally binding due diligence requirements; another one is the lack of measures to enable the German court system to provide remedies to the victims of human rights abuses involving German companies operating abroad; and the third one is the non-compliance with the duty to protect in regard to the state-business-nexus.

(a) Human rights due diligence (HRDD)

2. In General Comment No. 24 (2017) the CESCR stated that “Corporations domiciled in the territory and/or jurisdiction of States Parties should be required to act with due diligence to identify, prevent and address abuses to Covenant rights by such subsidiaries and business partners, wherever they may be located.” (Para. 33) and that “The obligation to protect entails a positive duty to adopt a legal framework requiring business entities to exercise HRDD.” (Para. 16). In the recent concluding observations on Spain the CESCR confirmed this stance and expressed concern that the legislative system does not determine the human rights responsibilities of transnational companies domiciled in Spain[2].

3. The regulation of due diligence requirements represents a current trend in Europe. France adopted a law on the corporate duty of vigilance. The UK has a law against modern slavery. In Luxembourg and Switzerland there are large public initiatives for a regulation of companies with regard to human rights, to which the Swiss parliament reacted with a proposal for a due diligence law.

4. In Germany, however, where many major transnational corporations are domiciled and engaged in activities that risk negatively affecting human rights abroad, a duty to exercise due diligence throughout the supply chain is absent from the legal system. The provisions of the German NAP are voluntary. Most of the action that has been taken and is described by the federal government in its answer to the list of issues (LoI) can be summarized as providing information and support to companies. This is the purpose of the NAP online information portal, the “NAP Helpdesk” and the diplomatic missions in the eight countries that have been chosen as pilot examples

[2] E/C.12/ESP/CO/6 of 25 April 2018.

for the NAP-implementation. None of the advisory services is compulsory; they are addressed exclusively to companies who are looking for guidance.

5. As the federal government indicates in its answer to the LoI the introduction of a duty of care into national law and their promotion on EU-level is up to the outcome of a monitoring process that will start in 2018 and review if less than 50% of German-based companies with more than 500 employees have implemented the core elements into their corporate processes. The monitoring design is criticized by civil society, because it will be limited to the analysis of due diligence procedures and neglect its effectiveness in concrete cases of alleged human rights abuses. There is a risk that the questionnaire that will be sent out to all the companies with more than 500 employees will basically be a tick the box exam. The answers shall be checked with publicly available information, however for many of the companies under review there are no public NGO reports. The companies under review will be kept anonymous; therefore NGOs will not be able to actively contribute critical information about these companies. We, as the undersigned NGOs, are concerned that such approach will not deliver a representative picture of the behavior of German-based companies. Binding obligations are indispensable and should be introduced, even if the quota is met. Under its duty to protect human rights Germany cannot not accept that companies act without due diligence even if the majority would comply with human rights standards.

(b) Access to justice

6. General Comment No. 24 (2017) requires States parties to remove barriers to remedies, including by "enabling human rights-related class actions and public interest litigation, facilitating access to relevant information and the collection of evidence abroad", (Para. 44) and stipulates that "States parties should ensure that the judiciary, in particular judges and lawyers, are well informed of the obligations under the Covenant linked to business activities." (Para. 47).

7. In its 2011 concluding observations the CESCR urged Germany to "ensure effective applicability of the provisions of the Covenant in national courts, including by raising awareness of this obligation and the provisions of the Covenant among judges, lawyers and other officials involved in law enforcement." (Recommendation No. 7). Germany answered in its sixth periodic report that aspiring judges, public prosecutors and lawyers must complete specialist courses, with modules on international law and, in particular, human rights as part of their standardized legal training (Para. 7) and that "it is possible for parties to German court proceedings to expressly invoke international conventions before the court at any time" (Para. 10). This affirmation was repeated in the answer to the LoI.[3]

8. However, the experience of public interest law firms representing victims of human rights abuses by German-based companies shows the opposite. Compared to other

[3] List of issues in relation to the sixth periodic report of Germany – Replies of Germany to the list of issues; I.General information No. 2 (9).

European countries like the Netherlands, Switzerland or the UK where there have been numerous court cases against companies for human rights abuses abroad, in Germany there have been very few and most of them failed. The two cases the Federal Government mentions in the annex to its answer to the LoI (KiK and Peruvian farmer against RWE) are the result of collective NGO efforts. Their outcome is very uncertain. The reasons are the numerous procedural barriers victims of human rights abuses by German companies' abroad face: The absence of a corporate duty of care and the lack of disclosure procedures makes it extremely difficult for claimants to prove the violation their rights by an act of the company. Since human rights violations by companies typically affect several persons or even entire communities, the unavailability of collective redress mechanisms in Germany is another obstacle. Finally, German state prosecutor`s offices and civil courts are not ready to deal with transnational claims.

9. In the KiK case[4] that was mentioned by the Federal Government as a positive example, it was not possible for the Baldia Factory Affectees Association, representing the families of the 250 workers who died during the factory fire, to bring actions for damages in Germany. Instead four claimants had to be singled out. At the moment it is most likely that the claim will be dismissed because of the statute of limitations.

10. Since the singling out of claimants and the compensation of individuals often leads to conflicts among those affected, in many cases the pathway of a criminal complaint is chosen. However, criminal complaints are not remedial and they are associated with other difficulties. Germany is among the few countries in the EU whose judicial system does not foresee the criminal liability of corporations. Another practical difficulty is that Germany doesn't provide specialized public prosecution offices for cases of corporate abuses abroad. So most charges are dropped after years of investigation without any result, because it proved impossible to verify the individual responsibility of the managers or the prosecution offices were not able to deal with the complex transnational issues. This was the case in Lahmeyer[5]. Due to the absence of class actions from the German civil procedure, the European Center for Constitutional and Human Rights (ECCHR) representing some of the more than 4.000 families affected decided to lodge a criminal complaint against two managers of the company. The complaint was dropped after six years of unsuccessful investigation. The same happened in the Danzer-Case[6] regarding a German-Swiss timber company that did not prevent its Congolese subsidiary from engaging security forces, who ill-treated several members of the local community. ECCHR representing the community filed a complaint against one of the managers with the prosecution office in Tübingen that was dropped without any result after two years of

[4] A description of the case can be found here: https://www.ecchr.eu/en/case/paying-the-price-for-clothing-production-in-south-asia/.
[5] A description of the case can be found here: https://www.ecchr.eu/en/case/reckless-development-forced-displacement-due-to-lahmeyer-dam-construction/.
[6] See the case profile for further information: https://www.ecchr.eu/en/case/no-investigations-against-danzer-manager-over-human-rights-abuses-against-community-in-drc/

investigation. In a current case against the German arms company Heckler & Koch for illegally exporting assault rifles to conflict areas in Mexico where they were used in the forceful disappearance of the 43 Ayotzinapa-students, it took eight years until the trial was opened.

11. These examples show that courts and state prosecution offices are not adequately equipped to deal with such cases. Against this background, it is not very likely that some non-compulsory modules on international law in the legal training of aspiring judges, state prosecutors and lawyers will make any difference. The chance to address the underlying structural problems was missed when the Federal Government adopted the NAP in 2016 and regarding access to justice again only reiterated that Germany has well-functioning judiciary that can be invoked by foreign claimants at any time. The only concrete measure is the multilingual informational brochure the Federal Government mentions in its answer to the LoI.[7] However, it is unclear how such a brochure shall help against the structural shortcomings of the German justice system regarding transnational claims. Recently, another possibility for improvement was missed. In reaction to the VW-scandal, the parliament adopted a declaratory action for consumer associations enabling collective redress, but it only applies to consumers in Germany.

(c) State-business-nexus

12. The NAP lacks on clarity and adequate measures to implement HRDD in cases where the state itself is involved in business transactions. Thereby Germany violates its duty to protect workers' and inhabitants' economic, social and at times cultural rights, i.e. when the state procures goods or grants export and investment support.

13. Regarding **public procurement**, the German government has missed the opportunity to introduce binding provisions for public procurers to include human rights aspects in their tenders when implementing EU Directive 2014/24 into national legislation in 2016. In the NAP the government announces a phased plan on how to enshrine binding minimum requirements for the corporate exercise of HRDD in procurement law. However, 1.5 years after adoption of the NAP it is still unclear, which ministry is in charge of developing the phased plan and which concrete measures will be taken.

14. Regarding **export promotion**, the NAP announces i.e. that human rights be given greater attention in project assessments. It remains unclear though which relevance human rights have in the actual decisions. A guarantee granted in May 2017, half a year after the approval of the NAP, for the **Yamal LNG project**[8] in Northern Russia raises grave concern that human rights continue to be set aside for the sake of business welfare: In 2015 the German government was warned by NGOs

[7] List of issues in relation to the sixth periodic report of Germany – Replies of Germany to the list of issues; I.General information No. 2 (10).
[8] Description of the Yamal LNG case: https://www.gegenstroemung.org/Yamal_LNG_Report_INFOE.pdf

that the project infringes upon the rights and threatens the livelihood of thousands of nomadic reindeer herders belonging to the Nenets indigenous people, one of Russia's 44 "indigenous minority peoples".

15. The Yamal peninsula is the home of the world's largest nomadic reindeer herding community. The LNG project and its components are destroying the landscape the reindeer depend on, severing through migration routes, and devastating fishing grounds. Thus the Nenets will be forced to give up their way of life, which constitutes a violation of their right to food and housing. In earlier cases, such involuntary sedentarisation of nomadic reindeer herding communities has resulted in the deaths of many community members. Relocation homes are often inadequate and thousands of kilometers away from the traditional living area.

16. The consortium claims to have obtained the Free, Prior and Informed Consent (FPIC) of the affected indigenous population, however, the process described in the Stakeholder Engagement Plan (SEP) that led up to what it calls "signing of FPIC declarations" took only a month (22 May-27 June 2014). It is highly unlikely, that any genuine FPIC process could have taken place within this extremely narrow timeframe, given the difficult conditions in the project area. Yamal is a locked up terrain, which cannot be entered without secret service permission and local indigenous representatives are intimidated and subject to constant surveillance. At the time, when the company claims to have obtained the signatures, one of the largest die-offs of reindeer in many years had just taken place and Nenets reindeer herders were flocking, in dire need of help, to Seyakha village, where the FPIC declarations where signed. The repressive environment and the desperate situation gives rise to the concern that Nenets herders may have been coerced into giving their signature for a paper whose nature they did not understand. The approval of the "Hermes" export credit guarantee for the Yamal LNG project raises serious doubts with regard to the adequacy of current human rights assessment procedures for export credit guarantees.

17. It confirms experiences with other cases such as the granting of export credit guarantees for two **coal power plants Kusile and Medupi** in South Africa in 2007 and 2008.[9] Already in 2011 the Inspection Panel of the World Bank confirmed earlier civil society concerns about the high risk for health of the local population around the power plant Medupi due to excessive sulfur dioxide (SO2) emissions above the nationally admitted limits. The health risk is heightened by the fact that the vulnerability of the local population to respiratory tract disorders is significantly increased by the above-average HIV/AIDS rate and by poverty and the lack of health care. Although all six power plant boilers shall be in operation by 2019, the flue gas desulphurization (FGD) systems are not due to be installed until the term between 2021 and 2025, which means that the population's right to health will be severely

[9] M. Müller/ A. Paasch 2017: When only coal counts – German co-responsibility for human rights in the south African coal sector, MACUA, MISEREOR and Action Aid South Africa: https://actionaid.nl/wp-content/uploads/2017/05/study_when-only-the-coal-counts_online_0.pdf

jeopardized by the SO2 emissions. Currently it seems questionable whether FGD or other filter systems will be installed at all.

18. No less serious are the risks to the rights to water, food and health posed by the high levels of water consumption at Medupi. For decades the semi-arid region has regularly suffered from severe droughts in which the Mokolo River virtually dries up. This situation will become more acute as a result of climate change. The water supply to Medupi is to be secured in future via the Mokolo-Crocodile (West) Water Augmentation Project (MCWAP). In 2011 the Inspection Panel of the World Bank estimated that this project would initially withdraw up to six million cubic meters of water annually from people living along the Mokolo River. After installation of the water-intensive FGD systems, this water loss could double to as much as twelve million cubic meters per year. This poses a particularly acute risk to agricultural irrigation in the region. In the opinion of the Inspection Panel, it will have a 'particularly harmful' impact on subsistence farmers, who lack alternative means of earning a living.

19. German government documents and reports show that Hitachi Power Europe was granted the export credit guarantee for the power plants mainly on the basis of the impact assessments that the World Bank Inspection Panel has criticized as abridged and faulty in 2011. It is clear that the German government has not taken the environmental and human rights risks of the power plants seriously. It largely ignored the impacts of associated facilities such as the mines; the flue gas desulphurization systems and the water transport systems, although the relevant standards required assessment of their impacts even then. In 2017, Germanwatch and MISEREOR have documented various other cases of human rights violations and lack of due diligence in the approval of export credit guarantees by the German government in the area of energy.[10] All these cases reveal **systemic problems**: 1) Even the current version of the *Recommendation of the Council on Common Approaches for Officially Supported Exports Credits and Environmental and Social Due Diligence* ("Common Approaches) from 2016 recommends a "specific HRDD" review only in cases with a "high likelihood of severe project-related human rights impacts occurring".[11] 2) Project reviews tend to neglect the regional political and social context of projects, such as conflicts, bad governance and lack of freedom of expression, which significantly increase risk of human rights abuses by companies in the project implementation. 3) The main basis for the assessment of projects remains the Environmental and Social Impact Assessments (ESIA) commissioned by the project operators themselves, without sufficient independent examination. 4) Even projects with a high risk are often approved, based on Plans of Action presented by the operators in order to mitigate the risks. However, during the implementation of the

[10] C. Heydenreich/ A. Paasch 2017: Globale Energiewirtschaft und Menschenrechte. Deutsche Unternehmen und Politik auf dem Prüfstand, Germanwatch/ MISEREOR, pp. 49-57: https://www.misereor.de/fileadmin/publikationen/energie-und-menschenrechte-bericht-2017.pdf

[11] OECD Council 2016: *Recommendation of the Council on Common Approaches for Officially Supported Exports Credits and Environmental and Social Due Diligence, 6.4.2016, para 14:* http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TAD/ECG%282016%293&doclanguage=en

project, the German government lacks sufficient leverage to make sure this action plan is adequately implemented. 5) Regarding investment guarantees, there still is no transparency on the projects supported by the State Party, so that an independent assessment whether human rights impacts have been adequately conducted is not possible.

Recommendations

20. We recommend that the Committee urges the State Party

- Implement the NAP in an ambitious manner. The monitoring process should be conducted in a transparent manner and be fully representative for all companies with more than 500 employees, in order to provide a credible basis for further legislative steps;
- Pass a legal framework that ensures that companies based in Germany identify, prevent and mitigate human rights related risks of their operations abroad and are liable for violations;
- Take appropriate measures to guarantee the victims of human rights abuses by companies have access to effective remedies and compensation in Germany;
- Promptly develop and publish the phased plan on how to enshrine binding minimum requirements for the corporate exercise of HRDD in procurement law;
- Make the existence of HRDD procedures within a company a prerequisite to receive export and investment guarantees and publish the projects that receive such guarantees;
- Commission independent HRDD assessments for all high risk projects (category A) before granting export credit or investment guarantees;
- Use its influence on state owned enterprises, so they expeditiously adopt HRDD procedures;
- Proactively cooperate in the process of creating a binding international framework that ensures corporate liability for human rights abuses and guarantees those affected access to remedy.

3. Germany's extra-territorial obligations in the case of Kaweri Coffee Plantation Ltd., Uganda

Article of ICESCR: Art. 11, with reference to General Comment No. 24
Concluding Observations of the previous report: CESCR to Germany

(E/C.12/DEU/CO/5) para. 10, CESCR to Uganda (E/C.12/UGA/CO/1) para. 30 b), CEDAW to Germany (CEDAW/C/DEU/CO/7-8) para. 16, CCPR to Germany (CCPR/C/DEU/CO/6) para. 16

Explanatory Note

(a) Summary[12]

21. From 17-21 August 2001 the inhabitants of four villages in the Mubende District in Uganda have been forcefully evicted by the Ugandan army from their land of 2,524 hectares. The Uganda Investment Authority (UIA) has leased it to Kaweri Coffee Plantation Ltd., a 100% subsidiary of the German Neumann Kaffee Gruppe (NKG)[13]. The houses, churches and a medical clinic of the approx. 4,000 peasants were destroyed, stables were burnt, food-stores were looted and crops were uprooted. Neither alternative land nor housing nor humanitarian aid had been provided for the evictees. Until today the evictees have not been compensated and many of them live in extreme poverty and suffer from hunger[14].

22. Although the evictees have sued Kaweri Coffee Plantation Ltd. and the Government of Uganda for redress in August 2002 (Civil Suit No. 179 of 2002), until today they have not been compensated. In January 2017, the Ugandan Minister of State for Kampala, Hon. Benny Bugembe, offered financial compensation for the evictees under the condition that they withdraw the plaint. In April 2017, the evictees decided that they are ready for an amicable settlement but that it should be negotiated under surveillance of the court as jurisdiction in Uganda allows.

23. NKG/Kaweri had been aware that the land they wanted to invest in was inhabited[15]. According to affidavits of evictees, on the eve of the eviction district officials accompanied by army officers and by two managers of Kaweri Coffee Plantation Ltd. threatened the inhabitants to quit their land latest next morning.

(b) Germany's obligations

24. Germany has supported the investment of Kaweri/NKG. Just three days after the forceful eviction, the ambassador attended the inauguration of the plantation[16].

[12] Detailed chronology: www.fian.de/fileadmin/user_upload/bilder_allgemein/Fallarbeit/mubende/Chronology_Kaweri_2001-2017.pdf

[13] A detailed report on the case has been handed in by FIAN to the CESCR in 2015: Human Rights violations in the context of Kaweri Coffee Plantation in Mubende/Uganda (INT_CESCR_IGO_UGA_18585_E.doc).

[14] Action Aid Uganda 2002: The impact of foreign direct investment on the local economy: The case of Kaweri Coffee and Kalangala Palm Oil Investments.

[15] www.dw.com/en/the-mubende-coffee-plantations-and-the-bitter-taste-of-eviction/av-37074814; Min. 1:37.

[16] www.newvision.co.ug/print_article/new_vision/news/1027730/museveni-launches-giant-coffee-farm?print=true

Several times, the evictees have asked the German government for support[17]. In a letter to FIAN Germany the German Minister for Economic Cooperation and Development expressed his support to Kaweri Coffee Plantation[18].

25. In 2011, 2012 and 2017, UN human rights treaty bodies CESCR, CCPR and CEDAW have recommended Germany,

- to ensure that its foreign investment policies serve human rights in the host countries (E/C.12/DEU/CO/5),
- to strengthen remedies to protect victims of activities of German based companies operating abroad(CCPR/C/DEU/CO/6),
- to adopt measures to facilitate access to justice for such victims(CEDAW/C/DEU/CO/7-8).

26. However, Germany has not taken respective actions to assist the evictees of Kaweri Coffee Plantation Ltd. In March 2017, a representative of the evictees, during a personal meeting has asked the German Ministry of Foreign Affairs to support the implementation of CESCR Concluding Observation to Uganda on the case[19]. The Ministry has not informed the evictees if Germany has taken measures in this regard.

27. In the light of CESCR General Comment No. 24[20], Germany has not complied with its obligation to protect people in other countries against human rights violations linked to foreign investments by companies which are based in Germany (para 32, 33). Moreover, Germany does not comply with its obligation to provide access to remedies as outlined in para 38 and 44. In addition, it has not applied sanctions to NKG as outlined in para 50.

Recommendations

28. We recommend that the Committee requests the State Party

- Apply sanctions to NKG until the company takes responsibility and supports adequate remedies for the evictees;
- Use development cooperation to encourage Uganda to comply with the concluding observations of CESCR regarding the case of Kaweri.

[17] Meetings of evictees with German Ministry of Foreign Affairs and Ministry of Economics: May 2004, December 2008, December 2010 (OECD-Complaint), December 2011, March 2017. Letters of the evictees to the German Ministry of Foreign Affairs: June 2004, August 2004, May 2005, March 2017. Additionally, FIAN has kept the Government of Germany informed through meetings with the German Embassy in Uganda and by letters.
[18] https://www.fian.de/wp-content/uploads/2021/06/Brief_Niebel.pdf
[19] E/C.12/UGA/CO/1
[20] E/C.12/GC/24

4. Climate Change

Article of ICESCR: General Provisions
Concluding Observation of the previous report: Recommendations No. 17
List of issues in relation to the 6th periodic report of Germany: Para. 4

Explanatory Note

29. Climate change has severe impacts on ecosystems, the economy, and human health and hence on the human rights protected under the ICESCR[21][22], including the rights to health, food, housing, water and sanitation. These impacts trigger human rights obligations on the part of all duty bearers.[23] The ICESCR requires States to take positive action to protect ESC rights. Failure to prevent foreseeable harm to human rights caused by climate change, including through the mobilisation of maximum available resources, constitutes a breach of this obligation.[24]

30. Germany is one of the largest emitters of greenhouse gas (GHG) emissions and has higher per capita emissions of GHG than comparable economies. To prevent further climate change-related damages, Germany must cut greenhouse gas emissions as much as it can. Moreover, it must support countries, which lack sufficient resources in their endeavours to mitigate and adapt to climate change through the provision of climate finance, climate technology transfers and capacity building. Such support has to be focussed on the most vulnerable who are at the greatest risk of having their rights impaired. The government must also ensure that climate projects or activities to which German funds contribute do not themselves result in human rights violations.[25] A just transition must be promoted within Germany and abroad.

31. Through the Paris Agreement, which Germany ratified in 2016, governments have committed to reduce temperature increase to 'well below 2°C and to pursue efforts to keep it below 1.5°C.[26] In a joint report to the UN Climate process, UN Special Rapporteurs have highlighted that human rights obligations require that States take actions to mitigate the causes of climate change so as to maintain the increase of temperatures to a maximum of 1.5°C of warming.[27] Even then harm to

[21] Human Rights Council, '*Analytical Study on the relationship between climate change and the human right to everyone to the enjoyment of the highest attainable standard of physical and mental health'*, UN Doc. A/HRC/32/23 (6 May 2016) at para. 1.
[22] World Health Organization, *Quantitative Risk Assessment*; see also Human Rights Council, Analytical Study, *op. cit.* at para. 20.
[23] Human Rights Council, Analytical Study at para 32.
[24] *ibid*. at para 48
[25] Different examples of these kinds of projects can be found here i.a.: http://www.deutscheklimafinanzierung.de; www.urgewald.org
[26] Paris Agreement, Article 2.1.a
[27] *The Effects of Climate Change on the Full Enjoyment of Human Rights*, Joint paper by five mandate holders of the HRC (2015), available at http://www4.unfccc.int/Submissions/Lists/OSPSubmissionUpload/202_109_130758775867568762-CVF%20submission%20Annex%201_Human%20Rights.pdf

human rights cannot be excluded. The CESCR has also recognized human rights risks caused by climate change and urged States to take measures to mitigate and adapt to climate change, including in relation to coal mining[28].

32. Under the Paris Agreement, Germany has defined national-level targets to protect the climate: a 40% reduction in GHG emissions by 2020, at least a 55% reduction by 2030, and a reduction of 80-95% by 2050, compared to 1990 levels.[29] These targets do not reflect a fair contribution to the global effort necessary to limit global warming to well below 2°C, let alone 1.5°C. With a reduction rate of 27.7% compared to the level of 1990[30] and under current policies, Germany will in all likelihood miss the target it set itself for 2020 by a significant margin.[31] The failure of Germany to cut emissions according to its 2020 target undermines global efforts to reach the Paris Agreement objectives, as research has demonstrated that any further delay in cutting emissions will threaten the attainability of these objectives. A clear action roadmap that would ensure that the medium and long-term targets will be met is not yet available. According to its *coalition* agreement the current government plans a climate law for 2019 which aims at guaranteeing that at least the 2030 target will be implemented. The corresponding programme of measures should be concrete and specific and outline a clear path and milestones towards the achievement of the 2030 goal.

33. As the EU's biggest emitter[32], Germany bears a special responsibility for the European energy and climate goals, which are significantly lower than the EU's fair share of the global effort.[33] Based on the UNFCCC criteria of responsibility and capability the EU 2030 target would have to be between 50% and 60%, not 40% as it is now.

34. The shortfall in meeting climate obligations is caused to a large extent due to lack of progress in transforming Germany's energy and transport sectors. The energy sector is responsible for 50% of GHG emissions and no decisive reduction of emissions has been achieved since 2009,[34] mainly due to the nearly constant share of coal, especially lignite – which is the most carbon-intensive form of fossil fuel – in the German energy mix. Without a clear exit strategy for coal power, Germany will not be able to achieve its mid- and long-term emissions reduction goals. It is

[28] E/C.12/AUS/CO/5 (CESCR, 2017), para. 12
[29] https://www.umweltbundesamt.de/daten/klima/klimaschutzziele-deutschlands#textpart-1
[30] https://www.umweltbundesamt.de/presse/pressemitteilungen/klimabilanz-2017-emissionen-gehen-leicht-zurueck
[31] https://www.agoraenergiewende.de/fileadmin/Projekte/2015/Kohlekonsens/Agora_Analyse_Klimaschutzziel_2020_07092016.pdf
[32] http://ec.europa.eu/eurostat/statistics-explained/index.php?title=File:Total_greenhouse_gas_emissions_by_countries_(including_international_aviation_and_indirect_CO2,_excluding_LULUCF),_1990_-_2015_(million_tonnes_of_CO2_equivalents)_updated.png
[33] https://climateactiontracker.org/countries/eu/
[34] https://www.umweltbundesamt.de/presse/pressemitteilungen/klimabilanz-2017-emissionen-gehen-leicht-zurueck; https://www.umweltbundesamt.de/daten/klima/klimaschutzziele-deutschlands#textpart-1

imperative that the Commission for Growth, Structural Change and Regional Development develop a concrete and ambitious plan to phase-out coal in a timely manner[35]. The situation is even more worrying as regards the transport sector where emissions lie slightly above 1990 levels,[36] which renders the goal of a 40-42% reduction of GHG emissions by 2030 particularly challenging.[37] Moreover, air pollution from transport and coal combustion in Germany is detrimental to human health and causes premature deaths[38], and hence violates the rights to life and health under the CESCR[39].

35. In addition to the obligation to address domestic sources of climate pollution that impact on human rights domestically and in third countries, Countries have a duty to cooperate internationally in order to contribute to the realisation of esc rights everywhere. In the context of climate change, this duty includes the provision of climate finance, climate technology transfers and capacity building support to developing countries, which do not have sufficient resources to undertake mitigation or adaptation measures required to prevent climate-induced human rights harms.

36. While there is no internationally agreed basis for allocation of the US $100 billion Copenhagen pledge made by States, the German government considers about ten per cent of the US $100 billion to be Germany's fair contribution.[40] In 2014, the Chancellor announced that Germany would double its annual public climate finance contribution from US $2 billion to US $4 billion in 2020. So far, the chancellor has not yet made clear if and how the new Government will abide by this promise.

37. Germany has played an important role in moving international climate finance forward, but the planned contribution of US $4 billion of public climate finance annually by 2020 still falls short of what is required to meet the government's international obligations, particularly with regards to support for adaptation for the most vulnerable populations in developing countries. With below 20 per cent, adaptation finance's share of total climate finance remains unsatisfactory given its importance in supporting in particular developing countries that are most vulnerable to the adverse effects of climate change.[41] The government assumes that in addition to the US $4 billion, loans and mobilized private investments will account for the remaining US $6 billion in order to reach the total objective of US $10 billion. This

[35] https://www.bmu.de/en/report/7918/
[36] https://www.umweltbundesamt.de/daten/verkehr/emissionen-des-verkehrs#textpart-4; https://www.umweltbundesamt.de/presse/pressemitteilungen/klimabilanz-2017-emissionen-gehen-leicht-zurueck
[37] http://www.bmub.bund.de/fileadmin/Daten_BMU/Download_PDF/Klimaschutz/klimaschutzplan_2050_bf.pdf
[38] https://www.greenpeace.de/files/publications/20160216_greenpeace_factsheet_diesel_problem_0.pdf
[39] Compare CRC Concluding Observations for the UK (CRC/C/GBR/CO/5), para. 5
[40] http://m.bmub.bund.de/fileadmin/Daten_BMU/Download_PDF/Klimaschutz/bmub_cop_tops_20151130_bf.pdf; http://www.germanclimatefinance.de/overview-climate-finance/
[41] Barbara K Buchner et al, Global Landscape of Climate Finance 2017, Climate Policy Initiative (2017).

makes it highly unlikely that sufficient support for adaptation will be provided, which generally suffers from a lack of private funds[42]. Furthermore, Germany must ensure that adequate safeguards and remedies are in place to prevent any violations of the rights of local communities, indigenous peoples and other marginalized groups, both in relation to bilateral assistance and funds that the country provides as well as in the context of multilateral funds (such as the GCF) to which the country contributes.

Recommendations

38. We recommend that the Committee urges the State Party to

- Increase its efforts to meet its climate targets - issue a rapid decision to phase out coal in a socially responsible manner and develop a road map to transform the transport sector;
- Support more ambitious European climate targets. This includes more ambitious decisions (2030) on ETS (Emissions Trading System), effort sharing and LULUCF (Regulation on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry) and a clear path towards greenhouse gas neutrality until 2050;
- Raise an additional US $5 billion of public climate finance annually by 2020 to fund climate change adaptation in a sufficient manner and in addition to the amount of public finance that will be needed for mitigation.

5. Trade and Investment Policies

Article of ICESCR: Articles 2.1, 11, 22 and 23
Concluding Observations of the previous report: Recommendations No. 9

Explanatory Note

39. The CESCR, in its **concluding observations** of 2011, “urges the State party [of Germany] to fully apply a human rights-based approach to its international trade and agriculture policies, including by reviewing the impact of subsidies on the enjoyment of ESCR in importing countries.”

40. Despite this recommendation, the EU, with support of Germany, has increased pressure on African States to sign and ratify **Economic Partnership Agreements** (EPA) that would oblige these countries to cut 75-80% of their import tariffs for EU products. While the EU does currently not grant export subsidies, other forms of direct subsidies still allow EU companies to **export agricultural products** such as

[42] Brown, J. Stadelmann, M., Wang, D., Boni, L., Jachnik, R., Kato, T. (2015). Estimating mobilized private finance for adaptation: Exploring data and methods. CPI and OECD.

milk powder, chicken parts and tomato paste at prices below costs of production to an extent that they threaten the right to food and an adequate standard of living of small scale producers in West Africa.[43] Other severe human rights risk arise from new trade agreements concluded by the EU with countries and regions such as South Korea, **Peru, Colombia, Central America** and CETA as well as and the ones under negotiation with Mexico, Mercosur, the Investment Protection Agreement with Myanmar and others. For example, obligations to implement the *International Convention for the Protection of New Varieties of Plants* (**UPOV 91**) "create obstacles to the reliance of farmers on informal seed systems may violate this obligation [the duty of respect], since it would deprive farmers of a means of achieving their livelihood".[44] Investment protection clauses such as the prohibition of *indirect expropriation*, *umbrella clauses* and the *Fair and Equitable Treatment* standard can create high financial risks and a chilling effect for the badly needed land reform and the right to food in Myanmar for instance.[45]

41. Given such human rights risks of trade and investment agreements, according to **General Comment No. 24**, "States Parties should identify any potential conflict between their obligations under the Covenant and trade or investment treaties, and refrain from entering into such treaties where such conflicts are found to exist." Moreover, "they are encouraged to insert a provision explicitly referring to their human rights obligations in future treaties, and to ensure that mechanisms for the settlement of investor-State disputes take human rights into account in the interpretation of investment treaties or of investment chapters in trade agreements."

42. However, human rights instruments in EU trade policies remain inadequate. Until 2016, only very few **Trade Sustainability Impact Assessments (SIA)** of the EU addressed human rights at all.[46] According to the new EU Handbook of 2016, SIA of trade agreements must include human rights chapters. On the other hand, these SIA are conducted after trade negotiation mandates are concluded and when negotiations are already too far advanced to be significantly influenced. An extreme example is the SIA on the **EU-Mexico Global Agreement** that was commissioned in

[43] T. Reichert und J. Leimbach 2015: Billiges Milchpulver für die Welt. Das Auslaufen der EU-Milchquote und die Milcherzeugung und -exporte in Deutschland und der EU, AbL, Brot für die Welt, Germanwatch und Misereor: https://www.misereor.de/fileadmin/publikationen/studie-billiges-milchpulver-fuer-die-welt-2015.pdf

[44] O. De Schutter: Seed policies and the right to food: enhancing agrobiodiversity and encouraging innovation, Report to the General Assembly, 23 July 2009, A/64/170. See also: Erklärung von Bern, Brot für die Welt, Misereor et al. 2014: Owning Seeds, Accessing Food: A Human Rights Impact Assessment of UPOV 1991 based on case studies in Kenya, Peru and the Philippines: https://www.publiceye.ch/fileadmin/files/documents/Saatgut/2014_07_10_Owning_Seed_-_Accessing_Food_report_def.pdf

[45] C. Olivet und P. Vervest 2017: Myths and Risks of the EU-Myanmar Investment Protection Agreement: TNI, CIDSE, Misereor u.a.: http://www.cidse.org/newsroom/eu-myanmar-investment-protection-agreement-many-risks-few-benefits.html, and: E. Röell 2017: The pending EU-Myanmar Investment Protection Agreement, risks and opportunities, Act Alliance: http://actalliance.org/wp-content/uploads/2017/04/EU-Myanmar-IPA-Risks-and-Opportunities.pdf

[46] E. Bürgi Bonanomi 2017: Measuring human rights impacts of trade agreements – Ideas for improving the methodology: Comparing the European's Sustainability Impact Assessment Practice and the Methodology with Human Rights Impact Assessment Methodology, Journal of Human Rights Practice 9, 2017: 481-503.

October 2017, almost one and a half years after the start of the trade negotiations in May 2016.[47] On April 21st 2018, the EC declared it had "a new agreement on trade, part of a broader, modernized EU-Mexico Global Agreement"[48] while the SIA was still in progress and policy recommendations of the SIA to the EC had not yet been submitted.[49] Thus, the EC lacked an adequate empirical basis to make sure it does not enter into a trade agreement that conflicts with human rights obligations of the EU and its member states.

43. Another major problem is the lack of meaningful consultation of civil society organizations and especially social groups in vulnerable situations. For the SIA on the **EU-Myanmar IPA**, only one central consultation workshop was held in December 2015 in Yangon, with mixed participation of business, government, academic and few trade union and CSO representatives.[50] Such a format is totally inadequate for the consultation of civil society representatives in a context of widespread repression, human rights violations and intimidation of human rights defenders. In addition, only 49 interviews were conducted, of which 25 covered commercial representatives, while only 10 represented NGOs and 2 trade unions.[51]

44. Another matter of concern is the recent policy of the EU (supported by Germany), not to include **human rights clauses** in trade agreements any more. The German Institute for Human Rights and MISEREOR had instead called for a reform of those clauses and published a model clause to better address possible negative human rights impacts of trade agreements themselves, to bring trade agreements in conformity with articles 3 and 21 of the EU Lisbon Treaty, which oblige the EU to respect and promote human rights in third countries in its external relationships, including in its trade policies.[52]

45. Recent EU trade agreements with South Korea, Central America, Colombia/ Peru and Canada include **Trade and Sustainable Development** (TSD) chapters that, however, do not cover human rights beyond ILO core labor standards, lack any legally binding enforcement mechanism and have not shown any tangible positive effect according to academic experts.[53] In July 2017, the European Commission (EC)

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[47] Brot für die Welt, MISEREOR et al: Joint statement by European non-governmental organizations: No EU trade agreement without ex-ante sustainability impact assessment, 18.12.2017: https://mexiko-koordination.de/downloadarchiv/pressemitteilungen/217-joint-statement-sia-mexiko/file.html

[48] European Commission: EU and Mexico reach new agreement on trade, 21.4.2018: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1830

[49] LSE Enterprise: Sustainability Impact Assessment (SIA) in support of the negotiations for the modernization of the trade pillar of the Global Agreement with Mexico. Interim Report, April 2018, p. 211: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1830

[50] European Commission: Sustainability Impact Assessment (SIA) in support of an investment protection agreement between the European Union and the Republic of the Union of Myanmar, final report, June 2016, pp. 186-190, http://trade.ec.europa.eu/doclib/docs/2016/december/tradoc_155121.pdf

[51] Ibidem, p. 196.

[52] Lorand Bartels: A Model Human Rights Clause for the EU's international Trade Agreements, German Institute for Human Rights and MISEREOR, Berlin/Aachen 2014: http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/Studie_A_Model_Human_Rights_Clause.pdf

[53] M. Barbu et al: A Response to the Non-paper of the European Commission on Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs), 26.9.2017:

recognized some major shortcomings of current TSD chapters in a non-paper and conducted consultations on how to improve them.[54] In February, the EC presented its conclusions and proposed 15 “concrete and practical actions” such as better cooperation within the EU and with international organizations, funding for CSOs to participate in Domestic Advisory Groups (DAGs) and the inclusion of commitments of the trading partners in TSD chapters “to promote Corporate Social Responsibility/ Responsible Business Conduct”.[55]

46. However these actions fail to address the fundamental problems of current TSD chapters, in particular the fact that trade agreements themselves can limit policy spaces of trade partners to respect, protect and fulfill their human rights obligations. Recommendations of academic experts and NGOs have not been taken into account in these recommendations at all.[56] Based on the above mentioned model human rights clause and a model TSD chapter developed in the context of TTIP debate,[57] NGOs had proposed to include human rights obligations (including ETO), to insert human rights obligations in *general exception clauses* and *review clauses*, to include HRDD obligations for investors in the form of a *denial of benefits clause*, and to submit the sustainable development and human rights obligations to the same dispute settlement as other obligations of trade and investment agreements. These and other reforms would be necessary to implement the commitment of the new German government to strive for “binding social, human rights and ecological standards in EU trade, investment and partnership agreements”.[58]

Recommendations

47. We recommend that the Committee requests the State Part to

- Reject the “concrete and practical actions” on TSD chapters proposed by the EC as insufficient and make the TSD chapters binding instruments, including with respect to human rights;

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https://warwick.ac.uk/about/partnerships/europe/events/tsd/a_response_to_the_nonpaper_26.09.17.pdf

[54] European Commission: Trade and Sustainable Development (TSD) chapters in Free Trade Agreements (FTAs), 11.7.2017: http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf

[55] European Commission: Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements, 26.2.2018: http://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf

[56] VENRO, Forum Menschenrechte, Forum Umwelt und Entwicklung und CorA: Positionspapier. Nachhaltigkeitskapitel und Nachhaltigkeit in EU-Handelsabkommen: https://www.cora-netz.de/cora/wp-content/uploads/2018/04/2018-04-06_Positionspapier-NRO-zu-Nachhaltigkeitskapiteln_final.pdf

[57] Markus Krajewski und Rhea Hoffmann: Alternative Model for a Sustainable Development Chapter and related provisions in the Transatlantic Trade and Investment Partnership (TTIP), The Greens/ European Free Alliance in the European Parliament, Brüssel 2016: http://reinhardbuetikofer.eu/wp-content/uploads/2016/08/Model-SD-Chapter-TTIP-Second-Draft-July_final.pdf

[58] Koalitionsvertrag zwischen CDU, CSU und SPD, 19. Legislaturperiode, Zeilen 653-658: https://www.cdu.de/system/tdf/media/dokumente/koalitionsvertrag_2018.pdf?file=1

- Initiate a debate in the EU on how to make SIAs a meaningful instrument to refrain member states to enter into trade agreements that conflict with human rights obligations of the members to the agreement;
- Reject the new EU trade agreement with Mexico based on the fact that it was concluded before the conclusion of the SIA and thus human rights concerns could not be adequately taken into account during the negotiations;
- To review its Trade for All strategy and the standard provisions of its trade and investment agreements in all chapters under a human rights, environmental and development perspective.

6. Austerity policies

Article of ICESCR: Art. 2(1) in conjunction with art. 6 ff.
Concluding Observations of the previous report: Recommendations No. 9

Explanatory Note

48. The drastic austerity measures implemented in Greece have resulted in domestic human rights violations by the Greek government, as well as violations of extraterritorial obligations (ETOs) by foreign States – including Germany – that played a preeminent role in imposing them.

49. Violations of ESCR are the primary violations in the context of austerity, as stated in general terms by the CESCR[59] and, for the Greek situation in particular, by concluding observations of different treaty bodies and reports of special procedures.[60] The violation of ESCR is clearly attributable to foreign States who have played a proven and evidenced role in imposing austerity on other States, be it as States members of international organisations, or in their capacity of Lending States.

50. In line with Principle 15 of the *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights,*[61] several treaty bodies

[59] See, *inter alia*, CESCR Statement on *Public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights*, E/C.12/2016/1 (22 July 2016), §2; *CESCR General Comment No.8*, E/1998/22 (12 December 1997), §8.
[60] See, *inter alia*, *CRC Concluding Observations on the combined 2nd and 3rd periodic review on Greece*, CRC/C/GRC/CO/2-3, 2012, §6; *CEDAW Concluding Observations on the 7th periodic review on Greece*, CEDAW/C/GRC/CO/7, 2013, §6; two *Report[s] of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Mission[s] to Greece* respectively on i) *22-27 April 2013*, A/HRC/25/50/Add.1, 7 March 2014, §40-89 and ii) *20 Nov.-8 Dec. 2015*, A/HRC/31/60/Add.2, 29 February 2016, §55-74.
[61] *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, adopted on 28 September 2011 in Maastricht. The document can be accessed here: http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23. Principle 15 (page 7).

have confirmed the human rights obligations of States in international organisations.[62]

51. A Lender State is also responsible under international law when forcing another State to violate its own obligations under the ICESCR or under other rules of international law.[63]

52. The human rights violations through the three Memoranda of Understanding (MoU)[64] imposed on Greece by the Troika (European Commission, European Central Bank and International Monetary Fund) have been largely documented.[65] Even though the Troika played an important role in imposing austerity to Greece, it was the Eurozone Member States that approved the signature of the MoU.

53. The "Greek crisis" was in reality a banking (private debt) crisis but portrayed and accordingly managed as a public sovereign debt crisis,[66] hence applying the approach of "privatizing profits and socializing losses".

54. Germany, as a member state of the Euro Area that acted as lenders to Greece and alongside with other Euro Area member states,[67]

1) led Greece to violate its human rights obligations towards its own population,[68] violating its extraterritorial obligation to respect;
2) has violated its ETOs to respect and protect[69] human rights after violations occurred in Greece due to the imposed austerity measures to primarily save European banks;[70]
3) has also violated its extraterritorial obligation to protect for not having regulated non-State actors it was in a position to (co-)control,[71] which is the

[62] See, *inter alia*, *CESCR General Comment No.2*; *CESCR General Comment No.14*, E/C.12/2000/4, 2000, §39; *CESCR General Comment No.15*, E/C.12/2002/11, 2002, §36; International Law Commission, *Draft articles on the responsibility of international organizations*, A/66/10, §87.
[63] See, *inter alia*, International Law Commission, *Draft articles on the responsibility of States for internationally wrongful acts*, art. 18, A/56/10; *CESCR General Comment No.8*, E/1998/22 (12 December 1997), §8.
[64] Respectively signed on 3 May 2010, 1 March 2012 and 12 July 2015.
[65] See, *inter alia*, *A/HRC/25/50/Add.1* and *A/HRC/31/60/Add.2*, op.cit., *Truth Committee on Public Debt. Preliminary Report*, Hellenic Parliament, 2015, pp.37-43.
[66] *Truth Committee on Public Debt. Preliminary Report*, op.cit., pp.11-27.
[67] See Olivier De Schutter and Margot E. Salomon, *Legal Brief prepared for the Special Committee of the Hellenic Parliament on the Audit of the Greek Debt (Debt Truth Committee). Economic Policy Conditionality, Socio-Economic Rights and International Legal Responsibility: The Case of Greece 2010-2015*, 15 June 2015, p.6-9.
[68] *CESCR General Comment No.8*, op.cit.
[69] See, *inter alia*, *ICESCR*, Art. 2(1), 11(1), 22, 23 ; International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*; 9 July 2004, §109; International Court of Justice, Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), 19 Dec. 2005, §178-180 & 216-217; *United Nations Charter*, Art. 56.
[70] Amongst which the German banks Commerzbank, Baden Bank, Postbank and DZ Bank that were facing risks in Greece.
[71] See, *inter alia*, *CESCR General Comment No.24*, E/C.12/GC/24, §30, *CESCR General Comment No.12*, E/C.12/1999/5, §15; European Committee of Social Rights, Complaint no. 30/2005, *Marangopoulos Foundation for Human Rights (MFHR) v Greece*, decision on admissibility of 30 Oct. 2005, §14.

case regarding the establishment of and the decisions taken by the European Financial Stability Facility (EFSF).[72]

55. With regard to the first MoU, the state-owned bank KfW was the signatory to the Loan Facility Agreement. KfW was acting in accordance with the instructions and with the benefit of the guarantee of the German government.[73] For that reason, Germany has manifest obligations of KfW's activities and is directly accountable for any human rights violations deriving from that agreement. Within the context of austerity measures imposed on Greece and the related human rights violations, Germany also failed in conducting human rights impact assessments (HRIA) prior to the MoUs.

Recommendations

56. We recommend that the Committee urges the State Party to

- Adopt all possible measures, jointly with other responsible States and institutions, to ensure adequate remedy for the affected people in Greece;
- Commission regular HRIA and establish monitoring mechanisms, which allow Germany to prevent violations of its extraterritorial human rights obligations in the frame of imposed austerity measures in the future, and/or corrective measures in case such violations have not been foreseen but are produced after the imposition of such measures;
- Use its influential role in the EU to prevent new violations of Human Rights derived from the imposition of austerity measures in the future; by requesting from international institutions and other states involved, the adoption of HRIA, monitoring and remedy mechanisms;
- Use its influential role in the EU and within the Troika to move forward to the suspension of the Greek sovereign debt.

7. Effects of German tax and fiscal policies on the capacity for full realization of ICESCR rights

Article of ICESCR: Art. 2(1), general provisions

Explanatory Note

[72] The ESFS, created by the Euro Area Member States and entered into force on 7 June 2010, as a public company based in Luxembourg, is established outside of EU law. It was succeeded by the European Stability Mechanism (ESM) from 8 October 2012 onwards. The ESFS has, as an institution of the EU, to comply with the EU Charter of Fundamental Rights, in accordance with Art.51§1 of the EU Charter of Fundamental Rights.

[73] Olivier De Schutter and Margot E. Salomon, op.cit., p.19.

57. Public revenues are essential to the realization of human rights. State parties to ICESCR need to raise and spend adequate resources, in order to fulfill their treaty obligations to ensure substantive realization of human rights. One of the most significant drains on public budgets today is the loss of tax revenue to cross-border tax abuse by corporations and individuals seeking to avoid or minimize their tax payments – a phenomenon that disproportionately affects developing countries. Cross-border tax abuse refers to the practices of individuals and corporations that aim to reduce or avoid their tax payments, for example through controversial profit-shifting, fraudulent underreporting of the value of taxable transactions and the use of off-shore accounts to hide taxable income.

58. German policy and practice in the tax and financial domains questions the country's compliance with its obligations under Art. 2 of the ICESCR to cooperate internationally to mobilize the maximum available resources to fully respect, protect and fulfill the rights under ICESCR. Furthermore, it questions the State Party's extraterritorial obligation under Art. 29 ICESCR to ensure that its policies and practices do not obstruct third Parties from complying with its obligations under ICESCR. In its conclusions on the sixth periodic report of the United Kingdom in 2016, the CESCR-Committee observed that financial secrecy legislation and permissive rules on corporate tax were affecting the ability of the State party, as well of other States, to meet their obligation to mobilize the maximum available resources for the implementation of ESCR.[74] The Committee recommended the United Kingdom thus to conduct a public HRIA of the changes introduced to its fiscal policy.

59. The 2018 Financial Secrecy Index ranks Germany as the seventh biggest enabler of financial secrecy in the world.[75] The report highlights that regulative loopholes, lax enforcement, and a general skepticism towards tax transparency make Germany an attractive destination for illicit financial flows and still pose a threat to the effectiveness of Germany's fight against fight tax evasion and money laundering. Particularly Germany's tax treaties with developing countries are a cause for concern. This is due to the legal content, which in many cases includes strong restrictions on the ability of developing countries to collect taxes, but it is also due to the fact that Germany has a relatively high number of treaties with developing countries, 51 in total. Human rights spillovers of Germany's tax and fiscal policies on developing countries ability to mobilize public revenues for the realization of human rights may be sizable. According to IMF data, spillover effects particularly on corporate tax bases and rates are significant and sizable and spillovers are especially marked and important for developing countries.[76] An ActionAid report estimates that a tax treaty with Germany cost Bangladesh more than US$ 450,000 due to lower tax income on dividends alone.[77]

[74] Committee on Economic, Social and Cultural Rights (2016) Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland. 14th July, 2016 (E/C.12/GBR/CO/6).
[75] Tax Justice Network (2018) Financial Secrecy Index 2018, Narrative Report on Germany.
[76] IMF (2014) Spillovers in International Corporate Taxation. IMF Policy Paper, May 9th, 2014.
[77] ActionAid (2016). Mistreated. Published February 23rd, 2016.

60. Germany also implemented the internationally agreed reforms on automatic exchange of information and country-by-country reporting (CBCR) for multinationals. The government has published a bill on non-public CBCR for multinational corporations that are based in Germany and have a turnover of at least €750 million. Yet, Germany is still blocking full public CBCR at EU level – with the goal of preventing full public transparency for citizens. So far, Germany has entered into bilateral tax information exchange agreements with 57 jurisdictions, among which very few poor countries. In these, the government insists on reciprocity in automatic information exchange which means that insufficiently equipped tax administrations of poorer countries in the Global South might not get access to the relevant tax data.

Recommendations

61. Consistent with the obligations set forth in ICESCR Art.2 and General Comment No. 24, we urge the Committee to recommend that Germany ensures that its tax and fiscal policies do not impinge upon other governments' ability to mobilize resources for the fulfillment of human rights. More specifically, we respectfully recommend that the Committee requests the State Party to

- Conduct an independent, participatory and periodic HRIA of the external spillover effects of its tax and fiscal policies on third countries,[78] namely developing countries in the Global South, and ensure that the findings are made public and guide future policy reforms with the aim of enhancing revenue mobilization for human rights, particularly in developing countries;
- Contribute to establish an institutional framework for addressing international tax spillovers and, to this end, strengthen multilateral approaches to exchanging tax-related information, in particular, by establishing a public registry of beneficial ownership of companies, foundations, trusts and other legal entities;
- Require multinational companies to publicly disclose CBCR information;
- Provide automatic exchange of information to developing countries on a temporary, non-reciprocal basis so they can benefit from the information on revenue collection before bearing the costs of compliance;
- Support the establishment of a UN intergovernmental tax body to achieve an unbiased, democratic and inclusive venue for shaping international norms of taxation and promoting international tax cooperation;
- Intensify its political efforts at international level, namely at the EU, G20 and UN, to address global tax abuse.

[78] Action Aid (2018) Stemming the Spills: Guiding Framework for undertaking national tax spillover analysis, May 14th, 2018.

8. Development and state-owned financial institutions

Articles of ICESCR: Art. 2(1) in conjunction with art. 7, 11, 12, 23
Concluding Observations of the previous report: Recommendations No. 10 and 11

Explanatory note

62. The German development banks KfW Entwicklungsbank and DEG as well as development funds such as AATIF play an increasing role in international development financing. Despite sustainability instruments in place, investments in large-scale agricultural or power plants confirm that human rights obligations are not adequately taken into account. The same is true for the state-owned KfW IPEX-Bank, which officially pursues the goal of supporting exports of German and European companies and helping them in securing their supply with raw material.

63. In 2009 the Committee urged States parties to „undertake ex ante impact assessments of financial, trade and development policies at both the national and international levels, to ensure that their bilateral and multilateral financial, trade and development commitments do not conflict with their international human rights obligations, particularly under the Covenant“.[79]

64. In its General Comment No. 24 the Committee confirmed that “major development projects have increasingly involved private investments, often in the form of public-private partnerships between State agencies and foreign private investors. These developments give particular significance to the question of extraterritorial human rights obligations of States”.[80]

65. In its sixth periodic report the German government states: „To ensure that human rights standards are considered in bilateral cooperation with partner countries, in 2013 German development policy introduced both a guide for defining country strategies that respect human rights, and guidelines for assessing the human rights risks and impact within the framework of programme proposal development“.[81]

66. While KfW Entwicklungsbank, DEG and AATIF publish information after investment decisions to some degree, the information typically is of general nature and does not sufficiently address specific human rights issues. Some projects are not listed at all. Moreover, the KfW Entwicklungsbank today holds shares in roughly 40 investment funds, and 54% of the investment portfolio of the DEG is towards finance institutions. KfW IPEX-Bank only randomly provides public information about projects it has financed in press releases and its annual reports. KfW argues that business confidentiality or banking secrets make it extremely difficult to provide systematic public information about projects, impact assessments and plans of action agreed on

[79] CESCR (2009): The World Food Crisis.
[80] E/C.12/GC/24
[81] E/C.12/DEU/6

to mitigate social and environmental risks. Many case studies show that infringements of human rights have occurred and can be related to acts or omissions of the respective oversight bodies.

(a) The case of financing agribusiness in Zambia

67. Research in Zambia has repeatedly documented human rights violations, including evictions, related to DEG and AATIF financing to agricultural investors *Zambeef, Zampalm* and *Agrivision*. The German government has repeatedly been informed. However, effective and independent human rights assessments have been promised, including in the 2011 BMZ strategy paper on human rights, but are still missing today.

68. In the recent report on her mission to Zambia the Special Rapporteur (SR) on the right to food stated: “The Government´s policy of turning export-oriented large-scale commercial agriculture into the driving engine of the national economy, in a situation where land protection is weak, runs the risk of pushing peasants off their land, which in turn could push them out of production, with a severe impact on their right to food.” The SR visited a community in Mkushi at the border of a large scale farm of the company Agrivision, which is funded by AATIF: “The SR was informed that the people ate barely once a day, that sometimes they were forced to make soup from local green plants to feed their families and children, and that they were under the constant threat of eviction. The SR recommends that the authorities take all measures necessary to guarantee the affected families´ right to food, including their access to land.”[82] Communities explained that they have been denied access to land they used to feed themselves which is now used by the company. Local authorities confirmed that Agrivision pushes for resettling while no human rights procedures are in place.

(b) DEG investment in PAYCO

69. In 2013 DEG invested 25 million Euros in the *Paraguay Agricultural Corporation* (PAYCO), based in Luxemburg. DEG holds 15.8% of the shares. Since 2013 PAYCO`s area of land increased from 135.000 to 144.000 hectares.

70. Paraguay is one of the countries with the highest land concentration worldwide: 2.6% of landowners hold 85.5% of the land. In 2008, the Committee noted “with concern the concentration of land ownership in the hands of a very small proportion of the population”.[83] Over the last 25 years, the number of undernourished people increased by a staggering 69.9%, which makes Paraguay the third most affected country by hunger in Latin America and the Caribbean. One third of the rural population lives in conditions of extreme poverty.

[82] A/HRC/37/61/Add.1 (2018)
[83] E/C.12/PRY/CO/3 (2008), para. 12 (b). See also para. 18

71. Moreover, local people have complained about unselective sprayings of agro-toxics and resulting health problems around several of the company's holdings. In at least one case PAYCO controls ancestral land of an indigenous community. Some of PAYCO's operations are carried out in the Chaco, an environmentally highly fragile region, which has the world's highest deforestation rate. According to DEG, there is an environmental and social plan that determines how human rights risks are assessed. However, DEG has repeatedly refused to make this information available, including to the German Parliament.

(c) KfW IPEX financing of dam project Hidroituango in Colombia

72. The KfW IPEX bank has provided a loan of 100 Mio USD to Empresas Públicas de Medellín E.P.M. for the Hidroituango Dam in Antioquia, Colombia via a project-related corporate loan for 8 turbines to GE (formerly Alstom).[84] The main financing of the project comes from the Inter-American Development bank (IDB). Since the start of the construction of Colombia's biggest hydroelectric dam in 2011 local communities organized in the *Movimiento Ríos Vivo s*have been warning against human rights, social and environmental risks. The area where the dam is constructed was highly affected by the internal armed conflict. 60% of the local people were forcibly evicted by illegal armed groups and about 63 massacres were committed between 1990 and 2016.

73. The *Movimiento Ríos Vivos* speaks about forced resettlement of numerous families because of the dam project. They appealed in various occasions on their institutional rights (Acción de Tutela) and complained about the environmental license given to E.P.M. In April/May 2018 heavy rainfall produced landslides which blocked the river's diversion tunnel, causing floods and the risk for a possible breach of the dam: Thousands of people have been evacuated producing a humanitarian crisis in the dam construction area. The members of *Movimiento Ríos Vivos* have suffered multiple threats, intimidations, and rights violations. Two of its members were killed in May 2018, as other community leaders before.

74. The KfW IPEX declares in its press release from 9-02-2018 that the project "was assessed with regard to compliance with KfW IPEX-Bank's Sustainability Policy and the Equator Principles and fulfils their requirements."[85] The *Movimiento Ríos Vivos* has sent a complaint to the KfW IPEX the 4th of March 2018. Since the moment of editorial they haven't received an answer.

Recommendations

75. We recommend that the Committee calls on the State Party to

- Commission independent HRIAs prior to its development financing and financing by state-owned banks. Areas with high human rights risks like large-

[84] https://www.kfw-ipex-bank.de/Presse/News/News-Details_456128-2.html
[85] ibid.

scale agribusiness, large-scale mining and infrastructure projects should have priority. All reports should be published;

- Fully disclose loans and investments of state-owned banks and actors with a public mandate such as DEG, KfW Entwicklungsbank and AATIF before the project´s start;
- Publish project information, environmental, social and HRIA as well as plans of action and monitoring reports on all funded projects of all branches of the KfW Group;
- Give embassies a formal directive and resources to monitor the impact of those investments on the enjoyment of ESCR;
- Establish an independent complaint mechanism for the whole KfW Group following the example of the independent complaint mechanisms of the World Bank, the European Investment Bank (EIB) or the DEG.

9. Foreign investments by German pension funds

Article of ICESCR: Art. 11
Concluding Observations of the previous report: Recommendations No. 10
List of issues in relation to the 6th periodic report of Germany: Para. 9

Explanatory Note

76. The recent years experienced a surge of investments in agricultural land by financial investors. While it is widely recognized that these types of investments come along with substantive risks on the enjoyment of human rights - especially the right to food -, public and private pension funds are becoming increasingly involved into land deals. In the OECD countries alone total private pension assets are valued at 38 trillion USD (2015).[86]

77. In Germany many pension funds are public-law institutions, where national or federal authorities exercise regulatory power. However, regulation only relates to financial risks, not to human rights risks. For example the German doctors´ pension fund *Ärzteversorgung Westfalen-Lippe* (ÄVWL) has invested 100 million USD into the TIAA CREF Global Agriculture I fund (TCGA I) which has acquired 132,904 hectares of land in Brazil (2016). A vast body of reports links the large scale land transactions (locally called '*grilagem*') in the respective areas with violations of human rights, including threats and criminalization. This is in line with the Committee's concerns in its Concluding Observations on the 2nd periodic report of Brazil: "…the Committee is

[86] OECD (2016), Pension Markets in Focus: www.oecd.org/daf/fin/private-pensions/Pension-Markets-in-Focus-2016.pdf

concerned about reports that human rights defenders, including those assisting individuals and communities in asserting their ESCR, are threatened, harassed and subjected to violence, frequently by private militias commissioned by private and public actors."[87]

78. According to the reports of community members in the area of the TCGA farm purchases, they have been suffering from direct (by means of threats, legal actions, destruction of houses and fields, personal aggressions) and indirect pressures (through the destruction of fauna and flora, contamination of soils and water by pesticides and diminishing of water resources among others) resulting from the expansion of agribusiness in the region and increasing land speculation, especially since international finance has started to target lands in the region. As a result, farming, hunting, fishing, and breeding of livestock have been made increasingly difficult, if not virtually impossible. In addition, since communities' legitimate tenure rights (so called *posseiros*) have not been secured by the state, they are especially vulnerable to dispossession by land grabbers and agribusiness companies.[88]

79. Recent investigations also indicate that land acquired by TCGA was purchased from a Brazilian businessman accused of using violence and murder to allegedly illegally acquire land in the area.[89]

80. Swedish pension funds also invested in this fund. In its Concluding Observations[90] on the sixth periodic report of Sweden the CESCR recommends that the State party fully exercise its regulatory powers on pension funds and other investors acting abroad, with a view to ensuring that such decisions respect and protect human rights, including a prior independent HRIA (recommendation 12(a)), effective monitoring mechanisms to regularly assess the human rights impact, remedial measures when required (12(b)) and accessible human rights complaint mechanisms (12(c)).

Recommendations

81. The Committee should urge the State Party to

- Establish the necessary regulatory mechanisms to ensure that the involved pension funds do not impair the enjoyment of human rights abroad. This should include mandatory prior HRIA;
- Proactively track and monitor the activities of pension funds and other actors, especially in sectors with high human rights risks, such as farmland investments;

[87] E/C.12/BRA/CO/2 (12 June 2009), http://www.refworld.org/docid/4b1d04010.html
[88] FIAN et al (2018, upcoming) The Human and Environmental Cost of Land Business – The Case of MATOPIBA, Brazil
[89] Rede Social de Justiça e Direitos Humanos et al (2016) Court rules that Brazilian businessman who sold lands to TIAA-CREF acquired lands illegally www.grain.org/article/entries/5521-court-rules-that-brazilian-businessman-who-sold-lands-to-tiaa-cref-acquired-lands-illegally ; FIAN et al (2018, upcoming) The Human and Environmental Cost of Land Business – The Case of MATOPIBA, Brazil.
[90] E/C.12/SWE/CO/6 (4 July 2016), https://undocs.org/E/C.12/SWE/CO/6

- Ensure accessible and adequate information, complaint and remediation mechanisms.

10. Mergers of agrochemical corporations

Article of ICESCR: Art. 7, 11
Concluding Observations of the previous report: Recommendations No. 10

Explanatory Note

82. The German company Bayer has acquired its US competitor Monsanto. Thereby Bayer controls about 25% of the seeds and pesticides market worldwide. Another leading agrochemicals company, BASF, is also based in Germany.

83. Today´s agro-industrial model is highly problematic, not only because it is dependent on dangerous chemicals but also due to its negative effects on climate change, its impact on the loss of biodiversity and its inability to ensure food sovereignty. Many activities of Bayer, BASF and Monsanto have been found to contribute to severe damages to the environment and to the health of peasants and agricultural workers. Such activities also threaten the right to food and biodiversity, as an increasing number of farmers grow exactly the same monocrops and use highly hazardous agrochemicals.[91]

(a) Seeds

84. Smallholders supply 70% of overall food production.[92] However, over the last decades about 90% of farmer´s varieties were lost. A broad range of locally adapted seeds is necessary for resilience against pests, draught and rising temperatures.[93] By reducing crop biodiversity Monsanto, Bayer and BASF have undermined the capacities of producers and consumers to enjoy the right to food.[94] Intellectual property rights and conventions such as UPOV 91 push peasants to use a limited range of proprietary brands and prohibit them from exercising their historical rights to save, use, exchange and sell farm-saved seeds. A non-commercial seeds system must exist and expand, ensuring that farmers have the ability to preserve their

[91] International Monsanto Tribunal, Advisory Opinion, The Hague 18.04.2017, p.24, 25.
[92] Committee on World Food Security, Connecting Smallholder to Markets, 2016.
[93] *The United Nations Special Rapporteur on the right to food, Hilal Elver, calls on Governments to protect the rights of family and small holder farmers working worldwide,* Geneva 16 October 2014.
[94] UN Human Rights council, Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, UN Doc./A/HRC/34/49, 19.01.2017, § 19.

traditional knowledge.[95] The UN Convention on Biological Diversity requires parties to create a national strategy for the conservation of biodiversity.[96]

(b) Pesticides

85. The use of agrochemicals has led to environmental damage and millions of intoxications. Pesticides are responsible for an estimated 200.000 acute poisoning deaths each year, 99% of which occur in developing countries.[97] The right to adequate food is recognized amongst others in Art. 11 IESCR. The protection from adverse substances sets requirements for food safety and for a range of protective measures.[98] The SR on the Right to food and the SR on Toxics recently pointed to denials by the agro industry of the hazards of certain pesticides and expressed concern about unethical marketing tactics and huge sums spent by the powerful chemical industry on influencing policymakers and contesting scientific evidence.[99]

Recommendations

86. Therefore we recommend that the Committee calls on the State Party to

- Ensure that German corporations respect human rights – especially the right to food and the right to health in developing countries – and avoid environmental damage where their conduct affects food issues;
- Ensure that peasants in developing countries don´t face price increases, adverse health effects and constraints in producing and selling seeds by treaties on intellectual property rights, by international policies or by activities of German corporations;
- Work towards that a “non-commercial seeds system must exist and expand, ensuring that farmers have the ability to preserve their traditional knowledge;”[100]
- Monitor pesticide use and exports, generate policies to reduce pesticide use worldwide, develop a framework for the banning and phasing-out of highly hazardous pesticides, impose strict liability on pesticide producers and penalties on companies that fabricate evidence and disseminate

[95] UN General Assembly, Seed Policies and the Right to Food: Enhancing Agrobiodiversity and Encouraging Innovation, Report of the Special Rapporteur on the Right to Food, Oliver De Schutter, UN Doc. A/64/170, 23.07.2009, § 7.
[96] Convention on Biological Diversity, CBD, Art.6.
[97] UN Human Rights Council, Report of the Special Rapporteur on the Right to food, UN Doc. A./HRC/34/48, 24.01.2017.
[98] General Comment 12, The Right to Adequate Food, Art. 11, E/C.12/1999/5, p.3 n.10.
[99] UN Human Rights Council, Report of the Special Rapporteur on the Right to food, UN Doc. A./HRC/34/48, 24.01.2017, Par. 4, 86.
[100] UN General Assembly, Seed Policies and the Right to Food: Enhancing Agrobiodiversity and Encouraging Innovation, Report of the Special Rapporteur on the Right to Food, Oliver De Schutter, UN Doc. A/64/170, 23.07.2009, § 7.

misinformation on the health and environmental risks of their products, especially in developing countries.

11. Land policy in German Development Corporation (DC)

Article of ICESCR: Art. 2 (1) in conjunction with art. 11, 22, 23
Concluding Observations of the previous report: Recommendations No. 11

Explanatory Note

87. As reconfirmed by the 2012 adopted *UN Voluntary Guidelines of Responsible Tenure of Land, Forest and Fisheries*[101], land policy is an area with a high relevance for ESCR. Land policy also is a relevant area for German DC.[102] As a new, globally agreed human rights instrument in the area of land, Germany should increase efforts to implement and apply the Tenure Guidelines in DC and to be held accountable for compliance with them.

88. However, in the case of Cambodia the German government has been reluctant to apply the Tenure Guidelines in their evaluation of the land policy support. The Committee has previously expressed concerns about negative impacts of development cooperation in the area of land in Cambodia.[103] In its response, Germany initially stated that it does not know about reports of violations of ESCR in Cambodia.[104] In its 6th periodic report Germany nevertheless concludes that the cooperation in the land sector was terminated "due to prolonged human rights abuses".[105]

(a) Missing application of Tenure Guidelines

89. With regards to Cambodia, it was a very positive step by the German development ministry BMZ to commission the first ever independent human rights assessment for development projects in the land sector.[106] However the study was limited to a short project period, and as such not integrating human rights impacts that have been brought to the attention of the Committee by FIAN in 2011.

[101] http://www.fao.org/cfs/home/activities/vggt/en/
[102] For example pillar „land governance" at SEWOH.
[103] E/C.12/DEU/CO/5, Recommendation 11 (12 July 2011).
[104] http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fCOB%2fDEU%2f14652&Lang=en
[105] E/C.12/DEU/6 (16 March 2017).
[106] www.institut-fuer-menschenrechte.de/uploads/tx_commerce/Study_Human_Rights_Assessment_of_the_German_Cambodian_Land_Rights_Program.pdf

90. When BMZ conducted an analysis of its 20 years support for land governance in Cambodia, German CSOs repeatedly requested the ministry to apply the Tenure Guidelines as a normative human rights basis. Nevertheless, the Tenure Guidelines have not been applied, leaving a substantive gap for such analysis from a human rights perspective.

91. As land is a highly sensitive issue from a human rights perspective, concerns also occur in other countries, for example regarding the impact on vulnerable rural communities in the context of support for *Rural Environmental Registry* (*Cadastro Ambiental Rural,* CAR)[107] or the multilateral World Bank Program *Piauí: Pillars of Growth and Social Inclusion*[108] on "regularization" of land in Brazil. This requires more systematic and rigorous HRIA in line with the states' extraterritorial obligations under the Covenant.

Recommendations

92. We recommend that the Committee urges the State Party to

- Oblige the development ministry BMZ to use independent human rights assessments more systematically to assess the human rights impact of their bi- and multilateral land policy support;
- Apply the Tenure Guidelines throughout such assessments and adopt corrective measures when policies and laws produce an impact on human rights contrary to the aim of the Tenure Guidelines.

12. Protection of human rights defenders, including affected local communities, in the context of business operations

Article of ICESCR: Art. 2 (1)
Concluding Observations of the previous report: Recommendations No. 10

Explanatory Note

93. Human rights defenders (HRDs) have played a vital role in the field of business and human rights as they seek to protect the ESCR of affected communities by providing information, legal advice and organisational support. Yet too often, these HRDs lack a safe and enabling environment to carry out their work. Around the world, they are subjected to death threats, harassment, defamation and smear campaigns, criminalisation, physical attacks and murder. Aggressions against them are rarely

[107] https://www.giz.de/en/worldwide/34060.html
[108] Word Bank Project number P129342. For detailed critique see international statement: https://bit.ly/2LUwckz

brought to justice. In recent years, numerous reports have given evidence that land and environmental rights defenders are among the most endangered groups of HRDs. Some traditional protection strategies, e.g. by increasing the defenders' international profile and recognition, have resulted less effective when friendly-minded states' own economic interests are at stake.

94. Because of the alarmingly high number of assassinated land and environmental defenders, international bodies have increasingly called attention on their situation, not only to states inside the territories of which defenders are attacked, but also states that domicile businesses which operate abroad. In its General Comment No. 24, the Committee called on States to "take all measures necessary to protect human rights advocates and their work. They should refrain from resorting to criminal prosecution to hinder their work, or from otherwise obstructing their work."[109]

95. The SR on the situation of HRD noted the complicity of businesses in attacks against defenders and communities working to protect ESCR, and he concluded that also non-State actors, such as businesses, have the responsibility to promote and respect the rights of defenders.[110]

96. In its Action Plan on Human Rights,[111] the government proclaimed that "protecting human rights defenders is (…) a top priority for German foreign policy."[112] However, the NAP, also adopted in the same month, falls short in addressing the protection of HRDs in contexts where businesses operate, nor does it give due consideration to the rights of those who might be affected adversely by German business operations abroad.

97. In case of the Agua Zarca hydroelectric power project in Honduras, funded by foreign development banks and supplied for by a German company, the project was started without any consultation with the affected communities.[113] Peaceful protests have been met with violent repression and several resistance movement leaders have been killed, among them Tomás García, Berta Cáceres and Nelson García. Hydroelectric dams and agribusinesses were recently identified as the industries most linked to murders of HRDs in Honduras.[114]

Recommendations

[109] See General Comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24 from 10/08/2017, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f24&Lang=en, para. 48.
[110] see Situation of human rights defenders, A/72/170 from 19/07/2017, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/220/75/PDF/N1722075.pdf?OpenElement, para. 4, 5, 16 and 24.
[111] adopted in December 2016, see https://www.auswaertiges-amt.de/blob/205200/c4f16b74de97b2e796e5a2c1305d3ff2/161221-mr-bericht-der-bundesregierung-12-data.pdf (in German)
[112] see https://www.auswaertiges-amt.de/en/aussenpolitik/themen/menschenrechte/03-zivilgesellschaft
[113] see https://ejatlas.org/conflict/proyecto-hidroelectrico-agua-zarca-honduras
[114] see Global Witness report „Defenders of the Earth", July 2017, https://www.globalwitness.org/en/campaigns/environmental-activists/defenders-earth/, p. 26

98. We recommend that the Committee requests the State Party to

- Develop an integrated action strategy for the protection of HRDs active in the context of business enterprises and communicate this strategy to all relevant actors;
- Provide businesses with a thorough understanding of who HRDs are, what they do and how best to relate them;
- Call on businesses to respect the commitment of HRDs, i.e. neither by interfering with the work of HRDs nor by putting them at a higher risk through the businesses' own activities, be it consciously or unconsciously;
- Encourage businesses to communicate with the local civil society – i.e. (potentially) affected persons as well as independent non-governmental organizations;
- Call on embassies to monitor compliance with international human rights standards in the field of business and human rights by the governments of host countries;
- Hold companies that are responsible for attacks against HRDs accountable, including by providing remedy for the victims.