



GERMANY

**List of Issues – EXTRATERRITORIAL OBLIGATIONS
submitted by Forum Menschenrechte**

**in response to the 6th Periodic Report of the Federal German Government
on the implementation of the International Covenant on Economic, Social and
Cultural Rights (ICESCR)**

Berlin, July 2017

Forum Menschenrechte (FMR) is a network of more than 50 German non-governmental organizations (NGOs) who are committed to better and more comprehensive protection of human rights – worldwide, in specific regions of the world, individual countries as well as the Federal Republic of Germany. The Forum was established in 1994 following the International Human Rights Conference in Vienna.

The following organizations of the Forum Menschenrechte contribute to the List of Issues on EXTRATERRITORIAL OBLIGATIONS

- MISEREOR Bischöfliches Hilfswerk e.V., German Catholic Bishops' Organization for Development Cooperation, <https://www.misereor.org/>
- pbi: peace brigades international, <https://pbideutschland.de/>
- BfdW: Brot für die Welt/ Bread for the World, <https://www.brot-fuer-die-welt.de/en/bread-for-the-world/>
- FIAN Deutschland: FoodFirst Information and Action Network; www.fian.de
- GegenStrömung: CounterCurrent, <https://www.gegenstroemung.org/web/>
- urgewald; <https://urgewald.org>
- AG Entwicklung und Wirtschaft im Forum Menschenrechte (FMR Working Group on Development and Business)

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I. Preface

In its List of Issues below, the Forum Menschenrechte (FMR) only deals with a number of select problem areas. This list does not claim to address all the problems resulting from the implementation of the International Covenant on Economic, Social and Cultural Rights in Germany. The Lists of Issues provided by other organizations, to which the FMR has also agreed in part, should also be referred to for complementary information.

II. List of Issues – EXTRATERRITORIAL OBLIGATIONS

(1) ISSUE: Trade Policies (MISEREOR)

ICESCR: Articles 2.1, 11, 22 and 23

Concluding Observations of the previous report: Recommendation No. 9

QUESTIONS:

How does Germany make sure that EU trade and investment agreements do not limit policy spaces of state parties to respect, protect and fulfil the social and economic human rights of people within and without their territories?

EXPLANATORY NOTE:

- Despite Recommendation No. 9 of the CESCR from May 2011, the EU has increased pressure on African states to sign and ratify Economic Partnership Agreements (EPAs) that would oblige these countries to cut 75-80 of their import tariffs for EU products. While the EU does not currently grant export subsidies, other forms of direct subsidies still allow EU companies to export agricultural products such as milk powder, chicken parts and tomato paste at prices below the cost of production to an extent that they threaten the right to food and an adequate standard of living of small scale producers in West Africa. The EPAs would be a serious obstacle for West African countries when it comes to protecting local markets and the right to food of their producers. Increased reliance on food imports and price volatility may also threaten the right to food of consumers in the medium term.
- EU trade agreements with Peru, Colombia and Central America oblige state parties to implement the International Convention for the Protection of New Varieties of Plants (UPOV 91) that restricts the use of farm-saved seeds/propagating materials of PVP-protected varieties and prohibits their exchange and sale by farmers. An HRIA of various NGOs has confirmed concerns that UPOV 91 regulations threaten the right to food. In current trade negotiations with Mexico and Mercosur, the EU also wants to include this same obligation.
- Human rights instruments in EU trade policies remain inadequate. While the EU has now included human rights chapters in the Sustainability Impact Assessments (SIAs) for new trade agreements, these SIAs are not conducted until after the trade negotiation mandates have been concluded and when the negotiations are already too far advanced to be significantly influenced. Another matter of concern is the recent policy of the EU (supported by Germany) to no longer include human rights clauses in new trade agreements. The German Institute for Human Rights and MISEREOR instead called for a reform of these clauses to better address the possible negative human rights impacts of these trade agreements.

(2) ISSUE: Effects of German tax and fiscal policies on tax justice and the capacity for full realization of rights under ICESCR? (MISEREOR)

ICESCR: Article 2.1

Concluding Observations of the previous report: No Recommendation

QUESTIONS:

How will Germany address its responsibility for the extraterritorial impacts of its tax and fiscal policies on tax evasion and tax abuse in the context of its obligation to undertake steps with a view to progressively achieving the full realization of the rights under the ICESCR and to strengthening tax justice?

EXPLANATORY NOTE:

Cross-border tax abuse refers to the practices of individuals and corporations that aim to reduce or avoid their tax payments, for example through controversial profit-shifting, fraudulent underreporting of the value of taxable transactions and the use of off-shore accounts to hide taxable income. German policy and practice in the tax and financial domains questions the country's compliance with its obligations under Article 2 of the ICESCR to cooperate internationally to mobilize the maximum available resources for the full realization of the rights under the ICESCR. We urge the Committee to recommend that Germany ensures that its fiscal and tax policies do not impinge upon the ability of governments to mobilize resources for the fulfillment of human rights.

(3) ISSUE: Protection of human rights defenders, including affected local communities, in the context of business operations (pbi)

ICESCR: Articles 1, 2

Concluding Observations of the previous report: Recommendation No. 10

QUESTIONS:

How will Germany explain to German companies operating abroad the importance and legitimacy of the engagement of human rights defenders and the right of local communities affected adversely by business operations to defend their rights?

EXPLANATORY NOTE:

Human rights defenders (HRDs) are key players in the field of business and human rights as they seek to protect the economic, social and cultural rights of affected communities by providing information, legal advice and organizational support. Yet too often, these HRDs lack a safe and enabling environment to carry out their work. Around the world, they are subjected to death threats, harassment, defamation and smear campaigns, criminalization, physical attacks and murder. Aggressions against them are rarely brought to justice. In recent years, numerous reports have provided evidence that land and environmental rights defenders are the group of HRDs with one of the highest death tolls in the world.

In many countries, HRDs are labelled criminals and enemies of (economic) progress. When German companies take up operations in these countries, they will likely adopt this kind of attitude unless they are reliably informed about the importance and legitimacy of human rights work. By proactively providing companies with this information and offering support in dealing with civil society, actors in the host countries would contribute substantially to the safety of the HRDs.

From our perspective, the German National Action Plan on Business and Human Rights, adopted in December 2016, does not sufficiently address the protection of human rights defenders in contexts where businesses operate, nor does it give due consideration to the rights of those who might be affected adversely by German business operations abroad.

(4) ISSUE: Corporate Social Responsibility (BfdW)

ICESCR: Article 2.1

Concluding Observations of the previous report: Recommendation No. 10

QUESTIONS:

How will Germany prevent business enterprises domiciled in its territory or under its jurisdiction from committing human rights violations abroad?

EXPLANATORY NOTE:

Multinational corporations based in Germany often achieve enormous profits by making use of more favorable conditions at production sites abroad while showing little or no willingness to bear the risks of assuring human rights due diligence throughout the supply chain or reparation of damages.

This issue was addressed by the German Federal Government in its National Action Plan on Business and Human Rights of 2016 with which it seeks to implement the UN Guiding Principles on Business and Human Rights. Instead of adopting binding standards on human rights due diligence throughout the supply chain, however, the Action Plan only foresees re-considering the introduction of a law if by 2020 less than half of the German based corporations with more than 500 employees have introduced human rights standards into their business processes. This vague announcement is not sufficient from a civil society perspective.

(5) ISSUE: Access to justice (BfdW)

ICESCR: Article 2.1

Concluding Observations of the previous report: Recommendation No. 7, 8

QUESTIONS:

How will Germany guarantee access to justice in cases relating to the violation of ESC rights through the conduct of German companies abroad?

EXPLANATORY NOTE:

Although foreign claimants generally have access to German courts, cases of human rights violations resulting from acts or omissions of transnational corporations involve certain characteristics that the German court system does not adequately deal with. Firstly, such cases normally affect a large number of claimants. Group or class actions, however, are not foreseen under the German civil procedure law, requiring affected communities to single out certain claimants instead of filing the claim as a group. Secondly, victims of human rights violations by multinational corporations cannot normally prove which decision actually led to the violation of their rights. In that sense, they lack provisions that ease the burden of proof or at least grant access to information about internal corporate processes, such as pre-trial or trial disclosure. Furthermore, courts and public prosecutor's offices are not adequately trained and equipped to deal with such cases which often leads to their dismissal.

In the National Action Plan on Business and Human Rights, Germany indicates that the mechanisms of the German civil procedure are sufficient to guarantee victims of human rights violations by German companies abroad access to redress in the national court system. In its state report (E/C.12/DEU/6, 16.03.2017), the Committee's recommendation to extend the competence of the GIHR to receive complaints is rejected with the argument that the judicial remedies already in place represent sufficient protection from the infringement of ESC rights. We as civil society organizations do not agree that the existing avenues of recourse allow for the adequate handling of such cases and are deeply concerned that Germany is not willing to adapt its civil procedure law to the necessities of the victims.

(6) ISSUE: Austerity Policies (BfdW)

ICESCR: Articles 6ff

Concluding Observations of the previous report: Recommendation No. 9f

QUESTIONS:

What does the German government intend to undertake in order to ensure that the European Stability Mechanism (ESM) does not require the countries concerned to adopt retrenchment or austerity policies which unduly restrict ESC rights?

EXPLANATORY NOTE:

In reaction to the crisis in the financial markets, a so-called Troika, composed of the European Commission, the European Central Bank (ECB) and the International Monetary Fund (IMF) established the stability mechanism ESM that, based on Memoranda of Understanding (MoUs), granted financial support to the countries concerned (e.g. Greece, Ireland, Portugal, Romania, Spain and Cyprus). The MoUs contained detailed timetables for structural reforms of the economic and social sector, to which the countries have to adhere in order to receive the relevant credit tranches. For instance, cuts in social security schemes, education and health care, the drastic reduction of minimum wages and pensions, the deregulation of the labor markets and decentralization of collective bargaining as well as the privatization of public services. Such measures raise important concerns regarding the protection of ESC rights. Hence, the Committee addressed a letter to all states to remind them of their obligations to use the maximum available resources to fulfil ESC rights, even in times of crisis. However, the EU's austerity policies (pursued mainly by the German government) significantly diminish the ability of the countries concerned to fulfil their obligations under the Covenant.

(7) ISSUE: Use of ODA resources (BfdW)

ICESCR: Articles 7, 11, 12

Concluding Observations of the previous report: Recommendation No. 9, 11, 25

QUESTIONS:

How does the German government ensure that the use of ODA resources for private investments in the frame of development cooperation does not contradict its commitment of raising the ODA ratio to 0.7% of gross national income (GNI)?

EXPLANATORY NOTE:

With its current initiative "Marshallplan with Africa" the German Ministry for Economic Cooperation and Development seeks to involve the private sector as a key "stakeholder" or "partner" in

development projects. While cooperation with the private sector is not automatically negative, it can become highly problematic when adequate safeguards for the protection of human rights and against conflicts of interest are not in place. With States reducing public funds dedicated to development cooperation and thereby increasingly relying on the private sector to step in, there are huge risks of policies and programmes becoming geared towards private sector interests. This can lead to distracting and diverting funds from measures that would address the structural causes and can stand in the way of regulatory measures – both of which are essential for the realization of human rights. It may also result in the privatization/commercialization of essential goods and services. One of the main objectives of the “Marshallplan with Africa” for instance is the promotion of private investments in infrastructure projects on the African continent. Involvement of private sector actors, in particular where these are assuming public functions, may also undermine efforts to improve accountability in development contexts. We demand that ODA recourses are only used for public development projects. Funds for private investments abroad should stem from other resources. If in exceptional cases development projects are carried out in cooperation with the private sector safeguards should be in place that ensure strict compliance with human rights standards.

(8) ISSUE: Development finance institutions and instruments (FIAN)

ICESCR: Articles 7, 11, 12

Concluding Observations of the previous report: Recommendations No. 10, 11

QUESTIONS:

How does the German government guarantee that its development finance institutions and instruments are in line with the obligations enshrined in the ICESCR?

Which measures have been taken to secure Germany’s human rights accountability in the context of increased private sector participation in development finance?

How does the German government assure that its membership and actions in multilateral development finance institutions, such as the World Bank or the EIB, are in line with the obligations enshrined in the ICESCR?

EXPLANATORY NOTE:

The German public banks, KfW-Entwicklungsbank and DEG, play a relevant and increasing role in international development financing. Both banks, as well as the aatif investment fund, have sustainability instruments in place.

However, a significant number of projects, for example in the context of hydro-energy and large-scale industrial agricultural investments, raise substantive concerns about the human rights due diligence of the development banks and development funds, such as the aatif, as well as the efficiency of the sustainability instruments in place. Moreover, these cases raise concerns about the implementation of Germany’s general and specific human rights obligations under the ICESCR.

While the KfW-Entwicklungsbank, DEG and aatif have all started publishing information following investment decisions, this information is typically of a general nature and does not address - or only insufficiently addresses - specific human rights issues. Furthermore, the KfW-Entwicklungsbank today holds shares in roughly 40 investment funds, whilst 52% of DEG’s investment portfolio involves finance institutions. Additional development finance instruments, such as public-private development funds (e.g. aatif), increase the complexity of development finance (“investment webs”), lead to a distancing of human rights accountability (making it difficult to directly link financial investment to the human

rights consequences on the ground) and tend to increase non-transparency based on arguments of business or banking secrets.

Additionally, Germany is a member and major shareholder of almost all the multilateral development banks (MDBs), such as the World Bank Group, Asian Infrastructure Investment Bank etc. Due to its shares, Germany is represented by executive directors in the boards of the MDBs, either with a single seat or in a constituency. All of the problems described above are also true for the MDBs. The general push for private sector finance in development raises concerns about the protection of human rights where money is channeled through financial intermediaries, such as private banks or private equity or investment funds. Recent studies show that transparency and accountability are minimal.

(9) ISSUE: Mergers of agrochemical corporations (FIAN)

ICESCR: Articles 7, 11

Concluding Observations of the previous report: Recommendation No. 10

QUESTIONS:

How does Germany ensure that economic, social and cultural human rights - especially the right to food and the right to health - are not harmed by the merger of agrochemical companies?

EXPLANATORY NOTE:

The German company Bayer is set to acquire its US competitor Monsanto. The merger would give control of 30% of the world's commercial seed market and 25% of the pesticide market to just one company. Today, the sector is already dominated by only six corporations which sell 75% of pesticides and 63% of all commercial seeds and which conduct over 75% of all private sector research in this field. Soon, three or four companies could dominate the market. Based on past experience, this oligopolistic situation is likely to result in a further loss of peasant autonomy, environmental damage, pressure on authorities and interference with independent scientists. The German and European authorities are evaluating the merger in terms of antitrust laws which focus on narrow competition issues. Human rights and public interests are not being adequately taken into account, although implications on human rights must be assumed, especially outside Germany:

- Right to food: Further market concentration will threaten seed variety and food sovereignty. As explained by the UN Special Rapporteur (SR) on the Right to Food, smallholder farmers produce 70% of the food consumed worldwide. Over the last decades, about 90% of farmers' varieties have been lost. However, a broad range of locally adapted seeds is necessary for resilience against pests, draught and rising temperatures. Intellectual property rights and conventions, such as UPOV, will further take innovation away from the peasants, obliging them to use a limited range of proprietary brands and prohibiting them from exercising their historical rights to save, use, exchange and sell farm-saved seeds.
- Right to health: The use of pesticides has led to environmental damage and millions of intoxications, many of them fatal. Increased market power is likely to lead to expanded use of hazardous chemicals, such as glyphosate or glufosinate, jeopardizing the health of farm workers. The SR on the Right to Food and the SR on Toxics recently pointed to denials by the agroindustry of the hazards of certain pesticides and expressed concern about unethical marketing tactics and huge sums spent by the powerful chemical industry on influencing policymakers and contesting scientific evidence.

(10) ISSUE: Foreign investments by German pension funds (FIAN)

ICESCR: Article 11

Concluding Observations of the previous report: Recommendation No. 10

QUESTIONS:

How does the German government ensure that investments by public or private pension funds do not harm human rights abroad?

Which preceding human rights impact assessments, including the gender dimension, are being conducted? How does the German government ensure that it can be held accountable for its human rights obligations with regard to investments by German pension schemes?

EXPLANATORY NOTE:

Recent years have experienced a surge of investments in agricultural land by financial investors. While it is widely recognized that these types of investments are accompanied by substantive risks to the enjoyment of human rights - especially the right to food -, public and private pension funds are becoming increasingly involved in land deals.

In the OECD countries alone, total private pension assets are valued at 38 trillion USD (2014). In Germany, many pension funds are public law institutions. Although the national and federal authorities exercise regulatory power, this only extends to the financial risks and not to human rights. For example, the German doctors' pension fund "Ärzteversorgung Westfalen Lippe" has invested 100 million USD into the TIAA CREF Global Agriculture fund (TCGA) which has acquired almost 300,000 hectares of land in Brazil (2015). A vast body of reports links the large-scale land transactions (locally called 'grilagem') in the respective areas with violations of human rights, including threats and criminalization. This corresponds to concerns raised by the CESCR in its Concluding Observations on the 2nd periodic report of Brazil regarding the prevalence of violence and impunity, also related to ESC rights. Moreover, recent investigations indicate that land acquired by TCGA was purchased from a Brazilian businessman accused of using violence and murder to acquire land in the area.

Swedish pension funds also invested in this fund. In its concluding observations on the sixth periodic report of Sweden, the CESCR recommends that the state party fully exercise its regulatory powers on pension funds and other investors acting abroad, with a view to ensuring that such decisions respect and protect human rights, including a prior independent human rights impact assessment, effective monitoring mechanisms to regularly assess the human rights impact, remedial measures when required and accessible human rights complaint mechanisms.

**(11) ISSUE: Foreign trade and investment policies, export and investment credit agencies
(Gegenströmung, MISEREOR, urgewald)**

ICESCR: Article 11

Concluding Observations of the previous report: Recommendation No. 10

QUESTIONS:

How will the state party provide transparency on all export and investment credit guarantees that enables civil society and affected people to assess the state party's human rights assessments and raise project-related concerns? How will the state party ensure that project-affected people are heard during project assessment and monitoring - independently from the project sponsors and without fear of repression, especially in light of the internationally shrinking space for civil society?

How will the state party ensure that companies that benefit from export and investment guarantees have proper company-wide human rights due diligence procedures in place?

EXPLANATORY NOTE:

The state party supports German business with investment guarantees between 2.5 and 6 billion € and export credit guarantees between 25 and 30 billion € annually. Despite the government's assertion that it is taking human rights impacts into account, guarantees continue to be granted for projects that entail severe human rights violations (e.g. export credit guarantees for the Medupi and Kusile coal power plants in South Africa which infringe upon the rights to water and health, as well as the readiness of the government to guarantee a coal plant in Vietnam which infringes on the right to health, and the Hidrosogamoso dam in Columbia which destroyed the livelihoods of villagers, fishers, fish-sellers and other affected groups).

Reasons for this lie, among other things, in inadequate human rights impact analyses, a lack of direct engagement with project-affected people, a lack of transparency and enforcement mechanisms. Notably, the general human rights situation in a country or area is not currently effectively being taken into account, e. g. restrictions on the freedom of expression which prevent project-affected persons from exercising their rights.

In its National Action Plan on Business and Human Rights (NAP) of Dec 2016, the German government announced that it would grant human rights greater visibility within its assessments of export credit and investment guarantees. However, so far it has fallen short of ensuring that it does not support the involvement of German companies' in projects that entail human rights violations. Notably, the NAP does not clarify that companies benefitting from public guarantees need to have Human Rights Due Diligence procedures in place in order to be able to adequately react to human rights risks.

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