Corporate Responsibility to Respect Human Rights:

Business Related Human Rights Protection in International Law and the Human Rights Due Diligence Process

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Foreword

Although we dealt with different areas of research and teaching tasks at Doshisha Law School, Takenaka-sensei has always showed an intensive interest in comparative studies with German constitutional and human rights law. When I once had offered a special seminar on “Cases presented in the German Bar exam”, he was especially interested in the practice-related issues of the constitutional law part of the exam and how the relevant problems were solved in sample solutions in Germany. When we had sometimes the opportunity for short discussions about human rights problems evolving out of the growing influence of transnational corporations through globalization of business activities, Takenaka-sensei regularly stressed on the importance of protection of human rights of the work-force in this context.

It is extremely regrettable, that we are no longer able to continue the exchange of opinions on this and other issues and that Takenaka-sensei was not able to accomplish his strong wish to take part in one of my regular study tours with

Law School students to Europe, where constitutional and human rights issues are always part of the study program through visits of the German Constitutional Court and the European Court of Human Rights.

There is nothing else for me but to express my gratitude and respect to Takenaka-sensei with some thoughts on the above mentioned subject on human rights and business activities, which has become a subject of increasing importance and covers various aspect of law, society and economy. It deals with the role and responsibility of companies to respect and protect human rights, which might be affected by entrepreneurial decisions. This subject has been, up to now, mostly dealt with in the context of "Corporate Social Responsibility" (CSR) and as such as part of local soft law. But with the increasing process of globalized business activities and their direct effect on consumers and workers, voices are increasingly demanding to extend the scope of consideration on substantive constitutional law, subsidiary local law and international law, which will itself have a reverse impact on strengthening national regulations. Looking at the research interests of Takenaka-sensei, I will focus insofar on human right problems in business, with special focus on labor law issues.

1. Human rights and Business in International Law[1)]

The debate concerning the responsibilities of business in relation to human rights became prominent in the 1990s, as oil, gas, and mining companies expanded into increasingly difficult areas, and as the practice of off- shore

1) Mainly used literture, which will be abbrevated in the respective footnotes: C.M.O'Brien, Business and human rights – a handbook for legal practitioners (2018), Council of Europe Publication; J. Kulesza, Due Diligence in International Law (2016).

production in clothing and footwear drew attention to poor working conditions in global supply chains.[2)]

It took about fifteen years, until a draft-set of norms was established by the UN Commission on Human Rights[3)], trying to impose on companies binding rules of obligation based on international law, which could be compared to those, which the UN-member states have to follow and which are laid down in a framework of protection of human rights, consisting of the Universal Declararion of Human Rights (UDHR), adopted in 1948, and two international treaties: the International Covenant on Civil and Political rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). This framework is also referred to as the "International Bill of Human Rights".[4)]

Out of this framework the states have obligations to fulfil, which may be of direct or indirect effect to business, as will be shown in more detail below:

Obligation to respect: A state (in all its functions) must itself refrain from acts or measures which breach human rights.

Obligation to protect: Any state is required to protect individuals and groups against breaches of their human rights perpetrated by other actors.

Obligation to fulfil: Specific human rights may require programmatic measures by states, so that individuals or groups are put into a position to facilitate their practical use or enjoyment.

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2) https://www.business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-protect-respect-remedy-framework.pdf (2010).

3) Now: UN Human Rights Council, which is an inter-governmental body within the United Nations system made up of 47 States responsible for the promotion and protection of all human rights around the globe.

4) https://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf.

1.1 International and regional standards on business and human rights

Out of the above mentioned framework it becomes already clear, that human rights related treaties and norms do not contain explicit state duties to prevent human right abuses by business/companies and – of course do not and can not address direct human rights obligations to the private sector. Nevertheless there are some areas which cause an indirect effect, enabling to sue business related human rights abuses before domestic or international courts.

One example are standards adopted by the International Labour Organization (ILO), which define basic rights for workers on one side and corresponding duties not only for states but also for employers on the other. This is due to the special tripartite structure of the ILO, where representatives of employers and workers are engaged as well in order to define what is meant by "decent work".[5] Included in the broad range of binding conventions are the conventions on freedom of association, right to organize and collective bargaining, abolition of forced labour, worst forms of child labour, discrimination etc.[6]

And there are explicit obligations for states to take any adequate countermeasures, to eliminate discrimination on the basis of disability by any person, organization or private enterprise; the same applies with regard to discrimination against women (Art. 4 (e) ICPRD and 2(e) ICEDAW).

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5) „Decent work sums up the aspirations of people in their working lives. It involves opportunities for work that is productive and delivers a fair income, security in the workplace and social protection for families, better prospects for personal development and social integration, freedom for people to express their concerns, organize and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men."; see more details in the "ILO Decent Work Agenda": https://www.ilo.org/global/topics/decent-work/lang--en/index.htm.

6) Fn 1, O'Brien, 172.

Related to companies this means, that they should "promote, secure the fulfillment of, respect, ensure respect of, and protect human rights" by performing their business activities. But considering the fact, that this kind of rules would – as a kind of "secondary law" - not have the same binding power as it has for the UN-member states, and an effective remedy-framework would have to be established, and also with regard to the strong opposition of the business world, the norms could not be put into effect.

But discussion went on and finally the "UN-Forum on business and human rights" was established in 2011, to serve as a global platform for stakeholders to "discuss trends and challenges in the implementation of the Guiding Principles and promote dialogue and cooperation on issues linked to business and human rights, including challenges faced in particular sectors, operational environments or in relation to specific rights or groups, as well as identifying good practices."[7)]

It led to the establishment of the "UN Guiding Principles on Business and Human rights" (UNGP) in 2011, which are now looked at as the world's first comprehensive guidance for companies to report on how they respect human rights.[8)]

From the legal perspective it means for the states, that they are not per se responsible for human rights abuse by private actors. However, states may breach their international human rights law obligations where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent,

7) https://www.ohchr.org/EN/Issues/Business/Forum/Pages/ForumonBusinessandHumanRights.aspx.

8) Details see https://www.ungpreporting.org.

investigate, punish and redress private actor's abuse.[9)]

1.2 Indirect effect on private business by imposing obligations on a state

The indirect effect of international law concerning the protection of human rights on private business can be exemplified by some cases, on which the European Court of Human Rights (ECHR), important judicial body of the Council of Europe (CoE), had to decide and which highlight the interaction between the UNGP and the doctrine of positive obligation of CoE-member states to protect human rights laid down in the European Charter of Human Rights (EChHR):

In *Fadeyeva v. Russia* the Court had decided in its judgement of 9 June 2005, that state regulations must govern the licensing, setting up, operation, security and supervision of respective activities and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risk.[10)]

Facts of the case: *in 1995 Nadezhda Fadeyeva and other Russian citizens from the town of Cherepovets brought an action in local court against Severstal, Russia's largest iron-smelting company. They alleged that the level of air and noise pollution from Severstal's steel plant located in their town exceeded the maximum emissions permitted by Russian law and made the area in which they lived, about 450 meters from the steel plant, unsafe for habitation. In fact, according to Russian law, the 1000 meter area surrounding the plant is deemed*

9) Commentary to UNGP 1 (FN 5).

10) See O'Brien (Fn 1), 26. Full text: https://hudoc.echr.coe.int/eng#{"itemid":["001-69315"]}.

unsuitable for residential property. The applicants argued that they should be resettled in an environmentally-safe area. On 17 April 1996, Cherepovets local court found that the applicants had the right to be resettled, but it made such resettlement conditional on the availability of funds. On 31 August 1999, the local court dismissed Mrs Fadeyeva's further action to enforce the 1996 judgment and confirmed that the first judgment had been properly executed through her placement on a general waiting list for relocation. Mrs Fadeyeva subsequently lodged an application against the Russian Government with the European Court of Human Rights (ECHR) on 11 December 1999. The Court unanimously found on 9 June 2005 that the Russian Government was in violation of Article 8 of the European Convention on Human Rights (the right to respect for private and family life, home and correspondence) and that it had failed to regulate the environmental pollution from the Severstal plant which affected the quality of life at the applicant's home.

This judgement was in itself a success for the protection of human rights, but (unfortunately) the case did not end there. In February 2007 the Department for the Execution of Judgments at the ECHR noted that the Russian Government had not provided any evidence showing that the environmental situation around the Severstal plant had improved and that the plant is not harming the local population's health. In October 2007 the Russian Government informed the ECHR that it had reconsidered the zone surrounding the Severstal plant deemed safe for residential property, and Mrs Fadeyeva's home was now no longer located inside this zone. Therefore, she is no longer entitled to resettlement. Furthermore, the owners of the Severstal plant claim they have spent 2.2 billion roubles (about €62 million) on environmental measures to reduce the plant's emissions. However, no evidence of these changes has been provided to the ECHR. On 1 August 2011, the Russian

organization Human Rights Centre “Memorial” sent a petition on behalf of the plaintiffs to the mayor of Cherepovets asking that the ECHR judgment be fully enforced and that the plaintiffs be resettled.

This is an example for the still existing (fortunately not as a rule) discrepancy between a ECHR judgement and its implementation.[11)]

In *Tatar v. Romania* the Court observed that water pollution with cyanide from a gold mine could interfere with the right to private and family life (Art. 8 EChHR) by harming human well being. As a result the state had a duty to regulate the authorizing, setting-up, operating, safety and monitoring of industrial activities, especially those dangerous to the environmental health.[12)]

Facts of the case: *The applicants, Vasile Gheorghe Tătar and Paul Tătar, father and son, are Romanian nationals who were born in 1947 and 1979 respectively. At the relevant time they lived in Baia Mare (Romania). Paul Tătar has lived since 2005 in Cluj-Napoca (Romania).*

The company S.C. Aurul S.A., now operating as S.C. Transgold S.A., obtained a licence in 1998 to exploit the Baia Mare gold mine. The company's extraction process involved the use of sodium cyanide. Part of its activity was located in the vicinity of the applicants' home.

On 30 January 2000 an environmental accident occurred at the site. A United Nations study reported that a dam had breached, releasing about 100,000 m^3 of cyanide-contaminated tailings water into the environment. The report stated that S.C. Aurul S.A. had not halted its operations.

After the accident Vasile Gheorghe Tătar filed various administrative

11) https://www.business-humanrights.org/en/fadeyeva-v-russia-re-severstal-smelter.

12) Decision of 6 July 2009, O'Brien (Fn 1),27.

complaints concerning the risk incurred by him and his family as a result of the use of sodium cyanide by S.C. Aurul S.A. in its extraction process. He also questioned the validity of the company's operating licence. The Ministry of the Environment, in November 2003, informed him that the company's activities did not constitute a public health hazard and that the same extraction technology was used in other countries.

The Court awarded the applicants 6,266 euros (EUR) for costs and expenses. It dismissed, by five votes to two, their claim for just satisfaction.

The first applicant also brought criminal proceedings, in 2000, complaining that the mining process was a health hazard for the inhabitants of Baia Mare, that it posed a threat to the environment and that it was aggravating his son's medical condition, namely asthma.

By an order of 20 November 2001 the Romanian courts discontinued the criminal proceedings concerning the accident of 30 January 2000 on the ground that the facts complained of did not constitute offences. No judicial order or decision concerning the other complaints has been issued to date.[13)]

1.3 Direct effect in the case of state-owned or state-controlled enterprises

The ECHR had also to deal with cases, in which violation of human rights was connected to stated owned companies. The criteria to distinguish these cases from the above mentioned is, whether the body in question is a public authority for which the state is responsible, which is conditional to apply Art. 34 EChHR, which restricts the jurisdiction of the ECHR to applications,

13) Summary in English available in the internet as pdf: 003-2615810-2848789.pdf; complete text only in French: https://hudoc.echr.coe.int/eng#{"itemid":["001-90909"]}.

claiming "to be the victim of a violation by one of the Hight Contracting Parties"; applications lodged against individuals or companies are excluded.[14)]

A direct responsibility of states for companies is not always clear to define. A good example of the criteria that had been developed can be found in *Yershova v. Russia*[15)], where the ECHR delineated whether the state was directly responsible for a municipal corporation's failure to pay the applicant or whether it had only failed to enforce a judgment against the company as a third party. The ECHR's deliberation on the issue was based on 'such factors as the company's legal status, the rights that such status gives it, the nature of the activity it carries out and the context in which it is carried out, and the degree of its independence from the authorities'.

Facts of the case[16)] :*The applicant was an employee of the municipal company, Yakutskgorteploset (the Yakutsk Town Heating Supply Municipal Company). This company was founded by a decision of the Municipal Property Management Committee of Yakutsk Town Council of 30 June 1992. Sections 3 and 4 of the company's statute stipulated that the company's main objective was to provide uninterrupted heating supply to all the people of Yakutsk, with maintenance work and transportation services, as well as commercial activity. The town of Yakutsk retained ownership of the company's property, while the company exercised the right of economic control in respect of it. Any change to the company's statutory capital was a prerogative of the founder committee. The company could not sell or in any other way alienate or dispose of the property under its economic control without the consent of the founder. The company*

14) O'Brien (Fn 1), 17.

15) Appl. no. 1387/04, ECHR Judgement of 8 April, 2010; 001-98130.pdf.

16) Judgement (Fn 12) Part B, C and D, Sec. 8 to 33.

was under an obligation to use its assets in accordance with the statutory objectives. Section 5 of the statute stipulated that the company could independently undertake a wide range of economic activities, make contracts and plan its commercial activity. It could also decide on the salary scales for the company's employees and determine the amount of funds to be allocated for salaries.

In August 2000 the applicant was dismissed from the company.

On 7 December 2000 the Yakutsk Town Court of the Sakha (Yakutiya) Republic reinstated the applicant and ordered the company to pay her 16,632.32 Russian roubles.

At some point the Municipal Property Management Committee of Yakutsk Town Council withdrew a major part of its assets from the company and transferred it to a newly-created municipal unitary enterprise called the Yakutsk Municipal Unitary Enterprise, MUP Teploenergiya «МУП Теплоэнергия») ("MUP Teploenergiya"). It appears that the newly-created enterprise had the same designated goal, that is, the supply of heating, assumed the same functions and was registered at the same address in Yakutsk as the company.

On 16 January 2001 the head of Yakutsk Town Council ordered the liquidation of the company, because it had become unprofitable, and appointed a liquidation commission.

On 14 June 2001 the applicant was again dismissed. She brought a court action challenging the dismissal, which was admitted by the Yakutsk Town Court, which awarded her compensation of RUB 50,357 payable by the liquidation commission of the company. The applicant was finally listed on the list of creditors. Subsequently there were various court proceeding challenging the legality of the insolvency decision. Finally the company was not able to satisfy the creditors claims.

The applicant brought therefore a new court proceeding in 2003, claiming that

the local authorities should be liable for the company's debts. The Supreme Court of Sakha Republic referred the case back to examine lawfulness of transfer off assets to another company, which finally had led to the insolvency and inability to pay depts due to lack of assets.
At the end the applicants claim was rejected, and the Constitutional Court of the Russian Federation as well, did not follow the applicants argument, that the provisions of the Federal Insolvency Act, which stipulated that, where there was a lack of assets, the debtor was to be released from claims that were unsatisfied in the insolvency proceedings, were incompatible with the Constitution.

The ECHR examined in this context also the relevant domestic law and practice and stated above others, that the Civil Code of the Russian Federation defines State and municipal unitary enterprises as special forms of legal entity that do not exercise a right of ownership in respect of a property allocated to them by its owner. The State or municipal authority retains ownership of the property – with all consequences like decide on the goals of the enterprise and the scope of its designated activities. The owner exercises control over the use of property in accordance with the designated purpose, has the right to reorganize or liquidate the unitary enterprise and receives a part of the enterprise's profit – but the enterprise may exercise in respect of that property the right of economic control and operational management.[17)]

For its decision, the court concentrated on the following arguments:

"55. In deciding whether the municipal company's acts or omissions are attributable under the Convention to the municipal authority concerned, the

17) Sec. 35, 38 of the judgement.

Court will have regard to such factors as the company's legal status, the rights that such status gives it, the nature of the activity it carries out and the context in which it is carried out, and the degree of its independence from the authorities (see, mutatis mutandis, Radio France and Others v. France (dec.), no. 53984/00, ECHR 2003-X (extracts), with further references). The Court will notably have to consider whether the company enjoyed sufficient institutional and operational independence from the State to absolve the latter from its responsibility under the Convention for its acts and omissions (see Mykhaylenky and Others, cited above, § 44, and, mutatis mutandis, Shlepkin v. Russia, no. 3046/03, § 24, 1 February 2007).

56. As regards the company's legal status, the Government argued that municipal enterprises are incorporated under the domestic law as separate legal entities and that the State is absolved from the responsibility for its debts, save in a limited number of cases specified in Article 56 of the Civil Code. In the Court's view, the company's legal status under the domestic law, however important, is not decisive for the determination of the State's responsibility for the company's acts or omissions under the Convention. Indeed, on several occasions, the Court has held the State liable for companies' debts regardless of their formal classification under domestic law (see, among others, mutatis mutandis, Mykhaylenky and Others, cited above, § 45; Lisyanskiy v. Ukraine, no. 17899/02, § 19, 4 April 2006; 12 YERSHOVA v. RUSSIA JUDGMENT Cooperativa Agricola Slobozia-Hanesei v. Moldova, no. 39745/02, §§ 18–19, 3 April 2007; Grigoryev and Kakaurova v. Russia, no. 13820/04, § 35, 12 April 2007; and R. Kačapor and Others v. Serbia, nos. 2269/06, 3041/06, 3042/06, 3043/06, 3045/06 and 3046/06, § 98, 15 January 2008). Accordingly, the applicant company's domestic legal status as a separate legal entity does not, on its own, absolve the State from its responsibility under the Convention for the

company's debts.

57. As regards the company's institutional and operational independence from the State, the Court notes the Government's argument that the degree of the State's involvement in the company's activities cannot be equated with that in the Mykhaylenky and Others case (cited above). At the same time, the Court notes that the company's independence was limited by the existence of strong institutional links with the municipality and by the constraints attached to the use of the assets and property. The Court notes in this respect that the city of Yakutsk was the company's owner in accordance with domestic law and retained ownership of the property conferred to the company. The Town Council approved all transactions with that property, controlled the company's management and decided whether the company should have continued its activity or been liquidated.

58. The company's institutional links with the public administration were particularly strengthened in the instant case by the special nature of its activities. As one of the main heating suppliers in the city of Yakutsk, the company provided a public service of vital importance to the city's population. The company's assets were withdrawn from circulation and enjoyed special status under the domestic law."

The judgement further referred to a decision of the Constitutional Court of the Russian Federation of 16 May 2000, which pointed out, that the relations arising from the management of communal infrastructure of vital importance have to be qualified as public in nature.

The ECHR concluded, that given this and the significant control over its assets by the municipal authority and the latter's decisions resulting in the transfer of

these assets and the company's subsequent liquidation, the company did not enjoy sufficient institutional and operational independence from the municipal authority. Accordingly, notwithstanding the company's status as a separate legal entity, the municipal authority, and hence the State, had to be held responsible under the Convention for its acts and omissions and was liable to compensate the applicants claim.

1.4 Control of business-related human rights protection in public procurement

In the public sector, the relevant authorities have to purchase works, goods or services from companies through a legally defined process called public procurement. The importance of public procurement can be illustrated by the example of the EU, where every year over 250.000 public authorities spend around 14% of GDP (around 2 trillion EUR per year) on the purchase of services, works and supplies. In many sectors such as energy, transport, waste management, social protection and the provision of health or education services, the public sector is the principal buyer.[18] For the OECD it is 12% of GDP per year.[19] Public procurement thus has the capacity to affect conditions in global supply chains, because governments can also be looked at as "mega-consumers".[20]

As states conduct a variety of commercial transactions with business enterprises through their procurement activities, it provides them – individually and collectively – with unique opportunities to promote awareness of and respect for human rights by those enterprises, including through the

18) https://ec.europa.eu/growth/single-market/public-procurement_en.

19) https://www.oecd.org/gov/public-procurement/.

20) O. Martin-Ortega, C.M. O'Brien; Public procurement and human rights. Opportunities, Challenges, Risks for the state as a buyer (2019).

terms of contracts, with due regard to States' relevant obligations under national and international law. This aspect is pointed out in UNGP 6: "States should promote respect for human rights by business enterprises with whom they conduct commercial transactions."[21)]

Not all UN-member states have yet set up an action plan to implement the UNGP 6, one example is presented by Germany with the following statement:[22)]

1. The state duty to protect

1.2 public procurement (page 21)

"The total value of public procurement contracts amounts to about €280 billion a year. The federal, state, and local authorities bear particular responsibility in this domain, in that they must discharge the state duty to protect human rights and ensure that the use of public funds does not cause or foster any adverse impact on human rights. By placing greater emphasis on sustainability in their procurement transactions, public authorities not only perform their function as role models but can also wield significant leverage in increasing the supply of sustainable products. The 2030 Agenda also makes explicit reference to sustainable public procurement as an instrument in the quest for sustainable development.

The current situation

Germany has fully transformed into domestic law its obligations to protect human rights under international agreements. This applies, for example, to the prohibition of child labour and forced labour that are imposed by the ILO

21) https://globalnaps.org/ungp/guiding-principle-6/.

22) https://globalnaps.org/ungp/guiding-principle-6/: What national action plans say on guiding principle 6 – Germany. Respective plan for Japan could not be found.

core conventions. If enterprises break the law in Germany in either of these respects, they can be disqualified from receiving public contracts. The Federal Government is already implementing a number of measures designed to promote sustainable public procurement by federal, state and local authorities and institutions:

- *Since 2010, the federal, state and local authorities have been cooperating in the framework of the Alliance for Sustainable Procurement, chaired by the Federal Government. Its purpose is to contribute to a significant increase in the percentage of sustainable goods and services among the purchases made by public bodies. The Alliance enables the main public procuring bodies to share their experience and is intended to contribute to more widespread application of uniform national and international standards by all three tiers of government – federal, state and local.*
- *Since 2012, the Centre of Excellence for Sustainable Procurement at the Procurement Office of the Federal Ministry of the Interior has been assisting public contracting bodies in applying procurement criteria. The Centre of Excellence is available to assist procurers in situ, for example by providing advice in person or by telephone and by forwarding information material. In 2014, the Centre of Excellence, along with the BITKOM association of German digital goods and service firms, drew up an initial sectoral agreement in the form of a Declaration on Social Sustainability for IT, which provides for adherence to the ILO core labour standards in procurement procedures. Other sectoral agreements on critical product categories are planned.*
- *Other Federal Government initiatives and support measures are to be found in the Program of Sustainability Measures, into which Federal Government targets for sustainable procurement have been incorporated.*

Measures

- *The Federal Government will examine whether and to what extent binding minimum requirements for the corporate exercise of human rights due diligence can be enshrined in procurement law in a future revision. It will draw up a phased plan indicating how this aim can be achieved.*
- *The expertise of the Centre of Excellence for Sustainable Procurement in matters of human rights, including the application of the ILO core conventions to procurement procedures, and in the implementation of the UN Guiding Principles will be used to expand the knowledge of procurement staff in the context of training courses.*
- *"Kompass Nachhaltigkeit" (sustainability compass), an information platform funded by the Federal Government, provides an overview of sustainability standard systems and supplementary requirements and assists public contracting bodies in incorporating a sustainability dimension into their procurement procedures.*
- *The "Fair Procurement Network" of municipalities, which is part of the service agency Communities in One World, provides advice to municipalities, among other things, and familiarises local authorities with the issue of sustainable procurement through specialised promoters. An information and dialogue campaign entitled "Deutschland Fairgleicht " informs municipal decision-makers and contracting bodies and raises their awareness of sustainable procurement. Following the reform of procurement law in 2016, with which three new EU procurement directives were transposed into German law, the new Part IV of the Restraints of Competition Act lays particular emphasis on observance of the law, especially taxation, labour and social legislation (sections 97(3) and 128(1) of the Act). The new legal framework enables procurement bodies to make greater use of public*

contracting to underpin the pursuit of strategic goals such as social standards, environmental protection and innovation."

The UNGP 6 finds a correspondent in a Council of Europe (CoE) recommendation of 2016:

"22. Member states should apply additional measures to require business enterprises to respect human rights, including, where appropriate, by carrying out human rights due diligence, that may be integrated into existing due diligence procedures, when member states:…

- conduct commercial transactions with business enterprises, including through the conclusion of public procurement contracts.[23)]

Furthermore, the EU adopted in 2011 a CSR strategy[24)], which explicitly referred to public procurement as one potential area for measures to enhance and promote "responsible business conduct", identifying government buying as a means to strengthen market incentives for CSR. Important part of this strategy has been/is the implementation of the UNGP on business and human rights. In detail the following text was formulated:

„Improving the coherence of EU policies relevant to business and human rights is a critical challenge. Better implementation of the UN Guiding Principles will contribute to EU objectives regarding specific human rights issues and core labour standards, including child labour, forced prison labour, human trafficking, gender equality, non-discrimination, freedom of association and the right to collective bargaining. A process involving enterprises, EU Delegations in partner countries, and local civil society actors, in particular

23) CoE Recommendation CM/Rec (2016) 3, (Appendix, paragraph 22).

24) http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2011)0681_/com_com(2011)0681_en.pdf.

human rights organisations and defenders, will raise understanding of the challenges companies face when operating in countries where the state fails to meet its duty to protect human rights.

The Commission intends to:

Work with enterprises and stakeholders in 2012 to develop human rights guidance for a limited number of relevant industrial sectors, as well as guidance for small and medium-sized enterprises, based on the UN Guiding Principles.

The Commission also:
Expects all European enterprises to meet the corporate responsibility to respect human rights, as defined in the UN Guiding Principles.
Invites EU member stated to develop by the end of 2012 national plans for the implementation of the UN Guiding Principles.

The EU CSR strategy also explicitly referred to public procurement as one potential area of measures to enhance and promote "responsible business conduct", identifying government buying as a means to strengthen market incentives for CSR which the EU should leverage together with other policies in the field of consumption and investment:

„The Commission set an indicative target that by 2010 50% of all public procurement in the EU should comply with agreed environmental criteria. In 2011 the Commission published a guide on Socially Responsible Public Procurement (SRPP), explaining how to integrate social consideration into public procurement while respecting the existing EU legal framework.[25] *SRPP*

can include positive action by public authorities to help under-represented businesses, such as SMEs, to gain access to the public procurement market.

Member States and public authorities at all levels are invited to make full use of all possibilities offered by the current legal framework for public procurement. The integration of environmental and social criteria into public procurement must be done in particular in a way that does not discriminate against SMEs, and abides by Treaty provisions on non- discrimination, equality of treatment and transparency."

Nevertheless, there remain today still significant legal obstacles to giving full effect to this goal, as is shown in a recent research on "Discretion in EU Public Procurement Law" .[26] It is concluded, that this is due to the fact, that constraints on public buyer's discretion to use purchasing decisions to advance respect for human rights in their supply chains have a number of important (negative) consequences. They appear to exclude, or at least render marginal, the use of public buying to promote the objective, publicly and repeatedly espoused by government, of promoting respect for human rights and sustainability by the private sector. In particular, whereas it might be expected that governments would use public buying to enhance the effectiveness of recently adopted legislation on corporate non-financial (and human rights) reporting, this appears to be ruled out by public procurement laws.[27]

Despite various efforts of control and promotion, NGOs active in looking

25) "Buying Social: a guide to taking account of social considerations in public procurement", European Commission, 2011.

26) Sanja Bogojevic et al (ed.), Discretion in EU Public Procurement Law (2019).

27) Sanja Bogojevic (Fn 23), aaO.

human rights abuse in business activities, still discover violations inside the CoE or EU member states. In 2015 it has been documented, that in Sweden and the UK simple surgical instruments and basic hospital supplies used by European public healthcare providers are manufactured under hazardous conditions. The same year it was discovered the systematic use of forced labour at Chinese electronic factories producing servers for universities in Denmark. Or it had been alleged that military uniforms supplied to European governments were sourced from manufacturers situated in Export Processing Zones, where trade unions are prohibited.[28)]

And there are or have been extremely terrible examples like the case revealed in 2017, in which a Dutch timber trader was convicted by a court in the Netherlands of being an accessory to war crimes and arms trafficking. He had sold weapons through his business to the former president of Liberia, who used them in civil wars that involved mass atrocities, the use of child soldiers and sexual slavery.[29)]

Although it has to be admitted, that the implementation of international standards is not easy to achieve, it is also clear on the other side, that public awareness of connection between business activities and human rights issues has increased constantly in recent years.

Another important actor on the international stage, which contributes constantly and substantively to the above mentioned awareness is the OECD, which has published its "Recommendations on Public Procurement"[30)] in 2015 (although without explicit refernce to human rights) and the Guidelines for

28) O'Brien (Fn 1), 44.

29) O'Brien (Fn 1), 50; reported in The Guardian, 22 April 2017.

30) https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0411.

Multinational Enterprises in 2011.[31] These Guidelines are recommendations addressed by governments to multinational enterprises operating in or from adhering countries. They provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognized standards. The Guidelines are the only multilaterally agreed and comprehensive code of responsible business conduct that governments have committed to promoting!

I will come back later to these guidelines in the context of human rights due diligence, as the OECD has also set up a "due diligence guidance for responsible business conduct"[32] as well, which provides practical support to enterprises on the implementation of the above mentioned Guidelines for Multinational Enterprises and help to understand what is meant by due diligence related to human rights.

2. UN-Forum on business and human rights

The UN-Forum on business and human rights, mentioned at the beginning of this paper is now the world's largest annual gathering on business and human rights with more than 2,000 participants from government, business, community groups and civil society, law firms, investor organizations, UN bodies, national human rights institutions, trade unions, academia and the media. The last forum took place in November 2018 in Geneva (Switzerland), dealing with the central theme "Business respect for human rights – building

31) OECD (2011), *OECD Guidelines for Multinational Enterprises,* OECD Publishing. *http://dx.doi.org/10.1787/9789264115415-en.*

32) https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf.

on what works" and had working groups on various subjects, which can only partially be introduced here together with a short summary and the key questions, in order to get a better knowledge or impression, on how substantive the various issues are discussed actually on the international level[33] :

2.1 Selected workshop subjects

- *Human rights due diligence in the world of sport:* *The aim of the session was to provide a structured discussion, with resource people to support / lead, on the impact of sports in general – including but not restricted to Mega Sporting Events – on human rights. The structure of the event has been through the lens of defined rightsholders and impacts on their enjoyment of human rights. Key rightsholders for consideration during the session were: players and athletes, fans, journalists, workers, community members. Cross cutting issues included treatment of vulnerable people and children, impact on political and civil rights, LGBTQI+ rights, collaboration and stakeholder engagement.*

- *Driving human rights performance from the top in the mining sector – the role of board and investors:* *Businesses have the potential to impact society in a range of ways, negatively and positively. Implementing the UN Guiding Principles allows companies to understand and address some of these potential impacts as they relate to human rights.*

  Good governance and a strong board are critical to making respect for human rights part of how business gets done, thereby advancing a range

33) Total Program overview: https://2018unforumbhr.sched.com/grid/.

of human rights in society, while protecting and creating value for the business. As Fink noted, "a company's ability to manage environmental, social and governance matters demonstrates the leadership and good governance that is so essential to sustainable growth." Board engagement is essential to improved performance over the long term, in providing rigorous oversight and accountability, in developing strategy and articulating purpose and responding to questions that are increasingly important to its investors, its consumers, and the communities in which it operates.

- *Labour rights and human rights due diligence: This session addressed corporate human rights due diligence in relation to labor rights, showcasing good practices and lessons learned. It looked into such processes within a company's own operations as well as in its business relationships with other enterprises.*

  Objectives were: Facilitate exchange of experiences on how corporate human rights due diligence processes can help enterprises to identify, prevent, mitigate and account for adverse labour rights impacts, including the fundamental principles and rights at work, working conditions, OSH, hours of work, wages, etc. and provide examples of meaningful consultation with potentially affected groups and other relevant stakeholders, and the central role of freedom of association and collective bargaining as well as industrial relations and social dialogue in this process.

  Key questions:

  ・How have the UNGPs been reflected in new international labor standards and the revised ILO Tripartite Declaration concerning multinational enterprises and social policy (MNE Declaration)?

・*How are business enterprises in all tiers of the supply chain engaging with workers' organizations as part of their efforts to engage in meaningful consultation with potentially affected groups in order to "take account of the central role of freedom of association and collective bargaining as well as industrial relations and social dialogue as an ongoing process" as set out in the ILO MNE Declaration? How does consultation with trade unions differ from engagement with other relevant stakeholders?*

・*What is the role of governments in this consultation and how are governments supporting this engagement?*

・*What have been some of the challenges and lessons learned?*

・*What sustainable solutions have resulted from such due diligence processes? What role did meaningful engagement with, or involvement of, workers and their representatives play in those efforts?*

- *Disruptive technology I: what does artificial intelligence mean for human rights due diligence?: Artificial intelligence (AI) will transform how we live, interact, work, do business, and govern. The human rights benefits of these disruptions could be significant, such as improved health diagnostics, enhanced education systems, better fraud prevention, and self-driving vehicles that improve road safety.*

However, evidence is mounting about potential adverse human rights impacts too. This includes new forms of discrimination arising from algorithmic bias, increased potential of surveillance using facial recognition tools, and new risks to child rights as the volume of data collected about children increases substantially.

These diverse risks and opportunities are united by three key features: the complexity of the technologies being deployed; the speed with which impacts may take hold; and the considerable uncertainty about how AI

will evolve.

Key questions:

・Can we build tools and methods equipped to address the complexity, speed, and uncertainty of AI?

・What due diligence should be undertaken across the AI value chain, including during the use phase?

・What is the respective role of technology and non-technology companies?

・How can human rights due diligence be incorporated into product design?

・How can AI be used to improve human rights due diligence?

- *Disruptive technology II: what does automation mean for human rights due diligence?: The Fourth Industrial Revolution is marked by technological advance of unprecedented scale and velocity—carrying with it tremendous promise and risk. The automation of low-skilled jobs has the potential to bring positive human rights impacts, such as improved workplace safety. However, there is also a risk that the use of machines to increase productivity will result in mounting inequality through downward pressure on wages and loss of jobs. Workers in low-skilled positions, particularly in the apparel and electronics sectors in the Global South, face an increased risk of bearing the negative effects of automation. Women and migrant workers make up large portions of both of these workforces and as they tend to face greater discrimination in the workplace, may be more likely to be displaced by machines.*

  This session explored emerging practices, challenges, and solutions for human rights due diligence in the context of automation. It will address the question of whether today's human rights due diligence tools and methods are equipped to address the impacts of increased automation and

explore good practices in human rights due diligence for companies.

- *Adressing "modern slavery" in supply chains – Company responses:*
  According to the International Labour Organization (ILO), approximately 24.9 million people worldwide are in conditions of forced labor. Supply chains include hundreds of thousands of workers who seek to make a better life for themselves and their families.
  Many are subject to conditions that may contribute to forced labor, including high recruitment fees, personal debt, complicated recruitment practices, a lack of transparency about their eventual working conditions, and inadequate legal protections in the countries in which they work.
  Guiding principles on forced labor are well-established, however, solutions tend to be fragmented across industries and geographies and only address certain aspects or specific points in a worker's journey. Due diligence on forced labor should be harmonized across multiple industries that share recruitment supply chain to drive labor market transformation through collective action.
  This session will provide testimonials from companies across multiple sectors on how they address forced labor in their operations and supply chains. It will review core processes to operationalize supply chain due diligence on forced labor while exploring collective action needed with stakeholders to address the root causes of this issue.

- *What human rights responsibilities apply to business with respect to climate change?: This session explored the responsibilities of businesses with respect to climate change, mitigation and adaptation. Businesses must be accountable for their climate impacts, participate responsibly in climate change mitigation and adaptation efforts with full respect for*

human rights, and exercise human rights due diligence in the course of their activities. States must also ensure that their own business activities, including activities conducted in partnership with the private sector, contribute to mitigating climate change while respecting human rights, and ensuring effective remedies for climate and human rights harms. Businesses and governments should go beyond simply avoiding climate harms and actively work to promote development that benefits both people and planet.

Key questions:

・What is the responsibility of the private sector for climate change?

・What does a rights-based approach to climate action look like for companies? What responsibilities does the private sector have to limit their carbon footprint (e.g. human right due diligence)?

・How can companies be held accountable for climate-related human rights harms?

- *Connecting child rights and human rights due diligence in practice:*

The focus of the session was to emphasize the need for companies to take specific measures to understand and address their potential impacts on groups and communities that may be at heightened risk of vulnerability or marginalization. Children are often the most vulnerable population, requiring specific attention to guarantee respect for their human rights. It is possible that one business activity might not impact the rights of adults, but the same activity could adversely impact the rights of a child. Despite this, children have not been adequately considered by business. Companies' consideration of their impact on child rights is often relegated to the issue of child labour or community investment, yet the impacts of business on children extend to such aspects as product design and

advertising, the behaviour of staff towards children, and children's rights in the supply chain, and the ways that companies operate in the wider community. Moreover, children are usually less well placed to advocate for their own interests and may be silenced within their households or communities. Unless companies make dedicated efforts to understand the risks they pose to child rights, and engage child rights advocates – children may be at risk of exclusion from companies' human rights due diligence and stakeholder engagement processes.

It becomes very clear, how far issues related to business and human rights reach and it would be interesting to know more about the results of the discussions on these workshops and how upcoming ideas will be implemented in practice. For this purpose, I will select some of the above mentioned subjects and look somewhat closer on urgent questions, before turning to German local law and see, to what extent the German constitution and subsidiary laws deal with these problems.

Yet, before doing so, one repeatedly used notion in the context of business an human rights has to be explained. It comes up quite often here and there, as if it should be self-explaining, but indeed is not:

2.2 Human rights due diligence

2.2.1 General definitions of due diligence

Due diligence itself is normally used in business activities, but as the word "diligence" is not used only in one single meaning, and as "human rights due diligence" is by some means a newly created technical term, we should first look at the established use of "diligence" as a precondition of an adequate

analysis of the term, which is believed to derive from US legislation, where to have made appropriate enquiries in a diligent manner, to have done what might be reasonably expected with due care and attention, to ascertain the truth of any statement made as part of an invitation to invest, was a defense against subsequent complaint or claim.[34)]

Looking into Black's Law Dictionary,[35)] various definitions can be found, depending on the context. First, it is described as "1. Constant application to one's business duty; preserving effort to accomplish something undertaken. 2. The attention and care required from a person in a given situation. We then can find "extraordinary diligence": Extreme care that a prudent person of unusual fastidiousness exercises to secure rights or property; "great diligence": The diligence that a person is required to exercise to be legally protected; "ordinary (or common) diligence": The diligence that a person of average prudence would exercise in handling his or her own affairs; "reasonable diligence": A fair degree of diligence expected from someone of ordinary prudence under circumstances like those at issue; "slight diligence": The diligence that a person of less than common prudence takes with his or her own concerns; "special diligence": The diligence expected from a person practicing in a particular field of specialty under circumstances like those at issue.

And, last but not least, there is the "due diligence", defined twofold: 1. The diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation (also termed "reasonable diligence"; 2. A prospective buyer's or broker's investigation and

34) A. Davey, Financial Due Diligence (Loose Leaf; March 2003), 1003.

35) Black's Law Dictionary, Tenth Edition (2014), 552 f.

analysis of a target company, a piece of property, or a newly issued security (also termed "corporations & securities due diligence). A failure to exercise due diligence may sometimes result in liability, as when a broker recommends a security without first investigating it adequately, or if the target company etc. hides important information, which may have an impact on the buyer's decision.

Finally we have the context related due diligence, like "Legal due diligence", Business and Commercial due diligence", Financial due diligence", "Tax due diligence" etc., all that describes a highly specialized kind of information process in order to get comprehensive knowledge in a certain area of activity.[36] This approach is basically what should be adopted also in the human rights perspective.

Another helpful definition in this context can be found in the "Guide to Professional Ethics of the ICAEW[37] :

"Due diligence is a term used to describe a wide range of services with or without the inclusion of an expression of professional opinion. It is commissioned by a client involving enquiries into agreed aspects of the accounts, organization and activities of an undertaking."

Consequently the purpose of the due diligence exercise is to provide information to enable the investor or purchaser to make an informed judgement as to balance of risks and opportunities and the terms on which to proceed to completion of the transaction.

36) E-H. Park, Vorvertragliche Informationspflichten im Due diligence Verfahren (2014), 26 f.

37) Institute of Chartered Accountants in England and Wales, Statement 1.221; more details: https://www.icaew.com; further business-related definitions see Fn 36, 21 f.

2.2.2 Human rights and due diligence in UNGPs

a) Content of important Guidelines

The above mentioned overview with various categories of definitions leads us to the question, how due diligence should be understood and practiced by business enterprises and if there are any instruments of monitoring.

Business enterprises need to know and show that they respect human rights. They cannot do so unless they have certain policies and processes in place. This is why UNGP 15 and following elaborate further on this question and have set up the following rules:

GP 15: *In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:*

(a) A policy commitment to meet their responsibility to respect human rights.

(b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights.

(c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.

GP 16: *As the basis for embedding their responsibility to respect human rights, business enterprises should express their commitment to meet this responsibility through a statement of policy that:*

(a) Is approved at the most senior level of the business enterprise.

(b) Is informed by relevant internal and/or external expertise.

(c) Stipulates the enterprise's human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services.

(d) Is publicly available and communicated internally and externally to all personnel, business partners and other relevant parties.

(e) Is reflected in operational policies and procedures necessary to embed it throughout the business enterprise.

In this context, the term "statement" is used as a generic term, to describe whatever means an enterprise employs to set out publicly its responsibilities, commitments, and expectations.

The level of expertise required to ensure that the policy statement is adequately informed will vary according to the complexity of the business enterprise's operations. Expertise can be drawn from various sources, ranging from credible online or written resources to consultation with recognized experts.

The statement of commitment should be publicly available. It should be communicated actively to entities with which the enterprise has contractual relationship; others directly linked to its operations, which may include State security forces, investors and, in the case of operations with significant human rights risks, to the potentially affected stakeholders.

Internal communication of the statement and of related policies and procedures should make clear what the lines and systems of accountability will be, and should be supported by any necessary training for personnel in relevant business functions.

Just as States should work towards policy coherence, so business enterprises need to strive for coherence between their responsibility to respect human rights and policies and procedures that govern their wider business activities and relationships. This should include, for example, policies and procedures that set financial and other performance incentives for personnel, procurement practices and lobbying activities where human rights are at stake.

Through these and any other appropriate means, the policy statement should

be embedded from the top of the business enterprise through all its functions, which otherwise may act without awareness or regard for human rights.[38]

GP 17:[39] *In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:*
(a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships.
(b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations.
(c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.

Official comment to this Principle:[40]
Human rights risks are understood to be the business enterprise's potential adverse human rights impacts. Potential impacts should be addressed through prevention or mitigation, while actual impacts – those that have already occurred – should be a subject for remediation (Principle 22).
Human rights due diligence can be included within broader enterprise risk management systems, provided that it goes beyond simply identifying

38) Official Commentary to GP 16; https://globalnaps.org/ungp/guiding-principle-16/.
39) GP 17 defines the parameters for human rights due diligence, whereas the following GP 18 through 21 elaborate the essential components of human rights.
40) https://globalnaps.org/ungp/guiding-principle-17/.

and managing material risks to the company itself, to include risks to rights-holders.

Human rights due diligence should be initiated as early as possible in the development of a new activity or relationship, given that human rights risks can be increased or mitigated already at the stage of structuring contracts or other agreements, and may be inherited through mergers or acquisitions.

Where business enterprises have large numbers of entities in their value chains it may be unreasonably difficult to conduct due diligence for adverse human rights impacts across them all. If so, business enterprises should identify general areas where the risk of adverse human rights impacts is most significant, whether due to certain suppliers' or clients' operating context, the particular operations, products or services involved, or other relevant considerations, and prioritize these for human rights due diligence.

Questions of complicity may arise when a business enterprise contributes to, or is seen as contributing to, adverse human rights impacts caused by other parties. Complicity has both non-legal and legal meanings. As a nonlegal matter, business enterprises may be perceived as being "complicit" in the acts of another party where, for example, they are seen to benefit from an abuse committed by that party

As a legal matter, most national jurisdictions prohibit complicity in the commission of a crime, and a number allow for criminal liability of business enterprises in such cases. Typically, civil actions can also be based on an enterprise's alleged contribution to a harm, although these may not be framed in human rights terms. The weight of international criminal law jurisprudence indicates that the relevant standard for aiding and

abetting is knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime.

Conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse. However, business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses.

b) Example of a national action plan

Not all contracting countries develop an own action plan with regards to the various UNGP, some do only for selected issues. As an example, it might be interesting to look at the plan of Germany, just to get an idea, where and how a possible monitoring might take place:

III. Federal Government expectations regarding corporate due diligence in respecting human rights[41)]

The responsibility to exercise due diligence applies in principle to all enterprises, regardless of their size, the sector in which they operate, or their operational context within a supply or value chain with an international dimension. The nature and exercise of due diligence for any given enterprise should be commensurate with these factors; it should be possible for the enterprise to incorporate its due diligence obligations into its existing processes in an appropriate manner without the creation of undue bureaucratic burdens.

41) The national action plan of Germany – Implementation of the UN Guiding Principles on Business and Human Rights, 2016–2020 - has been adopted by the Federal Cabinet on 16 December 2016. It is available as PDF file from the Federal Foreign Office's publication page at *www.diplo.de/publications.*

Enterprises should prevent and mitigate any adverse impact of their business activity on human rights. When due diligence in the realm of human rights is defined and exercised, consideration should be given to the beneficial effects of corporate activity and to the diverse perspectives of the company's own employees, the relevant stakeholders and others who may be affected. Within large enterprises, these include the staff of the human resources, purchasing, compliance and sales divisions. From outside the enterprise, suppliers, customers and trade unions but also bodies from civil society, business organizations and governments should be involved. Particular attention should be given to the rights of their respective employees and to those of local populations who may be affected.

Depending on the size of the enterprise, the nature of its products or services, the potential risk of particularly adverse impacts on human rights and the operating context, the measures to be taken are likely to vary in scope. It may be appropriate to conduct certain elements of the process in combination with other enterprises within an association or industry, subject to compliance with antitrust legislation. Small and medium-sized enterprises in particular should make use of the advisory and support services to be offered by the Federal Government and business associations under the National Action Plan. The expertise of organisations within civil society and trade unions should also be brought to bear. The elements of human rights due diligence described in binding form in the following paragraphs are not to be understood as a rigid sequence. On the contrary, findings relating to one element should be used continually for the revision and development of the other elements so that learning processes can take place. There must be scope for the incorporation of present and future legal requirements for the exercise of human rights due diligence.

1. Measures

- *The Federal Government expects all enterprises to introduce the processes described above in a manner commensurate with their size, the sector in which they operate and their position in supply and value chains. Their compliance will be reviewed annually from 2018. In the absence of adequate compliance, the Federal Government will consider further action, which may culminate in legislative measures and in a widening of the circle of enterprises to be reviewed (see chapter VI below).*
- *The National Corporate Social Responsibility (CSR) Forum of the Federal Government, comprising representatives of the political and business communities, trade unions, civil society and academic professions will draw up an intersectoral "CSR consensus" paper on corporate responsibility in value and supply chains and present it to the Federal Government as a recommendation. One element of that paper, among other things, is to reinforce the expectation of a responsible management of due diligence in the realm of human rights as described in the present chapter. Further information is made publicly accessible online at www.csr-in-deutschland.de. The possibility to join the "CSR consensus" is open to all enterprises that operate in Germany. The list of companies that have joined will be updated continuously and made publicly available at www.csr-in-deutschland.de.*
- *The aim is that at least 50% of all enterprises based in Germany with more than 500 employees will have incorporated the elements of human rights due diligence described in this chapter into their corporate processes by 2020. Enterprises which have not adopted particular*

procedures and measures should be able to explain why they have not done so (the 'comply or explain' mechanism). If fewer than 50% of the enterprises defined above have incorporated the elements of human rights due diligence described in chapter III into their corporate processes by 2020 and the target is thus missed, the Federal Government will consider further action, which may culminate in legislative measures. In this context, the Federal Government will also examine, in consultation with the National Regulatory Control Council, the necessity of the corporate compliance costs arising from this plan and will consider a widening of the number of enterprises to be reviewed, in order to potentially include enterprises with fewer employees in future assessments and subsequent additional.

2. Challenges in corporate practice

Enterprises can impact beneficially as well as adversely on the exercise of human rights within their own production processes and in their supply and value chains, both through their own business activity and through their business relationships. The ability of individual enterprises to meet systemic challenges in particular regions and/or sectors is often constrained or non-existent. It is therefore advisable for companies within a given sector to formulate a specific common definition of due diligence as described in chapter III above. Advice, experience-sharing and coordinated measures on the part of government, civil society, trade unions and enterprises help to pool resources and contribute to the creation of a global level playing field.

2.2.3 Human rights and due diligence in OECD

The fact, that the OECD has developed its own guidance with regard to due diligence of responsible business conduct shows, that there does not yet exist

a common understanding of due diligence, as one might presume after having read the UNGPs. It also shows, that international organizations, by deciding on common resolutions, have to find compromises in formulating the respective content in order to reach consensus between its member countries. It is therefore not unnecessary, that we have various attempts to substantialize due diligence, which keeps its application flexible and at the same time might extend its scope of usage.

The OECD Guidance has been set up in order to provide practical support to enterprises on the implementation of the OECD Guidelines for Multinational Enterprises[42] by offering clear explanations of its due diligence recommendations etc., which, in fact, are not only related to human rights, but also to the protection of workers (which is not always identical) and the environment, as well as to bribery, consumers and corporate governance.

Insofar we have, due to its broad variety of concerned issues, a clear distinction with regard to the UNGPs.

One more reason for the OECD Guidance is, that it should be understood as a response to the G7 Leaders' Declaration adopted on 7–8 June 2015, which recognised the importance of establishing a common understanding on due diligence, in particular for small and medium-sized enterprises, and encouraged enterprises active or headquartered in their countries to implement due diligence in their supply chains. In addition, G20 Leaders committed in their Declaration adopted on 8 July 2017, to fostering the implementation of labour, social and environmental standards and human rights in line with internationally recognised frameworks in order to achieve sustainable and inclusive supply chains, and underlined the responsibility of businesses to exercise due diligence in this regard.

42) See Fn 31.

a) OECD Guidelines for Multinational Enterprises (ME)

Before pointing out some details of the Guidance, some short remarks on the Guidelines referred to should be made. As mentioned already[43], the Guidelines are the only multilaterally agreed and comprehensive code of responsible business conduct that governments have committed to promoting. In its preface it is made clear, that they aim to ensure that the operations of ME are in harmony with government policies, to strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help improve the foreign investment climate and to enhance the contribution to sustainable development made by ME. An important reason for setting up behavioral standards is linked to the fact, that the rapid evolution in the structure of ME is also reflected in their operations in the developing world, where foreign direct investment has grown rapidly. There, ME have diversified beyond primary production and extractive industries into manufacturing, assembly, domestic market development and services. Another key development is the emergence of ME based in developing countries as major international investors.

The Guidelines are recommendations jointly addressed by governments to ME. They provide principles and standards of good practice consistent with applicable laws and internationally recognized standards. The observance is voluntary and not legally enforceable, although some matters may also be regulated by national law or international commitments.

There is no precise definition of ME, but it is common understanding, that they usually comprise companies or other entities established in more than one

43) See above p.23 and Fn 31.

country and so linked that they may co-ordinate their operations in various ways; ownership as well is no criteria.

Subjects of the Guidelines are disclosure, human rights, employment and industrial relations, environment, combating bribery, bribe solicitation, consumer interests, science and technology, competition and taxation. Due to limited space I will only give a short comment on the section "human rights".[44)]

The way, how the relationship between human rights and enterprises is expressed makes it immediately obvious, that the guidelines take a very prudent position: Enterprises „should" 1. respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved;[45)] 2. within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur; 3. seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts, or 4. have a policy commitment to respect human rights.

Although there is a commentary added to every section, most aspects still are kept very vague, trying to explain the new role and position of (multinational) enterprises in a changed/changing environment and appealing more or less to the moral responsibility of companies, to do "something". So it is let mostly to the discretion of the companies, how to deal with the guidelines. All the more it is necessary to have a closer look to the OECD Guidance principles.

44) OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 2011 EDITION , 31 f.
45) OECD (Fn 40), IV Nr.1, 31.

b) OECD Guidance

In its foreword, it is pointed out, that the purpose is to give clear explanations of its due diligence recommendations, which confirms the above mentioned impression, that the Guidelines themselves are not clear enough, too vague. After again general remarks given in an overview of due diligence for responsible business conduct (I), important information is given in part II, "due diligence process", where propositions for practical actions are given with regard to issues like "1. Embed responsible business conduct (RBC) into policies and management systems" (p.22 f.); "2. Identify and assess actual and potential adverse impacts associated with the enterprise's operations, products or services" (p.25 f.); "3. Cease, prevent and mitigate adverse impacts" (p.29 f.); "4. Track implementations and results" (p.32); "5. Communicate how impacts are addressed" (p. 33) and "6. Provide for or cooperate in remediation when appropriate" (p.34 f.). These practical actions are easy to understand and give a lot of examples. In addition and related to these actions, a list of 54 provisional "Questions related to the overview of due diligence for RBC" are added in the Annex, giving again answers illustrated by examples, as shows the first question: What are some examples of adverse impact on matters covered by the OECD Guidelines for MNEs? The answer related to the topic "human rights" points out: Forced labour; Wage discrimination for equal work or work of equal value; Gender-based violence or harassment including sexual harassment; Failing to identify and appropriately engage with indigenous peoples where they are present and potentially impacted by the enterprise's activities; Involvement in reprisals against civil society and human rights defenders who document, speak out about, or otherwise raise potential and actual human rights impacts associated with projects; Restriction on people's access to clean water.

To sum up, the OECD Guidance is a quite practically elaborated framework, which gives more substance to the often theoretically treated notion of "human rights due diligence".

3. Summary

The above mentioned remarks illustrate, that during the last ten to fifteen years the connectivity of human rights and business activities has become strongly aware on the international level, covering various endeavours on different stages, of which this article focused mainly on international legal regulations of the UN and the OECD. Nevertheless, these widespread movements on international level do not stop there, the implementation of all these rules has finally to take place through the states, which signed the respective agreements and have themselves set up action plans, and some of the examples mentioned above also show, that the implementation of human rights issues connected with business activities also take place through international and local jurisdiction. But states are not only in the role of "mediators" between international agreements and private companies registered under their jurisdiction, they sometimes are directly addressed by themselves, if they own a company or are main shareholders. The question of 'how states should own corporations in the global economy?' is more pertinent now than at any other time in the past 30 years. And it is a fact, that during the past decades, the new rise of state ownership has seen state-owned multinational corporations (MNCs) become the top sources of foreign direct investment (FDI).[46)]

46) M. Rajavuori, How should states own? Heinisch v. Germany and the Emergence of Human Rights-Sensitive state ownership function. *European Journal of International Law,* Vol. 26 (08/2015), 727–746.

The broad international consciousness of responsibility of enterprises, especially those active in global business with sometimes unclear supply-chains, towards protection of human rights, has led to the question, how to check with regard to the complexity of global business the criteria which decide, if and where human rights problems are at stake. And it is quite interesting, that in this context a "due diligence" process has been brought up, a process which normally is used in relation/connection with business issues, especially in M&A undertakings, and it is in fact highly recommendable to use the same strategy as a model.[47] But looking on the context in more detail it becomes quite clear, that the complexity of problems related to the purchase of a company is not so much different to the complexity of human rights issues in business, because also here there have so many areas to be considered, increasing with the complexity of business activities.

The process of human rights due diligence may also be compared to the development of principles related to corporate social responsibility (CSR) or of rules related to corporate governance. Although the respective targets are somewhat differing, we finally get a feeling of the density of interrelated aspects concerning the role, duty and responsibility of enterprises.

In fact, the discussion about business related human rights protection and the respective due diligence process has reached already many companies, especially globally acting enterprises, which have taken proactive measures to

47) Some examples out of many: R. L. Trope/Th.M. Smedinghoff, Guide to cybersecurity due diligence in M&A transactions (2019); P. Howson, Due diligence – the critical stage in mergers and acquisitions (2017); A. Lajoux/Ch.M. Elson, The art of M&A due diligence (2012); R.P. Green II/J.J. Carroll, Investigating entrepreneurial opportunities. A practical guide for due diligence (2000).

comply with the requirements set up by international law and standards.[48] But the examples also show, that the effectivity of all these measures depend to a broad extent on the cooperation with NGOs, local civil society organizations, local authorities, investors and shareholders etc., which has also been named in the above mentioned OECD Guidance as one of some important methods.[49]

48) BDA (German Association of Emplyers) ed., Menschenrechte und Unternehmen. Möglichkeiten und Grenzen unternehmerischen Engagements. https://www.arbeitgeber.de/www/arbeitgeber.nsf/res/DA16BF5F54E3C8F8C12574EF00544F61/$file/Menschenrechte_dt_WEB.pdf.

49) See Fn 32, 48, 56; some examples of German companies, which practice this method already are mentioned in BDA (Fn 46): Bayer AG (18), Addidas (20), Daimler AG (23).