Who will join the negotiating table? Position paper on the second revised draft for a legally binding human rights instrument on activities of transnational corporations and other business enterprises

Deutsches Institut für Menschenrechte

Position paper

Who will join the negotiating table?

Position paper on the Second Revised Draft for a Legally Binding Human Rights Instrument on Activities of Transnational Corporations and other Business Enterprises

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1 What is at stake?

In June 2014, the UN Human Rights Council decided, by way of Resolution 26/9, to establish the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises (OEIGWG). The mandate of the working group is to create an international, legally binding instrument to regulate the activities of transnational corporations and other business enterprises with respect to human rights. The OEIGWG will meet for the sixth round of negotiations from 26 to 30 October 2020. The basis for discussion will be the revised draft submitted by Ecuador on 06.08.2020.[1]

In order for the agreement to have its desired effect - the elimination of protection and accountability gaps in transnational economic activities - at least some of the relevant countries of origin of transnational companies must be convinced of the agreement's validity. The vast majority of countries that can be classified as host States of transnational companies have been involved in the negotiations so far. Important Western industrialised countries such as the United States of America, Canada, Australia, Japan, and South Korea do not support the process. The European Union (EU) has also made it clear that it is not yet ready to participate in the negotiations. In the past, it has justified this on the grounds that EU proposals for more orientation towards consensus and to overcome divisions on the part of the initiators of Resolution 26/9, Ecuador and South Africa, have not been given sufficient consideration. In addition, the EU claims that a negotiating mandate is lacking from the European Commission.[2] However, the EU does not consider there to be a fundamental contradiction between the Treaty process and the global consensus of the UN Guiding Principles (UNGP), as long as the latter form the basis for further international legal developments in the field of business and human rights.

2 Summary assessment

In its previous comments on the various drafts of the first draft elements,[3] the German Institute for Human Rights has made it clear that an overarching international legal framework is helpful and necessary in order to solidify States' protective duties in relation to business activities. In the view of the Institute, the zero draft and the first revised draft of 2019 already set the right priorities required to close human rights protection gaps, especially in transnational supply chains. For this reason, the Institute recommended that the German government work to ensure that the EU constructively accompanies the further negotiation process by participating in the negotiations and contributing to their content. This seems all the more necessary as DG JUST announced in April that it would aim for EU-wide regulation on due diligence obligations in 2021.

The reworked Second Revised Draft shows further significant improvements compared to the preliminary draft. It retains the right priorities, extends the scope of

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1 Here is the **second revised draft** of 06.08.2020, here the **first draft** of 16.07.2019 and **"zero draft"** (last accessed 24.08.2020).

2 For the EU's contributions to the 5th round of negotiations, see UN Doc. A/HRC/43/55, p. 20-21.

3 Niebank, Jan-Christian / Schuller, Christopher (2018): Building on the UN Guiding Principles towards a Binding Instrument on Business and Human Rights. Berlin: German Institute for Human Rights; Niebank, Jan-Christian / Schuller, Christopher (2018): OEIGWG has come in from the cold. Will the EU do the same? Berlin: German Institute for Human Rights; Niebank, Jan-Christian (2019): Getting to critical mass – Will the EU now provide the necessary traction? Berlin: German Institute for Human Rights.

application to all corporate activities and is generally more systematically oriented towards the UNGP. With a view to the victims' perspective, the draft now also makes gender-specific distinctions.

All this can be seen as a clear concession by the Chairmanship to the EU. The draft is thus a very good basis for further intergovernmental negotiations planned for late October 2020. The Institute recommends that the German government strongly advocates a negotiating mandate for the EU delegation in the European Commission for the upcoming round of negotiations. France, Spain, and the Netherlands have already expressed their explicit support for the UN process and could work together with the German government to obtain a joint EU mandate.

The new draft is presented below, and the main changes compared to the preliminary draft of 2019 are highlighted. For the time being, the proposed Optional Protocol on the national implementation mechanism as well as other issues concerning the implementation and monitoring of the agreement are not taken into account.

3 Scope and definitions

3.1 Scope

The question of which companies or business activities are to be subject to regulation in the context of the state's duty to protect is of crucial importance for the effectiveness of the agreement.

Art. 3 para. 1 now stipulates that all business enterprises are covered, including but not limited to transnational corporations and other business enterprises that undertake business activities of a transnational character. The definition of business activities (Art. 1 para. 3) has been adapted accordingly and now reads: '"business activities" means any for profit economic or other activity undertaken by a natural or legal person, including State-owned enterprises, transnational corporations, other business enterprises, and joint ventures undertaken by a natural or legal person. This will include activities undertaken by electronic means.' In the combination of Art. 1 para. 3 and Art. 3 para. 1, the draft offers a more consistent definition of the scope of application than the 2019 draft and emphasises prominently that the agreement applies to all business enterprises, including State-owned enterprises, and non-profit enterprises. In theory, this also covers activities conducted by international trade and financial institutions.

With regard to small and medium-sized enterprises, Art. 3 para. 2 of the draft rules that, in accordance with UN Guiding Principle 14, States may determine in a nuanced manner the ways that enterprises can fulfil their responsibility to prevent human rights violations - according to their size, sector, operating environment, and the severity of the human rights impact.

The extended scope of application to all business enterprises and to all forms of economic activity is once again a clear concession (to the EU, among others) and is to be welcomed from the perspective of the rights-holders. Their effective protection requires that any kind of adverse human rights impact exerted by business enterprises and their activities must be recorded. The aim of the 6th round of negotiations must therefore be to reach a consensus on the issue of scope. Although the majority of

countries, including the EU, have previously welcomed the extended scope of application, there are some countries (above all Russia and South Africa) which would like to see the Treaty concentrate exclusively on transnational companies.

3.2 Substantive reference framework

With regard to the substantive scope, there was a considerable need for specification in the 2019 draft, as the agreement was intended to cover "all human rights" (Art. 3 para. 3). Problems with regard to the principle of legal certainty under the rule of law would have arisen during implementation by the signatory States at the latest. Accordingly, the relevant agreements have been specifically named in the present draft and carried over into the operative part of the agreement. It is pleasing to see that the draft goes beyond the UNGP in this respect;[4] Art. 3 para. 3 provides that the agreement covers all human rights and fundamental freedoms which are derived from the Universal Declaration of Human Rights, customary international law, as well as from each core human rights treaty[5] and each ILO convention ratified by the respective State. The new agreement thus reaffirms the obligations of States that have been established by ratification of other human rights treaties.

However, a shortcoming in terms of the substantive reference framework remains in this draft. Environment-related duties of care are specified (Art. 1 para. 2, Art. 4 para. 2 (c) and Art. 6 para. 3 (a) and (e)), but the draft does not refer to the specific legal sources of international environmental law or other applicable internationally recognised standards. The draft thus lacks certainty in terms of environmental law, which will cause difficulties for the operationalisation of environmental due diligence obligations. For the implementation of environmental due diligence obligations, it would be helpful to develop a globally recognised environmental standard, specific to business enterprises, which could serve as a substantive reference framework. This process could also be initiated or supported by the German government.[6]

3.3 Definitions

With regard to the definitions used in the draft, the authors have made improvements. The draft of 2019 did not use the terms "human rights violations by States" and "human rights abuse by business enterprises" in a clear-cut way. The current draft deals consistently and exclusively with human rights abuses by business enterprises. The UNGP concept of "potential and actual adverse human rights impacts" has been replaced by "human rights abuses". The abandonment of this terminology is incomprehensible from the perspective of the UNGP and should be reversed.

Finally, Art. 1 para. 5, which specifies which areas of business activity must comply with due diligence obligations, is of vital importance for the scope of the duties of care.

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4 The UNGPs refer to the Universal Declaration of Human Rights and the Civil and Social Covenant.

5 Core human rights treaties are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD), the International Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the Convention against Torture (CAT), the Convention on the Rights of the Child (CRC), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), the Convention on the Rights of Persons with Disabilities (CRPD) and the Convention for the Protection of All Persons from Enforced Disappearance (CPED). The current status of ratification of all core human rights treaties can be found here: OHCHR: Status of Ratification: https://indicators.ohchr.org/

6 A report commissioned by the Federal Environment Agency makes suggestions for operationalisation: Scherf, Cara-Sophie; Nele Kampffmeyer, Peter Gailhofer, David Krebs, Constantin Hartmann, Remo Klinger (2020): Umweltbezogene und menschenrechtliche Sorgfaltspflichten als Ansatz zur Stärkung einer nachhaltigen Unternehmensführung. Final report, pp. 37, 38 (only available in German).

The preliminary draft had - highly controversially - been based on the "contractual relationships" of a business enterprise. This concept of contractual relationships was also controversial, especially from the point of view of the rights-holders, as a business enterprise's contractual relationships are usually not visible for them. In accordance with the UNGP, the present draft has taken up the more far-reaching concept of "business relationships" (see below, section 5.2).

4 Rights of victims

The 2019 draft had already highlighted the rights of those affected by human rights abuses. The purpose of the corresponding Art. 4 is to strengthen the right to effective remedy and the associated minimum procedural rights.

Even more clearly than in the preliminary draft, Art. 4 aims to protect those affected by human rights abuses, their family members[7], legal advisers and human rights defenders from repression (Art. 4 para. 2 lit. a, b, e) and to reduce the various obstacles faced by rights-holders on the way to effective remedies. Art. 4 para. 2 lit. d regulates the right to bring an action, also as a collective or class action; to have access to relevant information and legal assistance and access to the respective consulates, which is often of particular importance in transnational cases.

Those affected need "equality of arms" with business enterprises, i.e. existing informational asymmetries between those affected and business enterprises must be reduced (Art. 4. para. 2 lit. f and g, Art. 7 para. 2, Art. 7 para. 3 lit. a). This is because without sufficient information, for example concerning the internal structures of a business enterprise or the risk analyses it conducts, victims are generally unable to substantiate their complaints adequately. In this respect, the present draft goes further than the preliminary draft, which only provided for a relatively vague right to information and for under-specified corporate reporting. Art. 6 para. 3 lit. e of the draft requires States to ensure that business enterprises comply with reporting obligations "on non-financial matters, including information about group structures and suppliers as well as policies, risks, outcomes and indicators concerning human rights, labour rights and environmental standards". This provision could potentially contribute towards the reduction of informational asymmetries.

A positive change has been made with Art. 7 para. 6 on the reversal of the burden of proof: States may take legislative action to reverse the burden of proof in appropriate cases. The reference to the necessary conformity with principles of the rule of law and to the "appropriate cases" in which this may take place appears to be a more careful formulation than in the preliminary draft. The preliminary draft provided that the reversal of the burden of proof may be ordered by the courts and that this could only be regulated according to national law (Art. 4 para. 16). Another positive aspect is the reintroduction of the right to collective redress for victims in Art. 4 para. 2 lit. d, which was not included in the preliminary draft.

Another major problem for many victims is the financing of legal actions. States must do more to reduce financial barriers to enforcement within their jurisdictions. It is

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7 The inclusion of relatives as "victims" essentially follows Art. 24 of the International Convention for the Protection of All Persons from Enforced Disappearance.

therefore to be welcomed that the present draft also addresses this problem, even going beyond the international fund (Art. 4, lit. f) provided for in Art. 15 para. 7.

As already stated in the Institute's Position Paper on the first revised draft in 2019, the right to interim relief should be explicitly mentioned in Art. 4 para. 2 lit. c. In cases where interim measures are necessary in order to avert possible irreparable harm to the persons affected by the alleged infringement, the rights of such persons must be effectively protected even before a court decides on the merits of the case.[8]

5 Prevention

5.1 Orientation towards the due diligence concept from the UNGP

In accordance with the UNGP, the present draft is also clearly oriented towards State obligations: It exclusively addresses States as subjects of international law, which must hold business enterprises responsible as part of their State obligation to protect. Art. 6 para. 1 reaffirms the State's duty to effectively regulate economic activities[9]. According to Art. 6 para. 2, this should be fulfilled by obliging business enterprises to observe "human rights due diligence". Art. 6 para. 2 and 3 are thus clearly oriented towards the process standard of human rights due diligence, the central concept of the UNGP.[10]

As in the preliminary draft, the programme of obligations to be imposed on business enterprises is, in accordance with the UNGP, oriented around behaviour rather than results and refers to the core elements of due diligence it mentions: States should take measures to ensure that business enterprises have procedures in place to identify actual and potential human rights violations, take measures to avert such violations, review the effectiveness of these measures and account for them by way of reporting procedures. Companies should base these due diligence processes on consultations held with rights-holders (Art. 6 para. 3 lit. b).

However, as in the preliminary draft, Art. 6 does not call for complaints mechanisms to be established at the level of business enterprises themselves - a core element of human rights due diligence under the UNGP. This is unfortunate, as a complaints mechanism can fulfil a signalling function for adverse human rights impacts caused by corporate activities. Complaint mechanisms enable enterprises to identify systemic problems based on the analysis of complaints and to adapt their practices accordingly. At the same time, complaints mechanisms may be able to provide faster redress and prevent damage from worsening (see commentary on UNGP 29).

5.2 Extent of due diligence

In order to close loopholes in protective legislation pertaining to globalised economic structures, the human rights diligence which States intend to impose on business enterprises must not relate solely to the business enterprise’s “own activities”. The

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8 The draft mentions "injunction" in Art. 4 para. 2 c, which is also - but rarely - translated into German as "einstweilige Anordnung". However, the positioning of this term at the end of the list in paragraph c rather leads to the conclusion that this is a court order in the main action, i.e. not an interim relief. Explicit mention and inclusion of interim relief in clause c should be made by means of the common terms such as "interim measures" or "preliminary injunction" or "interim injunction". See Art. 5 of the Additional Protocol to the ICESCR.

9 See General Comment No. 24 (2017) of the UN Committee on Economic, Social and Cultural Rights and General Comment No. 16 (2013) of the UN Committee on the Rights of the Child.

10 The preamble already makes explicit reference to this in sentence 12 and underlines the responsibility of business enterprises to respect human rights by repeating Guiding Principle 13 of the UNGP almost word for word.

agreement must therefore clarify under which conditions human rights risks arising from “third party” activities are also taken into account.

Here the current draft has clearly taken a step forward – one that was necessary from the perspective of the UNGP. The 2019 draft provided for due diligence obligations to take effect concerning a business enterprise’s own activities and its "contractual relations". The current draft is based on the UNGP[11] and mentions "business relationships": "'Business relationship' refers to any relationship between natural or legal persons to conduct business activities, including those activities conducted through affiliates, subsidiaries, agents, suppliers, partnerships, joint venture, beneficial proprietorship, or any other structure or contractual relationship as provided under the domestic law of the State, including activities undertaken by electronic means. " (Art. 1 para. 5).

5.3 Occupied and conflict-affected areas

There is still a need for further specification with regard to entrepreneurial duties of care in occupied and conflict-affected areas, for example, which "enhanced human rights due diligence measures" (Art. 6 para. 3 lit. g; Art. 16 para. 3) should apply exactly. For example, it remains unclear whether it is mandatory to refrain from entering existing areas of conflict, or when a business activity should be abandoned[12]. The UNGP does not answer these questions either; however, they recommend that credible and independent experts from governments, civil society, national human rights institutions, and relevant multi-stakeholder initiatives be consulted (commentary on Guiding Principle 23). With regard to State obligations in connection with conflict-affected areas, Art. 16 para. 3 is still too vague. UN Guiding Principle 7 provides guidance on how States can promote respect for human rights in conflict-affected areas.

5.4 Corporate capture

Finally, Art. 6 para. 7 (formerly Art. 5 para. 5) is of fundamental importance, which must be understood in connection with the State's obligation to protect and its corresponding duties to regulate. The particular interests of the economy are fundamentally at odds with the interests of common welfare which States must pursue. This is taken into account in the draft, which specifies that States are to protect their political decision-making processes from undue influence from economic representatives. At EU level, effective rules to limit the influence of business enterprises on politics are still lacking. Among other things, the European Alliance for Lobby Transparency and Ethical Rules (ALTER-EU) criticises the fact that member State governments serve as "lobby vehicles for business interests".[13] In contrast to the situation at EU level, Germany even lacks a legal framework for the introduction of a mandatory lobby register.[14] Against this background, the retention of this article is to

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11 Guiding Principle 13 b UNGP and its commentary.

12 Thielbörger, Pierre / Manandhar, Timeela (23.08.2019): Bending the Knee or Extending the Hand to Industrial Nations? A Comment on the New Draft Treaty on Business and Human Rights. EJIL:Talk (accessed 24.06.2020).

13 See Alter-EU (2018): Corporate capture in Europe - When big business dominates policy-making and threatens our rights.

14 Cf. resolution of the 37th Conference of the Information Freedom Commissioners (IFK) in Germany on 12 June 2019 in Saarbrücken on the lobby register (accessed 24.08.2020), during which a draft law for a German lobby register was controversially discussed in summer 2020, see https://www.deutschlandfunk.de/transparenzregeln-in-der-politik-was-bringt-ein.2897.de.html?dram:article_id=479325 (only German version available, accessed 06.09.2020)

be assessed positively, despite the fact that an appropriate specification of it, brought about by clear rules and barriers, is still lacking.[15]

6 Disadvantaged and marginalised groups

The 2019 draft already placed a stronger focus on the protection of discriminated and marginalised groups. The naming of such groups with special protection needs is formulated openly in the new draft, and no longer takes the form of an exhaustive list. Depending on the context, protection needs of, for example, internally displaced persons or LSBTIQ persons can be identified and covered (Art. 4 para. 1).

The reference to the UN Declaration on the Protection of Human Rights Defenders in the preamble and the relevant implementation in Art. 5 para. 2 ("State Parties shall take adequate and effective measures to guarantee safe and enabling environment for persons, groups and organisations that promote and defend human rights and the environment") remains in place. Whistleblowers may also fall under the broad definition of the UN Declaration on Human Rights Defenders[16]; however, an explicit reference to their protection would be desirable, not least because the disclosure of business secrets in order to expose human rights violations serves the protection of the common good and can therefore be lawful.[17]

As part of the measures to prevent human rights violations, Art. 6 para. 3 lit. c provides for consultations with potentially affected persons, taking particular account of increased risks for certain groups - women, children, people with disabilities, indigenous peoples, migrants, refugees, internally displaced persons and protected populations in areas of occupation or conflict. This right to consultation is complemented by the need to conduct it in accordance with the "free, prior and informed consent (FPIC)" of indigenous peoples (Art. 6 para. 3 lit. d). This is a significant step forward compared to the preliminary draft, which only established a right of indigenous peoples to consultation. Consultation processes in the context of human rights risk and impact assessments should also be extended to include a gender perspective (Art. 6 para. 3 lit. b). Art. 8 para. 5 also provides for gender-specific reparations for victims of human rights violations.

7 Legal liability

National civil law and civil procedure must ensure effective legal protection for those affected by human rights violations in connection with transnational economic activities. The treaty contributes to this through its rules on the civil liability of business enterprises (Art. 8 para. 1-3, 5, 7 and 8).

Art. 8 para. 1 calls for a comprehensive and adequate liability regime covering legal and natural persons "conducting business activities". Art. 8 para. 5 strengthens the rights of persons affected by human rights violations by requiring States Parties to provide for domestic law to provide "adequate, prompt, effective and gender

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15 See case studies for ESCR-Net, https://www.escr-net.org/corporateaccountability/corporatecapture (accessed on 24.08.2020), ALTER-EU (2018), see footnote 13

16 See also: UN High Commissioner, "Who is a defender" (accessed 06.09.2020).

17 The European regulatory framework for the protection of whistleblowers must be implemented nationally by 2021; for the German legal situation for the protection of whistleblowers see German Bundestag, Wissenschaftliche Dienste, Sachstand WD 7 - 3000 - 257/18 (only German version available, accessed 06.09.2020).

responsive reparations to the victims of human rights violations". In addition, States may require that business enterprises provide financial security for possible compensation claims (Art. 8 para. 6).

Of particular importance is Art. 8 para. 7, which provides for the liability of natural or legal persons for failures to take preventive measures in the context of business relations in the supply chain. Liability is triggered when a business enterprise exercises legal or factual control or supervision over a third party (natural or legal person) with whom the enterprise has business relations or, where human rights violations by such a third party are foreseeable, has not taken adequate measures to prevent human rights violations. In contrast, the preliminary draft provided for "close relations" as an alternative (cf. Art.12 para. 12).

From the perspective of the rights-holders, however, it may be difficult to prove legal or factual control or to predict the likelihood of human rights violations occurring. Compared to the preliminary draft, however, potential gaps in protection were addressed by focusing on business relationships (instead of contractual relationships). This is because human rights violations can also consist in part of financial influence or de facto influence. This concerns in particular the relationship between parent enterprises and their subsidiaries.[18]

According to Art. 8 para. 4, States Parties should also take the necessary measures to provide for "effective, proportionate and dissuasive criminal and/or administrative sanctions" if business enterprises have caused or contributed to human rights violations through their business activities. In addition to civil liability, the State should therefore make full use of its sanctioning options in accordance with its duty to protect human rights.

According to Art. 8 para. 9, the States Parties shall ensure that the elements of criminal law provisions apply to legal persons carrying out economic activities. This is to be achieved through the criminal liability of legal persons or through a "criminal or functionally equivalent liability of legal persons". Criminal liability and, alternatively, administrative liability are mentioned further down in the same paragraph. The paragraph refers to the human rights standards to which the State Party is bound, customary international law and national criminal law. Sanctions for legal persons should be proportionate to the gravity of the offence. Unfortunately, even the new draft does not provide States with guidance on the level of appropriate sanctions to make them effective, proportionate, and dissuasive. A reference to Art. 25 para. 3 of the Rome Statute of the International Criminal Court, which contains the internationally recognised forms of perpetration and participation, could be useful here.

The liability provisions in Art. 8 distinguish between the liability of natural persons and that of legal persons, between civil liability and criminal liability, and between criminal and administrative sanctions available to the State. However, the distinction is sometimes still unsystematic in the individual paragraphs. A sorting of the levels is urgently recommended in the further revision of the draft treaty: who is liable and how

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[18] The relevance of this is shown, for example, in the case of Vedanta Resources plc. In this case, the UK Supreme Court accepted a duty of care by the natural resources company Vedanta towards Zambian plaintiffs affected by water pollution caused by the copper mining of a subsidiary. This confirmed the liability of the British parent enterprise; for a presentation of the case see https://www.business-humanrights.org/en/latest-news/vedanta-resources-lawsuit-re-water-contamination-zambia/ (accessed 06.09.2020).

should the State impose sanctions? Which liability regime is at issue in which section? The provisions on civil liability and criminal liability in particular should be clearly separated.

Overall, however, the rules are more comprehensive than the preliminary draft and take better account of the rights-holders' perspective. Moreover, they are more closely oriented towards the UNGP, since liability or sanctions are no longer triggered solely by the cause, but also by a contribution to negative human rights impacts ("caused or contributed to human rights abuses", see Art. 8 para. 4, Art. 8 para. 7, Art. 8 para. 8).

The link between liability and the process standard of entrepreneurial due diligence, i.e. the duty to make an effort, has been better achieved in the current draft than in the preliminary draft: Art. 6 stipulates that States are to oblige business enterprises to conduct human rights due diligence, and the latter are to be liable if they have not made adequate preventive efforts. While Art. 8 para. 7 refers to the failure to take preventive measures ("failure to prevent"), proof that due diligence obligations have been fulfilled no longer automatically releases a business enterprise from liability (Art. 8 para. 8). A court or other competent authority is to decide whether liability is incurred after verifying compliance with due diligence standards.

8 Adjudicative jurisdiction, statutory limitations, and applicable law

The provisions on adjudicative jurisdiction, statutory limitations, and applicable law are intended to close gaps in accountability. Rights-holders in the host countries of transnational business activities are often confronted with the denial of rights - through abduction, corruption, lacking independence of the judiciary and general bad governance. Moreover, regardless of the merits of their claims, they often do not have access to legal redress in the business enterprises' home States.

8.1 Adjudicative jurisdiction

As in previous drafts, the current draft provides for (civil) jurisdiction being opened in the home State as well as in the business enterprise's host State. Legal action can be brought at the location of the human rights abuse (Art. 9 para. 1 lit. a), the act or omission that contributed to the human rights abuse (Art. 9 para. 1 lit. b) or the State in which the business enterprise is domiciled (Art. 9 (1) lit. c). The opening of jurisdiction in the States of origin of transnational corporations is crucial for the remedy of human rights violations by corporations in States with deficient judicial systems. From the perspective of rights-holders, it is important to be able to choose the judicial forum as freely as possible in order to have access to effective remedies. In contrast to the previous draft, the new draft makes it clear that the doctrine of *forum non conveniens,* which is valid in common law, does not apply here and thus closes gaps that have existed up to now (Art. 9 para. 3). According to this doctrine, a court may deny its jurisdiction in a case if it considers another court more competent. In the past, this doctrine has repeatedly hampered victims' access to courts in the States in which the business enterprises are domiciled[19]. In addition, the draft meets the requirements of the introduction of a *forum necessitatis* to ensure effective access to legal remedies

[19] Probably the most prominent example is the fire disaster in Bhopal, India (1984), where lawsuits against the US company Union Carbide could not be brought in the US.

(Art. 9 para. 5). For example, courts in the EU can thus decide on a dispute in exceptional cases if it is unreasonable or impossible to initiate or conduct proceedings in a third-party State with which the dispute has a close connection.

8.2 Statutory period of limitation

Existing limitation periods often fail to take into account the complexity of human rights violations in connection with transnational economic activities, difficulties accessing information and the effort required to prepare proceedings from abroad. The previous draft already responds to this in Art. 8 para. 2 and demands "reasonable" limitation periods for civil and other proceedings. Unfortunately, the new draft also fails to specify the limitation periods in more detail (Art. 10 para. 2). However, it has been made clear that States must allow more time for the enforcement of such transnational claims, since some damages can only be determined after a long period of time, as in the case of damage to health, for example, which only manifests itself years after an event which later gives rise to damage. The draft could be improved by also addressing the issue of limitation periods. A limitation period may only commence when the persons concerned have knowledge of all facts giving rise to a claim.

8.3 Applicable law

The applicable law is also crucial for effective remedies. In European law, the law of the State in which the damage occurs is generally applicable to claims for damages under tort law on the basis of the general conflict rule of Art. 4 para. 1 of the Rome II Regulation. However, this may be unfavourable for plaintiffs if the law of these States provides for a lower level of protection. [20]

Art. 11 of the new draft provides for a choice between the law of the State in which the complaint is pending (forum State) and the foreign legal system in the case of human rights violations by business enterprises. Alternatively, the applicable law may be determined by the place where the event giving rise to the damage occurred (Art. 11 para. 2 lit. a) or the domicile of the defendant enterprise (Art. 11 para. 2 lit. b). This could ensure a higher level of protection.

9 International legal assistance and cooperation

9.1 International legal assistance

Despite numerous accusations against business enterprises of being involved in human rights abuses, investigations and prosecutions remain rare[21]. Therefore, States Parties must provide each other with mutual legal assistance in initiating and conducting investigations, prosecutions, and judicial and other proceedings. In particular, they must make available all relevant information and provide all evidence available to them that is necessary for the proceedings in order to enable effective, prompt, thorough and impartial investigations. These concerns, as set out in Art. 12

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[20] For example, four Pakistani plaintiffs were not able to enforce any existing claims against the German textile discounter Kik due to the devastating fire in a textile factory in Karachi, simply because the statute of limitations had come into effect under Pakistani law (Decision of the Higher Regional Court of Hamm of 21.05.2019, file no. 9 U 44/19).

[21] Statement by the Working Group on Business and Human Rights Chairperson on the 35th session of the Human Rights Council, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21713&LangID=E (accessed on 24.08.2020).

para. 1 of the new draft, are to be welcomed. Cross-border judicial cooperation in civil, criminal, and administrative matters is envisaged in relation to all claims covered by the Treaty. The new draft provides greater clarity and precision in this respect compared with the previous draft.

9.2 International cooperation

In accordance with Art. 56 of the Charter of the United Nations, the States Parties undertake to cooperate internationally. Art. 13 para. 2 lists possible measures that are urgently needed, especially by host States of transnational corporations to prevent human rights abuse and violations. These measures include technical assistance, knowledge sharing, awareness and capacity building, and facilitation of scientific cooperation on challenges and best practice examples. It is pleasing that the important role of national human rights institutions is now also recognised and that the draft provides for corresponding capacity building in the field of business and making human rights the subject of international cooperation (Art. 13 para. 2 lit. a).[22]

10 Relation to other obligations under international law

The German Institute for Human Rights considers human rights obligations to override other obligations. In reality, however, trade and investment agreements often restrict the necessary regulatory freedom of States to fulfil their human rights protection obligations. The previous draft did not adequately address this imbalance. In Art. 14 para. 5 lit. a, the new draft now states that all existing bilateral and multilateral agreements, including trade and investment agreements, are to be interpreted and implemented in such a way that the new agreement is not undermined or restricted. Furthermore, future bilateral and multilateral trade and investment agreements should be compatible with the human rights obligations of the new agreement (Art. 14 para. 5 lit. b)[23]. In order to ensure respect for human rights principles, States should be obliged to carry out independent human rights impact assessments before new trade and investment agreements enter into force, so that impacts on the human rights situation are already taken into account at the time of their conclusion, human rights are not violated, and ex-post dispute settlement procedures are avoided. States should also report in detail on the use of human rights expertise both in the preparation of impact assessments and in the monitoring of existing trade agreements.

11 Outlook

The present draft is a significantly improved basis for further intergovernmental negotiations. There are no longer any convincing factual arguments against taking part in further negotiations and fine-tuning the text. As requested by the EU, the scope of the agreement, which was initially too narrow, has been extended to all corporate activities, including State-owned business enterprises. The previously vague reference to "all human rights" has been defined much more precisely. There is no danger that

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22 See Niebank, Jan-Christian (2019): Bringing Human Rights Into Fashion: Issues, Challenges and Underused Potentials in the Transnational Garment Industry. Berlin: German Institute for Human Rights, p. 48 ff.

23 Cf. zero draft Art. 13 para. 6 and 7.

an international agreement will undermine the implementation of the UNGP, as the new draft is clearly oriented towards it.[24]

And so, everything hinges on the crucial political question of "who will join the negotiating table"? The EU stated in the last round of negotiations that the process must develop traction with the UN member States. With 27 member States, the EU holds sway over this question. The EU should therefore - in accordance with its competences - quickly agree on a formal negotiating mandate for the European External Action Service, so that it can help shape the further negotiation process. Germany should work towards this within the framework of EU coordination and its Council Presidency. This would involve key States of origin of large transnational business enterprises in the process, thus almost doubling its momentum.

Imprint

German Institute for Human Rights
Zimmerstraße 26/27, 10969 Berlin
Phone: 030 25 93 59-0
info@institut-fuer-menschenrechte.de
www.institut-fuer-menschenrechte.de

CONTACT: Jennifer Teufel, Lissa Bettzieche

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The Institute

The German Institute for Human Rights is the independent national human rights institution in Germany. It is accredited according to the Paris Principles of the United Nations (A status). The Institute's tasks include policy advice, human rights education, information and documentation, application-oriented research on human rights issues and cooperation with international organisations. It is funded by the German Bundestag. The Institute has also been entrusted with the monitoring of the implementation of the UN Disability Convention and the UN Convention on the Rights of the Child and has set up corresponding monitoring centres for this purpose.

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[24] For the contributions of the States in the 5th round of negotiations, see UN Doc. A/HRC/43/55, p. 20-21, 33.