

# Globalising economic and social human rights by strengthening extraterritorial state obligations



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## Germany's extraterritorial human rights obligations

# 6

Introduction and  
six case studies

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**Authors:**

Ute Hausmann  
Rolf Künnemann

**Editors:**

- Ute Hausmann
- Reinhard Koppe
- Rolf Künnemann
- Nicole Podlinski
- Michael Windfuhr

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## Executive Summary

Universality is a basic principle of human rights. The implementation of this basic principle in the international protection of human rights has been limited by exclusively emphasising the obligations of states towards people living within their territories. States have always acted beyond their borders. Their acts and omissions directly impact on the enjoyment of human rights in other countries. Extraterritorial obligations refer to the human rights obligations of a state towards people in other countries. The principles of universal respect for all human rights and of international cooperation to protect and promote human rights are laid down in the UN Charter. They are the backbone on which to build an integrated understanding of extraterritorial obligations. This publication focuses on economic, social cultural rights and on the implementation of the International Covenant on Economic, Social and Cultural Rights (CESCR). It introduces the concept of extraterritorial obligations and its legal basis. Six case studies demonstrate the relevance of extraterritorial obligations in times of globalisation. They also highlight specific challenges in the implementation of extraterritorial obligations related to foreign investment and trade, the home state regulation of trans-national companies and decision-making in multilateral development banks.



This man in India lost his land to the coal mine Parej East which had been co-financed by the World Bank.

Following the International Covenant on Economic, Social and Cultural Rights, states parties to the Covenant have to implement their human rights obligations “individually and through international assistance and cooperation”. The tripartite classification of obligations to respect, protect and fulfil human rights does not only apply to obligations on the national level, but also to extraterritorial obligations. This understanding has been underscored in several general comments by the UN Committee on Economic, Social and Cultural Rights and has been confirmed by the UN Special Rapporteur on the Right to Food. The case studies in this publication demonstrate that extraterritorial obligations require states to act unilaterally, as well as in a bi- and multilateral context. Extraterritorial obligations emanating from international human rights represent a much needed instrument for designing and implementing policies which provide a response to the challenges of globalisation. Based on the discussion of the case studies, the publication concludes by presenting the following recommendations to the German government on steps to implement its extraterritorial obligations:

- The German government should take a proactive approach to extraterritorial obligations. It should promote extraterritorial obligations through mainstreaming and institutionalising these obligations in its executive branch, including the effort to increase in capacity to analyse the implications of German policies on human rights outside its territory. This should explicitly include trade and investment policies as well as decisions taken in multilateral development banks.
- The German government should instruct and enable institutions and individuals who represent the German state in other countries to take Germany’s extraterritorial obligations into account, for example when negotiating and interpreting bilateral investment agreements.
- The German government should invite legal expertise on the possibilities of (and obstacles to) legal action in cases where German companies are involved in human rights abuses in other countries. Such expertise should present recommendations on the ways and means to overcome such obstacles including the possibility of legislative initiatives.



## Introduction

In India, indigenous people (Adivasi) are losing their land to make way for the mining and steel industry. In Paraguay, landless peasants are applying to the state for the transfer of land so that they can earn a living and feed their family, but their application is refused. In Cameroon peasants are losing their income from poultry because imported frozen chicken pieces are cheaper than what they can offer to the local market. Again in India, it is a common phenomenon that children of agricultural workers are forced to work because of the debt bondage of the family.

### Extraterritorial obligations reflect the universality of human rights

Universality is a basic element of human rights. Universality has been underlined again and again by the community of states, most notably at the World Conference on Human Rights in Vienna in 1993. In fact, universality is part of the definition of human rights: Human rights are very different from citizen's rights. Depending on where a person is born, she may have varying citizens' rights. Independently, however, of the person's birthplace, she is equipped with the same human rights – and cannot lose these rights wherever she may be. Human rights therefore are not a territorial concept. Human rights are sources of states obligations – and these obligations are regulated in international and national human rights law. The universality of human rights has to be reflected in these state obligations. Therefore, obligations cannot be restricted to apply only to people living within a state's territory. The discussion on state obligations toward people in other countries – extraterritorial obligations – has only recently received more attention. There is a growing understanding that economic globalisation makes the strengthening of extraterritorial human rights obligations in international law even more important, in order to effectively address human rights violations and to fully reflect the universality of human rights. Economic globalisation results in the fast increase in trans-boarder activities, therefore extraterritorial effects are also on an increase and need to be tackled.

Human rights are not a territorial concept. Obligations cannot be restricted to apply only to people living within a state's territory.

Economic action beyond borders are nothing new. In recent years, however, it has reached an unprecedented depth – in particular in the context of increasingly powerful trans-national corporations (TNCs) and the immense role of intergovernmental organisations in policy making. In the case of the adivasi losing their land, World Bank funding has made possible the construction of new coal mines. In Paraguay, land is not being redistributed based on the argument that it belongs to German nationals whose property has special protection under a bilateral investment agreement between Paraguay and Germany. Chicken products, which have far reaching impact on Cameroonian peasants' livelihoods, are exported from the European Union at prices lower than the world market. And in India, the German chemical company, Bayer, is buying cotton seeds from subcontractors which practice child labour. Some intergovernmental institutions, such as the international financial institutions, sometimes act as if they see themselves de facto beyond state control. Some TNCs try to be not only de facto, but even de jure beyond states' human rights control. The World Bank has been allowed for decades to deny the relevance of human rights for its work. TNCs have worked hard to shape international law according to their business interests in the context of the World Trade Organisation (WTO) – sometimes at the cost of marginalizing international human rights law and environmental law. States have often gone along with this agenda.

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## Exploring extraterritorial obligations

Liberalisation and privatisation has, in many countries, effectively reduced the state's ability to protect and fulfil economic, social and cultural rights. There is an urgent need to strengthen the international human rights system to address both the unwillingness and the inability of states to respect, protect and fulfil human rights. One of the challenges is how to address the negative effects that one state's policies can have on human rights in another country. The respect for and the promotion of human rights is an obligation under international law. However, there is no common understanding on a

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set of rules which guides policy decisions regarding their effects on human rights in other countries. Such rules can be developed unilaterally as well as through discussion in international human rights fora. The firm establishment, monitoring and enforcement of extraterritorial obligations in international law requires a careful approach. They must be linked to the growing body of understanding of the scope and limits of national human rights obligations.

In 2001, Brot für die Welt, EED and FIAN presented the first civil society report on extraterritorial obligations to the UN Committee on Economic, Social and Cultural Rights. This report was very well received by the Committee, as well as by civil society, and has been referenced by academics, as well as the UN Special Rapporteur on the Right to Food, in further defining the normative basis and content of extraterritorial obligations. Encouraged by the positive reception of the report, Brot für die Welt, EED and FIAN have since cooperated with a large number of partners in different parts of the world. During the last two years, the organisations have in a collaborative effort analysed 87 cases in which it was reported that German policies had an influence on the human rights situation in another country. These cases reflect the choices and concerns of civil society organisations cooperating with the victim groups. The analysis benefited from comments on some of the cases by international legal experts in the field. It is our hope that the publication of the selected six case studies, as well as presenting them in a wider context, will contribute to a better understanding of extraterritorial obligations as an integral part of human rights in times of globalisation.

## What are extraterritorial state obligations?

It might be a political goal of states to take into account human rights when making decisions with international effects, but is it also a legal obligation? The examples given in this publication show that there is a need to respond adequately to human rights violations which involve the co-responsibility of a state other than the state of the victim. The recognition that both states carry obligations under international law towards these people is an important precondition to effectively implement and protect human rights.

International human rights law is often understood to address only the relationship between the state that has ratified human rights treaties and the individuals and groups who live in this state. The challenge of globalisation lies in analysing the relationship between the state and individuals and groups who live outside the state's borders. Various terms have been used to describe this relationship in terms of human rights obligations. Besides "extraterritorial obligations", "international obligations" or "transnational obligations" have been used as well<sup>1</sup>. The term "extraterritorial obligations" recognises the fact that the nature of relationship between the state and people residing outside its territory (which are not citizens of this state) is different from the relationship with its citizens and migrants living within its territory. "Extraterritorial obligations" should not be confused with "extraterritoriality" in the sense that the power of a state's laws is extended outside its territory<sup>2</sup>. Rather, people outside a state's territory should be empowered to claim their rights, on the basis of international law, against a state which has contributed to (or even committed) the human rights violations they are suffering. The term "extraterritorial obligations" is used both in relation to economic, social and cultural rights, as well as civil and political rights. While acknowledging that all human rights are interdependent, the discussion in this publication is limited to economic, social and cultural rights. There is a lively international debate also on extraterritorial obligations in relation to civil and political rights<sup>3</sup>. Over the last few years, international courts have taken first steps to develop international jurisprudence on the extraterritorial application of human rights treaties in relation to civil and political rights. It is, however, still very limited and, at the same time, highly inconsistent<sup>4</sup>. So far, no international jurisprudence has been developed on extraterritorial obligations regarding economic, social and cultural rights.

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### International human rights law

Contemporary international human rights law provides a range of legal principles and provisions which underpin extraterritorial obligations related to economic, social and cultural rights. The duty to respect all human rights as well as to cooperate internationally to protect and promote human rights is at the core of the United Nations Organisation. Article 55 of the UN Charter reads that the United Nations shall promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion". Article 56 provides that "all Members pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in article 55". The principles of universal respect for all human rights and of international cooperation to protect and promote human rights, as laid down in the UN Charter, are two cornerstones on which to build an integrated understanding of extraterritorial obligations, while specific obligations flow from international human rights treaties.

The principles of universal respect for all human rights and of international cooperation to protect and promote human rights are two cornerstones on which to build an integrated understanding of extraterritorial obligations.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) is the key international treaty which protects economic, social and cultural rights. The Covenant has, as of May 2006, been ratified by 153 states. While ratification of the Covenant began in 1968, the last fifteen years have seen a wave of commitment by states to the rights protected in the Covenant. During the 1990s, 50 new states ratified the Covenant. Between 2000 and mid-2006, another twelve states have ratified, most importantly China and Indonesia. Germany ratified the Covenant in 1973. Once a state has ratified the Covenant, it is obliged to report every five years to the UN Committee on Economic, Social and Cultural Rights (CESCR) on

how it has implemented the human rights protected in the Covenant into national legislation and policies. The UN Committee is a body of independent experts which will review the state report, raise concerns and give recommendations to the state party on how to better implement the provisions of the Covenant. The UN Committee is also charged with the legal interpretation of the Covenant. The experts publish so-called General Comments which deal with specific rights (for example, right to housing, right to food, right to health), the rights of specific groups (equal rights for men and women, rights of elderly persons or persons with disabilities) or with general questions related to the nature of obligations resulting from the Covenant. In its General Comments, the UN Committee has addressed extraterritorial obligations to some extent, but not extensively.

### Extraterritorial obligations in the Covenant on Economic, Social and Cultural Rights

The Covenant is an international effort to implement the “obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms<sup>5</sup>”. The states parties recognise that “in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his/her economic, social and cultural rights, as well as his/her civil and political rights”. As discussed above, universality and international cooperation are important principles in the international protection of human rights. Both of them are reflected in article 2.1. of the Covenant which describes the general nature of obligations under the Covenant:

“Each State party to the present Covenant undertakes to take steps individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view of achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

In addition, article 11 of the Covenant reiterates a similar provision especially for the right to be free from hunger:

“The States Parties to the present Covenant, recognising the fundamental right of everyone to be free from hunger, shall take, individually and through international cooperation, the measures, including specific programmes, which are needed ...”

The universality principle is reflected in the fact that, following article 2.1., the realisation of the rights of the Covenant is not limited to the territory of the state party. Steps to realise the rights in the Covenant have to be taken individually and through international cooperation – the second principle. A state has to meet its extraterritorial obliga-

tions either individually, in cooperation with the state of the possible victim, or in cooperation with other states, for example in the context of specialised UN agencies. While all states parties to the Covenant have the obligation to cooperate, cooperation is not a goal in itself but an instrument to achieve the progressive realisation of the rights recognised in the Covenant. The obligation of a state like Germany to realise economic, social and cultural rights of groups and individuals in other countries is, therefore, an obligation towards these individuals and groups, not towards the governments of these countries.

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## Scope and limits of national obligations

A better understanding of extraterritorial obligations cannot be developed independently of the growing body of understanding of the scope and limits of human rights obligations in general – in particular the tripartite classification of obligations. National obligations are today understood to comprise three types: a state has obligations to respect, to protect and to fulfil access to the object of the right<sup>6</sup>. The object of the right is the good, service or other item on which the right provides a claim. The object of the right to adequate food, for example, is adequate food.

**The obligation to respect** requires State parties not to take any measures that result in preventing existing access to the object of the right.

**The obligation to protect** requires measures by the State to ensure that enterprises or individuals (or other third parties) do not deprive individuals or groups of their existing access to the object of the right.

**The obligation to fulfil (facilitate)** requires State parties to pro-actively engage in activities that strengthen access to the object of the right where it does not exist. Whenever a group or individual, for reasons beyond their control, do not have access to the object of the right by the means at their disposal, States have an **obligation to fulfil (provide)** that object directly.

It should be kept in mind that these obligations are under the general provision of “maximum availability of resources” which applies in particular to the obligation to fulfil.

In order to comply with its national obligations, a state is also obliged to cooperate internationally:

“A State claiming that it is unable to carry out its obligation for reasons beyond its control, therefore, has the burden of proving that this is the case and that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food.”

In order to render this obligation meaningful, there must be corresponding obligations of other states and international organisations to contribute to ensure the availability and accessibility of the object of the right (for example food, housing or health services).

## A tripartite classification of extraterritorial obligations

The tripartite classification of state obligations also applies to extraterritorial obligations. The UN Committee on Economic, Social and Cultural Rights has emphasised in its General Comment on the right to food that states parties should “respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to

food and to provide the necessary aid when required". The UN Special Rapporteur on the Right to Food in his report to the UN Commission for Human Rights in 2005 discussed this tripartite classification. He describes the obligations in the following way<sup>8</sup>:

**The obligation to respect** requires States to ensure that their policies and practices do not lead to violations of the right to food in other countries.

**The obligation to protect** requires States to ensure that their own citizens and companies, as well as other third parties subject to their jurisdiction, including transnational corporations, do not violate the right to food in other countries.

**The obligation to support the fulfilment** of the right to food requires States, depending on the availability of resources, to facilitate the realization of the right to food in other countries and to provide the necessary aid when required.

The UN Committee has employed the threefold typology of extraterritorial state obligations also in General Comments on rights other than the right to food<sup>9</sup>. Much needs to be done, however, to concretise and to operationalise these obligations. Governments are still very reluctant to proactively tackle the question of what extraterritorial obligations imply for their own policies. They are afraid that these obligations will overburden the capacity of the state and overstretch the willingness of political constituencies to address economic, social and cultural rights in other countries. This, however, is no excuse for not implementing legal obligations flowing from the International Covenant on Economic, Social and Cultural Rights.

The obligation to respect economic, social and cultural rights in other countries is straight-forward, as it mainly implies that the state refrains from certain action. However, in order to comply with this obligation, the state has to adopt measures to ensure that its policies do not violate human rights in other countries – for example by implementing human rights impact assessments.

Extraterritorial obligations are obligations towards people and not towards states, and these obligations exist regardless of the role of the victims' state in a particular situation.

Regarding the extraterritorial obligation to protect and fulfil human rights, the national obligations of the victims' state and the action it has or has not taken, have to be taken into account. However, it should be kept in mind, that extraterritorial obligations are obligations towards people and not towards states, and that these obligations exist regardless of the role of

the victims' state in a particular situation. In order to adequately address the principle of universality, it is sensible to take a broader approach to the obligations and to differentiate according to obligations in the bi- and multilateral context<sup>10</sup>.

### What action is required of states in a unilateral or bilateral context?

Compliance with extraterritorial obligations requires unilateral action as well as bi- and multilateral cooperation. These three levels are closely interwoven. Unilateral action is most obviously required regarding the obligation to respect economic, social and cultural rights. In the context of export promotion or project finance, the German state is obliged not to promote activities which bear a risk of destroying the enjoyment of a human right abroad. However, the state might also take unilateral action regarding its obligation to protect by imposing and enforcing internationally recognised human rights standards on multinational companies which are headquartered in Germany (see chapter 4 for a discussion on host state regulation). Bilateral cooperation is important to

Unilateral action is most obviously required regarding the obligation to respect economic, social and cultural rights.

all three types of obligations. In bilateral agreements (see the example of the bilateral investment agreement with Paraguay in chapter 3) the German government must ensure that the ability of the other state to protect and fulfil rights will not be undermined. Investment agreements might as well include human rights clauses as a contribution to the protection of economic, social and cultural rights of workers or communities affected by foreign direct investments. Bilateral development cooperation on the other hand should respect the enjoyment of human rights and support the fulfilment of rights in the partner country<sup>11</sup>.

### Obligations in the multilateral context

The multilateral context is the level which has received most attention in the human rights debate on globalisation during the last few years. The negative effects on economic, social and cultural rights of agreements negotiated in the World Trade Organisation (WTO) and of conditionalities imposed by the International Monetary Fund (IMF) and the World Bank have been at the centre of the debate. Much of the debate is concerned with documenting the effects of the policies promoted by WTO, IMF and World Bank, as well as with establishing direct legal obligations and the human rights accountability of these international organisations. In terms of extraterritorial obligations, the question is how states can ensure that international organisations are accountable via the states which rule them. A corresponding question is which extraterritorial obligations states carry when they negotiate international agreements or vote on funding for large-scale development projects. In its Concluding Observations of 2001, the Committee encouraged Germany

The question is how states can ensure that international organisations are accountable via the states which rule them. States carry extraterritorial obligations when they negotiate international agreements or vote on funding for large-scale development projects.

“as a member of international financial institutions, in particular the International Monetary Fund and the World Bank, to do all it can to ensure that the policies and decisions of those organizations are in conformity with the obligations of States parties to the Covenant, in particular the obligations contained in articles 2 (1), 11, 15, 22 and 23 concerning international assistance and cooperation.”

During the last few years, the UN Committee has encouraged most state parties who belong to the international donor community to do the same, for example Finland, Ireland, Japan and the United Kingdom. The UN Committee has also, in several General Comments, addressed the national and extraterritorial obligations of states when acting in international organisations. For example, the General Comment on the right to work (article 6 of the Covenant) reads:

“In negotiations with international financial institutions, States parties should ensure protection of the right to work of their population. States parties that are members of international financial institutions, in particular the International Monetary Fund, the World Bank and regional development banks, should pay greater attention to the protection of the right to work in influencing the lending policies, credit agreements, structural adjustment programmes and international measures of these institutions. The strategies, programmes and policies adopted by States parties under structural adjustment programmes should not interfere with their core obligations in relation to the right to work and impact negatively on the right to work of women, young persons and the disadvantaged and marginalised individuals and groups.<sup>12</sup>”

Limited influence and a lack of effective control should not be an argument against holding states accountable for their decisions in international fora.

Member states of the WTO, IMF and the World Bank should be held accountable for human rights violations which have been facilitated by these organisations. Even though Germany is the third largest share-holder in the World Bank, its influence is limited. At the same time, if all states parties to the Covenant acted according to their obligations when taking decisions on the Board of the World Bank, this would constitute a majority of 83 % (77 % in terms of voting power). Limited influence and a lack of effective control should, therefore, not be an argument against holding states accountable for their decisions in international fora. In its General Comment on the right to water, the UN Committee has made clear that it is the action of the state party that has to be scrutinised: “States parties should ensure that their actions as members of international organisations take due account of the right to water.” When voting on a decision affecting extraterritorial obligations in a multilateral context, Germany should therefore vote according to its obligations as if the outcome only depended on Germany alone. If the voting result deviates from the German vote, Germany should still take steps to address the violations implied by the vote of the majority.

## Addressing globalisation with human rights

Foreign investment and international trade are important aspects of globalisation. This chapter presents three cases, where Germany's extraterritorial obligations are affected in this context. In Paraguay, the state has not redistributed land to landless farmers based on the argument that this land belongs to German owners and is, therefore, protected under the bilateral investment agreement between the two countries. In Cameroon, the state has failed to effectively control the import of chicken products which are endangering the rights to food, health and work. And in South Africa, the government is still struggling with how to facilitate access to anti-viral drugs for persons infected with HIV in the context of international patent law. German policies have influenced the enjoyment of human rights in these cases. The form and intensity of this influence varies in the different cases. The case descriptions start out by analysing the human rights violations and corresponding national state obligations, before moving on to an assessment of Germany's extraterritorial obligations in the respective case. The chapter concludes by making some general remarks on extraterritorial obligations in the context of foreign investment and international trade.

### 1 Paraguay: Bilateral Investment Treaty hinders land reform

47 % of the population in Paraguay lives in rural areas. According to the Censo Nacional 2002, 48 % of the population is without food security. According to the data of CEPAL (2004), 50 % of the rural population is below the poverty line. 14 % of the total population is undernourished (FAO 2004). The main reason for undernourishment in the rural areas is landlessness. On the one hand, peasants and agricultural workers face hunger and malnutrition; on the other hand, there is a small class of big landlords who bought the land for speculation without working it.

Palmital is a settlement of 120 landless families: More than 10 years ago they had occupied an estate which had been idle. They now have their fields, houses and animals. The estate covers 1003 hectares and is owned by several Germans who live in Germany and have not made any improvements on the land for years. Under the agrarian reform provisions of Paraguay, the landless peasants of Palmital applied for a transfer of title to their names. This requires that the land be sold by the owners or (if the owners refuse to sell) expropriated. Paraguay refused to expropriate the land and referred to the Bilateral Investment Treaty (BIT) between Paraguay and Germany of 1993 which supposedly prohibits, in its article 4, the expropriation of rural property of German citizens and companies. The police violently expelled the families from their settlement three times, burnt down their farms and destroyed their fields. The leaders of the peasants were imprisoned. For several months the men and women, children and seniors lived virtually on the street, without a roof over their heads and without food supplies. Being faced with hunger, disease and homelessness, the families always returned to the estate. Meanwhile, there has been an out of court settlement between the peasants, the owners and the state of Paraguay so that they may remain on the land. The case, however, is not an isolated one: The application of the agrarian reform to land owned by Germans has been blocked with reference to the BIT. More cases are likely to come up.

## Human Rights obligations of Paraguay

Paraguay is a state party to the International Covenant on Economic, Social and Cultural Rights. Under article 11.2 of the said Covenant, Paraguay is obliged to carry out agrarian reforms in order to effectively implement the landless peasants' right to food. The landless peasants in Paraguay depend on the land to feed themselves. Considering the high level of unemployment (38%), obtaining alternative jobs is an unlikely option for them. The agrarian reform law of Paraguay responds to this situation in the sense that land which does not meet its social function can be expropriated. Paraguay has taken the respective measures to carry out such expropriations under the rule of law. The implementation of agrarian reform, however, is slow. This leads to occupation of

idle estates by undernourished landless peasants who cannot wait any longer. The owners and the state sometimes react with brutality against such attempted settlements. In the case of Palmital, there was an escalation of violence by the police evicting the settlers, with violations of the rights to food, housing and physical integrity. It should be noted, however, that the agrarian reform authorities of Paraguay finally took action towards the expropriation of the land, recommended a transfer of title to the peasants and, thereby, tried to meet its obligations towards the landless peasants. The authorities were unable, however, to implement the expropriation, since the Senate refused its consent. The Senate was of the opinion that an expropriation of the German owners would violate the BIT with Germany.

### Recommendations to the German government

The German government should make use of this opportunity to show its commitment to the International Covenant and the extraterritorial obligations contained in this Covenant. It should clearly instruct its embassy in Asunción not to encourage or even request Paraguay to interpret the BIT in a manner which violates the Covenant. If Paraguay continues to violate the Covenant, this cannot be an excuse for Germany to remain silent on violations which obviously favour its citizens. In any upcoming case similar to the Palmital case, Germany should make a clear statement to the Paraguayan authorities that the BIT is not ruling out expropriations under agrarian reform. In the meantime, Germany should start a dialogue with the competent Paraguayan authorities, in particular the Senate, on this matter in order to avoid further violations of landless families' human rights due to an interpretation of the BIT which is not in conformity with the Covenant.

### Extraterritorial human rights analysis

As a state party to the International Covenant on Economic, Social and Cultural Rights, Germany is obliged under article 2.1 to cooperate with other state parties, among them Paraguay, in the immediate realisation of the right to food of the landless peasants in Paraguay. Under no circumstances must Germany contravene the efforts of Paraguay to implement its own territorial obligations under the Covenant.

The BIT allows for expropriations "in public interest". According to General Comment 12, states parties have to keep their duties under the Covenant in mind when entering international treaties. Therefore, the BIT has to be interpreted in a way which does not contradict the mentioned obligations under the Covenant. This implies an interpretation which sees expropriation as measures „in public interest“ and, therefore, not excluded by the BIT. On March 29, 2006, the Inter-American Court of Human Rights pronounced a judgment on a similar case (Sawhoyamaya vs. Paraguay), where Paraguay had used the BIT as one of the arguments for refusing the return of ancestral land (owned by a German) to an indigenous

community: "The Court holds that the application of bilateral commercial agreements do not provide a justification for the breach of states obligations emanating from the American Human Rights Convention; on the contrary, their application must always be compatible with the American Convention<sup>13</sup>".

The German Embassy in Paraguay, in an intervention with the Paraguayan authorities, had referred to the BIT in the Palmital context and created the impression that Paraguay would violate the BIT, if it expropriated these German citizens. The German Embassy, thereby, took measures countervailing Paraguay's efforts to implement its agrarian reform legislation in this case. In particular, Germany failed to cooperate with

Paraguay in this matter to the maximum of its possibilities, thereby, breaching its obligations under the Covenant. Moreover, the Embassy, through its intervention, may have instigated Paraguay to violate the Covenant and the American Convention on Human Rights.

## Performance of the German government concerning its extraterritorial obligations

The German government had been notified repeatedly (by FIAN International in cooperation with Brot für die Welt and EED) about the effects of the BIT on the right to food in Paraguay. The government has so far failed to ensure an interpretation of the BIT in conformity with the Covenant – for example, by making a statement towards this effect to its Paraguayan counterparts. In a first reaction, it even questioned whether the Paraguayan agrarian reform authorities had acted within the limits of Paraguayan law. The government claimed that the interpretation of the BIT, concerning expropriations in Paraguay, is in the full competence of Paraguay and that a unilateral statement by Germany would not be useful in this context. It did, however, send a note to its embassy in Paraguay alerting it to the circumstances and the need to take human rights aspects into consideration. Whether the embassy will act accordingly remains to be seen.

## 2 Cameroon: European Union exports unsafe chicken

20 % of the population in Cameroon is malnourished. As in most other countries, the reason is not a general lack of food or food production potential, but the poverty and marginalisation of parts of the population. 65 % of the total population in Cameroon make their living in agriculture. Before globalisation, Cameroon was producing 90 % of its food needs inside the country. Chicken has been the traditional food for special events such as weddings or funerals. Raising and selling chicken has been a source of income for thousands of people in Cameroon, mainly women. The production of one ton of chicken meat in Cameroon represents three livelihoods in agriculture, for producing and raising them and for growing the corn to feed them, and two livelihoods in the urban area for plucking and selling them.

Chicken production in the EU – although not directly subsidised – can make use of subsidised inputs. Europeans increasingly prefer only selected parts of the chicken (in particular the tender meat of the chicken breast or upper parts of the leg) instead of the entire chicken. For the rest of the chicken, (legs, wings, gizzards) there is no market in Europe. Selling them to West Africa is more profitable for European traders than selling them for alternative use in Europe. Moreover, it offers the hope of conquering a new export market. Over the past decade, the EU has increased its exports of frozen chicken parts to West Africa (in particular Cameroon, Ghana and Senegal) from 48.000 tons in 1996 to 200.000 tons in 2004. Cameroon imported 978 tons in 1996 – and 24.000 tons in 2004. Approximately three-quarters of these imports come from the EU, mainly from France, Belgium, the Netherlands and Spain. Until 1996, Cameroon was basically self-sufficient in the poultry market. The imports (mainly duck and geese) were meant for the supermarkets in the big cities Jaunde and Douala. The consumers of these imports were mainly foreign experts. Frozen food was seen as a luxury item by the population.

The total demand for poultry in Cameroon is estimated at 35.000 tons. In 2002, 21.000 tons were covered by domestic production. In 2003, the production had dropped to 13.000 tons – thus production in Cameroon dropped by 8.000 tons in a single year. This alone meant the loss of 40.000 livelihoods of vulnerable people in Cameroon in just one year. The law of Cameroon limits imports to 7.000 tons per year. The Ministry for Animal Breeding determines the import volumes. But the country lacks inspectors and control. In 2004, neither the volume nor the quality was properly checked. Bribery and irregularities undermine the implementation. For the importers, frozen chicken parts are good business: They buy one kg for 0,80 € and sell it for 1,50 €. Local producers can only survive with a price of 1,80 € per kg.

Exporting European frozen meat to a tropical country like Cameroon which doesn't have proper cool chains or refrigerators creates a health risk for the population affected. After unloading the ships from Europe in the cool chain, the meat in Cameroon can no longer be controlled. Large portions of the merchandise are transported in open pick ups – in 30 degree Celsius temperatures and 90 % humidity. It takes hours to get to the markets in the country. Often the chicken is sold in open stands without cooling. In shops with freezers, NGOs found out that 15 % of the freezers were rotten and 25 % were open with the chicken parts partially thawed. The Centre Pasteur in Jaunde classified 83,5 % of the frozen chicken parts on the Cameroon markets as “unsuitable for human consumption”. The level of microbes was up to 180 times the respective upper EU-threshold. A health risk was seen in those 15 % which contained salmonella and 20 % which were contaminated with Campylobacter. Food poisoning increasingly occurred after weddings or funerals where EU chicken parts were consumed. The incidence of the respective disease patterns in the hospitals of Cameroon was found to be statistically correlated with the increasing imports of frozen chicken.

### Human Rights obligations of Cameroon

The import of frozen chicken without proper cooling chains means a health risk for the population. Cameroon is a state party to the Covenant on Economic, Social and Cultural Rights and, therefore, duty-bound to protect the population's “highest attainable standard of physical and mental health” (article 12.1) against destruction by third parties. By not intervening against the distribution of food that is a health risk, the government of Cameroon has violated the said Covenant.

The import of frozen chicken at rates far below the production cost of local producers has destroyed local chicken production. Under article 6 of the Covenant, Cameroon has recognized “the right of everyone to the opportunity to gain his[her] living by work which he [she] freely chooses or accepts” and undertaken the obligation that it “will take appropriate steps to safeguard this right”. In Cameroon, unemployment is very high. According to the available data, the rate of unemployment is at least 25 %. Opportunities to gain one's living are, therefore, scarce, and persons losing their work cannot easily be rehabilitated in order to avoid deprivation under article 6. Moreover, given the lack of state social security provisions, the loss of work can easily turn into the loss of livelihood – and a deprivation under article 11 of the said Covenant (right to an adequate standard of living). One of the measures to implement the obligations under article 11 covers the guarantee of access to productive resources and the possibility to gain an income from that. The sharp increase of imports is violating that possibility to gain an income from the productive resources. The Covenant would, therefore, indicate that Cameroon take effective protective measures for the vulnerable local chicken producers. Introducing import quota, and/or introducing tariffs, is, therefore, necessary to safeguard the right to work under these circumstances. Cameroon law

limited chicken imports to 7.000 tons per year. The estimated imports for 2004, however, amounted to about three times this quota. The severe shortcomings of the authorities in Cameroon to enforce this law and hence its failure to protect the vulnerable producers' right to work is in breach of the said Covenant.

## Extraterritorial Human Rights Analysis

A food-exporting country has the external obligation under the human right to health to take measures (1) individually within its control and (2) in cooperation with the importing country to protect the right to health of persons, in so far as the consumption of the exported food is concerned. So far the EU has not taken effective measures to meet its members' commitments under the Covenant. Possible effective measures "individually under its control" available to the EU include the denial of export licences for frozen chicken parts to Cameroon. The failure to take effective measures, therefore, contributes to the violation of the human right to health of the affected consumers in Cameroon. General Comment no. 11 on the Right to Adequate Food of the UN Committee on Economic, Social and Cultural Rights authoritatively stipulates in para 39 that "products included in international food trade or aid programmes must be safe and culturally acceptable to the recipient population".

The obligation to take such measures is also part of EU law, which prohibits the export of unsafe food in Regulation (EC) Nr. 178/2002 of the European Parliament and Council of January 28, 2002 on the general principles and requirements of food law and in matters of food safety<sup>14</sup>. It stipulates in article 14.3:

"In determining whether any food is unsafe; regard shall be had (a) to the normal conditions of use of the food by the consumer and at any stage of production, processing and distribution".

In light of the experiences with imported chicken products from the EU to Cameroon, this food has to be considered unsafe, and exports should be prohibited in order to protect the right to health and food in Cameroon.

The export of chicken does not only have implications for the rights to health and food but also for the right to work in Cameroon. An exporting country has the external obligation under the human right to work to take measures (1) individually within its control and (2) in cooperation with the importing country to protect the right to work in the respective country. Cameroon has introduced quota to comply with its territorial obligations on the right to work under article 6 of the International Covenant on Economic, Social and Cultural Rights. This measure has proved ineffective. Germany should take measures in cooperation with Cameroon to prevent the import of unsafe food. Restricting export licenses in Europe would be the most direct measure, not only to protect the right to health and food, but also the right to work in Cameroon.

### Recommendations to the German government

The German government should work with the relevant authorities in the European Union to enforce Regulation (EC) Nr. 178/2002, which prohibits the export of unsafe food. Restricting export licenses in Europe for export of chicken products to Cameroon would be the most direct measure to protect the right to food, health and work of consumers and peasants in Cameroon.

## Performance of the German government concerning its extraterritorial obligations

Germany does not lose its obligations under the Covenant in the context of its EU membership. It, therefore, has to take measures to the maximum of its possibilities in the EU to address the violations of the said regulations and stop the human rights violations mentioned. Possibilities of domestic or bilateral measures are unclear, as it remains unclear to which extent German chicken producers or traders are involved. The main responsibility of Germany therefore has to be seen in the context of the EU.

### 3 South Africa: Access to anti-retroviral drugs

In 2005, in South Africa more than 5,5 million people were living with HIV and AIDS, that is 19 % of the adult population. There has been a gradual increase of HIV prevalence over the past decade. Anti-retroviral drugs (ARVs) are no cure for AIDS, but they can prolong lives. Moreover, ARVs reduce the rate of transmission of HIV. In 2005, one million people in South Africa were in urgent need of anti-retroviral treatment to save their lives, however, only 190.000, i.e. 20 %, received it. The main reasons for the low coverage of anti-retroviral treatment (and for the delay in the respective public health measures) have been - besides the lack of infrastructure and of trained personnel - the high prices and patent rights. Patent law, as prescribed by the WTO's TRIPS Agreement, grants patents for a 20-year period, thereby, preventing competition from generic drugs - that is non-branded drugs - which are much cheaper. Only when generic drugs enter the market, patent holders are forced to drop the price of their products. Patent law, thereby, effectively blocks access of people living with HIV and AIDS in poor countries to essential ARV drugs. It is generally accepted that patent holders have very high profits that make up much more than their due share for the development and research cost of a drug plus an adequate profit.

There are safeguard mechanisms in TRIPS, such as "compulsory licensing": Governments are allowed to issue a license to a domestic manufacturer for production of a generic drug without permission of the patent holder. In 1997, at a time when very few South Africans living with HIV/AIDS received anti-retroviral treatment, the country passed Act 90 allowing for compulsory licensing in order to make ARVs accessible to the population. This law, however, was challenged by 39 pharmaceutical companies (among them, German corporations such as Boehringer-Ingelheim) who sued the South African government before the South African Supreme Court. In this way, they prevented the implementation of Act 90 for three years, thereby, blocking the production of cheaper generic drugs and hence the access to this urgently needed medication. Following a massive campaign led by the South African non-governmental organisation "Treatment Action Campaign", and supported by international civil society groups, the pharmaceutical companies withdrew their case in April 2001.

International lobbying and advocacy also contributed to the reaffirmation in the "Doha Declaration" in 2001 of the flexibilities of the TRIPS Agreement. The Declaration reinforced the TRIPS provisions concerning the right of countries to grant compulsory licenses and the freedom to determine the grounds upon which these licenses are granted.

For countries without domestic drug manufacturing capacities, the compulsory licensing clause in TRIPS does not provide much relief because it is limited to domestic consumption. In December 2005, the WTO amended its intellectual property rules to make permanent a waiver from August 2003 permitting countries that lack pharmaceutical industries to import generic medications for HIV/AIDS. However, this regulation has been set up very complicated and bureaucratic to use, so that it has not really helped the countries which it was supposed to assist. Although South Africa has some manufacturing capacities, for long-term sustainability of access to ARV drugs it will be necessary to explore other avenues, such as importing drugs.

The EU reached an EU-wide agreement in 2005 on the regulation of “compulsory licensing”, with the aim of developing the conditions under which compulsory licenses for export of medicines can be issued. The EU Regulation on Compulsory Licensing, which was published on June 9, 2006, is rather bureaucratic and there are doubts whether it will lead to a better supply of crucial drugs to low-income countries.

## Human Rights obligations of South Africa

South Africa is under an obligation to fulfil (to the maximum of available resources) access to medical care (Universal Declaration article 25). South Africa is not a state party to the International Covenant on Economic, Social and Cultural Rights. Its constitution, however, contains some of the most far reaching provisions on economic, social and cultural rights to be found among the constitutions in the world. Article 27 reads:

- “ (1) Everyone has the right to have access to
  - a. health care services, including reproductive health care; [...]
- (2) The state must take reasonable legislative and other measures, within its available resources, in order to achieve the progressive realisation of each of these rights.
- (3) No one may be refused emergency medical treatment.”

South Africa’s attempt to compulsory license ARVs was, therefore, in line with its human rights obligations. There have been a number of severe shortcomings on the side of the South African government in responding adequately to the challenge of providing universal access to ARV. These are, however, not the focus of this case study.

## Extraterritorial human rights analysis

The human right to health is defined in article 12 of the International Covenant on Economic, Social and Cultural Rights as the “right of everyone to the highest attainable standard of physical and mental health”. Article 12. further stipulates that the steps taken by states parties “shall include those necessary for:

- (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
- (d) The creation of conditions which would assure all medical service and medical attention in the event of sickness.”

The United Nations Millennium Declaration contains explicit references to the role of the international community in addressing the AIDS/HIV pandemic<sup>15</sup>. Although these are not legally binding formulations, they show strong political commitment by the leaders of the world for the implementation of which they may be held accountable<sup>16</sup>. More clues can be found in resolutions adopted by the UN Commission on Human Rights<sup>17</sup>. Following the International Covenant on Economic, Social and Cultural Rights, Germany is obliged to cooperate on a bi- and multilateral level to create an international framework<sup>18</sup> which will enable states to comply with their obligations to fulfil the right to health of persons affected with HIV by compulsory licensing ARVs.

In the specific case of South Africa, a number of companies trying to obstruct access to ARVs in the period 1998 to 2001 by raising the issue in the South African Supreme Court were German companies. Germany was, therefore, under a special obligation to co-operate with South Africa on this issue.

## Performance of the German government concerning its extraterritorial obligations

The Minister for Development Aid and Economic Cooperation, Heidemarie Wierczok-Zeul criticised in a press release the action of the corporations at the South African Supreme Court. Moreover, there have been a couple of declarations made by Germany in multilateral contexts: The G8 leaders in 2005 called for achieving universal access (including access to anti-retroviral treatment) by 2010; the UN High Level Meeting on HIV/AIDS in June 2006 also stated to achieve universal access and urged its member states to develop national plans with targets and time lines to achieve this goal.

### Recommendations to the German government

In order to meet its extraterritorial obligations, Germany should take a couple of measures with the aim of promoting South Africa's (and similar countries') access to essential and life-saving ARV drugs:

1. There is reason for concern that the new EU Regulation of June 9, 2006, on „Compulsory Licensing“ will be too complicated to allow Germany to effectively exercise its obligation to support Southern countries in fulfilling access to ARVs in their territories. The EU regulation falls behind national regulations on trans-boundary compulsory licensing, such as those issued by Canada, the Netherlands or Norway. Germany may, therefore, have to take additional steps in this direction by implementing its own national legislature which allows its pharmaceutical industry to produce generic drugs and export them to countries in need. Otherwise the human rights violations in this context will continue.
2. It is urgently needed that all TRIPS regulations are set and interpreted in a way that grants access to life-saving ARV drugs in South Africa and similar countries. The German government should pursue a coherent policy in this regard and assure that human rights principles are respected in the international laws of institutions such as WTO, i.e. the TRIPS agreement.
3. The German government should adhere to the promises and declarations made by the G8, UNGASS and others that commit the signatories to achieve universal access to HIV/AIDS treatment by 2010.

## Extraterritorial obligations in the context of foreign investment and trade

Cameroon became a member of the WTO in December 1995. Low tariffs of 20 % for chicken make Cameroon an attractive market for exports from the European Union. The government has limited the amount of chicken imports, but it is unable to fully control the volume and quality of the chicken that comes into the country. Cameroon is only one country where food safety – a major component of the right to food and the right to health – has become a problem following the liberalisation of agricultural markets. The destruction of livelihoods of peasants and workers as a result of the import of agricultural products below national production costs has also been documented in many countries<sup>19</sup>. Advocates of the right to food are, therefore, calling for an end to dumping and a re-orientation of agricultural policies in the EU and the USA, in order to protect the right to food of peasants and of consumers living in other parts of the world. Human rights will only be realised if states are in a position to protect markets of vulnerable peasants from cheap imports. Trade and investment agreements have to respect this policy space for the state. As is demonstrated by the case of access

to anti-retroviral drugs in South Africa and the redistribution of land in Paraguay, assigning special protection in such agreements to trans-nationally acting private companies and individuals, can curtail a state's capacity to protect and fulfil economic, social and cultural rights. The provision in investment agreements for international procedures for the settlement of investor-state disputes reinforces this even further<sup>20</sup>.

The UN Committee on Economic, Social and Cultural Rights calls upon Germany and other States in Concluding Observations and General Comments to respect and protect the rights in the Covenant when engaging in negotiations on agreements which govern trade and investment. Human rights impact assessments during negotiations are necessary for Germany to be able to meet its extraterritorial obligations – rather than just promoting the national interest as well as the private interest of German companies. It is the nature of these negotiations combined with a lack of human rights accountability of all parties concerned that make trade negotiations on the inter-regional (between the EU and other regional groupings) and multilateral level problematic in terms of human rights: “Lack of transparency, participation and democracy in the WTO is in clear contrast to human rights principles which require participation, protection of the most vulnerable and accountability<sup>21</sup>.” Given the fact that Germany is negotiating trade agreements as part of the European Union does not imply that the German obligation to respect, protect and contribute to the fulfilment of human rights is reduced in this context. The German government should actively promote international human rights accountability of the European Union. In a case where a conflict between trade and investment regulations and human rights becomes apparent, or where a state is approaching the German government for support in order to regain its ability to protect and fulfil rights, Germany is under the obligation to cooperate with this state.

## Holding German companies accountable

Trans-national corporations (TNCs) are the driving force of globalisation. This chapter presents two cases from Mexico and India where the national state has failed to effectively protect workers against private companies. In both cases, German companies have been involved. In the case of Mexico, the company is headquartered in Germany. In the case of India, the German company Bayer has a direct link to and profits from its relationship with Indian companies which fail to respect human rights.

### 4 Mexico: Continental breaks Mexican law<sup>22</sup>

In December 2001, the German tire manufacturer Continental shut down the Euzkadi factory in El Salto near Guadalajara, Mexico and dismissed 1164 workers. The reason for the closure was a dispute between the management and the Mexican labour union SNRTE. New labour schedules which had obliged employees to work twelve-hour shifts led to the dispute and the workers went on strike. With no conciliation on the horizon, Continental decided to shut down the factory. Mexican labour law, however, stipulates that prior authorisation must be obtained before shutting down a factory. Continental failed to obtain this authorisation.

The workers decided to stand up for their rights. They continued their strike – and sought the cooperation of counterpart organisations in Germany. FIAN Germany, FIAN International, and the advocacy network Germanwatch took up the case, applying a mix of strategies both in Germany as well as in Mexico. The labour union, SNRTE, maintained that the released workers should be enabled to return to work and receive compensation for the salaries they were deprived of during the time the factory was closed.

In cooperation with critical shareholders, the campaign took advantage of the shareholders' right to speak at the Annual Meeting – a right which can be assigned to a third party. For three years in a row, the Mexican unionists, as well as FIAN and Germanwatch, brought the difficulties in Mexico to the attention of the convened owners of the company and the business press, and requested the chairmen of the board to accept accountability. The campaign brought the case successfully into the media. Leading German and Mexican Newspapers (such as Frankfurter Rundschau, La Jornada) reported regularly on the case. Also, public TV stations such as WDR and ARTE featured the case.

Finally, on January 17, 2005, the long-lasting conflict between the labour union of the Euzkadi tire plant and Continental was settled in the presence of the Mexican president, Vicente Fox. After three years of strike, the workers achieved their most important objectives: the reopening of the Euzkadi plant and the maintenance of their jobs. Together with Lanti Systems, the labour union formed a joint company. The workers received, besides compensation payments already offered by Continental, the ownership of 50 % of the plant. Its value is estimated at about 80 Mio US-Dollar. In this way, Continental paid a major part of the outstanding salaries to the workers. Furthermore, the Mexican Government committed itself to assist financially in the resumption of production. The reopening of the plant was celebrated on February 25, 2005. On January 25, 2006, the successful campaign received the Public Eye Positive Award 2006 in Davos, Switzerland.

## Human Rights obligations of Mexico

Mexico is a state party to the International Covenant on Economic, Social and Cultural Rights which contains in article 6 the right to work, in article 7 the right to just and equitable working conditions, in article 8 the right to freedom of association and the right to strike and in article 9 the right to social security and in article 11 the adequate standard of living. Continental Tire abused these economic rights in the context of Euzkadi. This triggered the protect-bound obligations of the Mexican state under the Covenant. Moreover, Mexico has strong commitments to core labour standards in its constitution and basic legislation. Mexico has ratified ILO Convention No. 87, on trade union rights. The legal provision to make the closing down of factories subject to approval by the state can be seen as an attempt to protect the mentioned rights against abuse in the case of shut-downs. Ignoring this legal provision can be seen as an attempt by Continental Tires to ignore the Mexican state's protective role under the Covenant and the Mexican constitution.

## Extraterritorial Human Rights Analysis

Both Germany and Mexico are state parties under the said Covenant. Germany therefore has the obligation under article 2.1 of the Covenant to take measures (1) individually within its control and (2) in cooperation with Mexico to protect the mentioned economic rights under the Covenant. Mexican courts had repeatedly declared the activities of this German TNC illegal. After a certain point, Continental seemed to try to unreasonably prolong the court procedures in order to exhaust the workers' resistance. In this situation, Germany can be seen under an obligation to take measures to protect the Mexican workers' human rights individually and in cooperation with Mexico.

## Performance of the German government concerning its extraterritorial obligations

The Euzkadi campaign requested politicians in Berlin to approach Continental for its behaviour in the Euzkadi case. Germanwatch and FIAN urged the Mexican authorities to enforce Mexican law against this German TNC. The NGOs argued the case with the Mexican parliament and judiciary and with the German Government and with members of parliament in Berlin. Mexican unionists visited Germany three times to present their case to the company and to publicly bring forward their arguments. Germanwatch and FIAN organized meetings with the top management of the group and also with various German and European politicians. These dialogues helped to soften previously entrenched positions. In 2002, Germanwatch along with the Mexican labour union filed a complaint to the German OECD Contact Point against the violation of the OECD Guidelines. The Mexican unionists repeated the submission at their National Contact Point.

The German advocacy network used the public attention in Germany to question the German Government and German Parliament about their co-responsibility in this case, which is one of many in view of the ongoing globalisation process. The network argued that in the Euzkadi-Continental case, three international instruments had been violated, which are valid not only for Mexico but also for Germany: First, the International Covenant on Economic, Social and Cultural Rights. Second, the protective provisions on human rights in the general agreement between the European Union and Mexico (to the effect that all commercial and investment measures of private actors with their main seat in the EU must not abuse any kind of economic and social human

rights in Mexico). Third, the OECD guidelines for multinational enterprises. German authorities conducted detailed and useful procedures under these guidelines. This included a round table at the Contact Point with representatives of the labour union, Continental Tire, and the Mexican and German authorities and observers from German civil society. The German Contact Point at the Bundesministerium für Wirtschaft und Arbeit, however, did not come up with a recommendation to Continental Tires.

## 5 India: Child Labour for Bayer

Cotton is a major commercial crop in India. It occupies about 9 million hectares, with about 40 % of this land covered by hybrid seeds. India accounts for 21 percent of world's total cotton area. Andhra Pradesh alone accounts for about 65 % of the seed production in India. The production and marketing of hybrid seeds are carried out by both public and private agencies, such as Syngenta, Hindustan Lever, Advanta, and Proagro (owned by Bayer). The role of TNCs in the cottonseed business has increased due to various trade deregulation policies.

Social scientists did a survey in 2001/2002 (and again in 2003) on the working conditions of children in 174 cottonseed farms in 38 villages in the Kurnool, Mahaboobnagar, Rangareddy and West Godavari districts of Andhra Pradesh. Out of 174 farms surveyed, 130 produce seed for various local companies and 44 for transnational seed companies. The total number of children working on farms producing seed for Proagro (Bayer) was 1650 (in 2003/2004). In Andhra Pradesh, children in the age group of 6-14 years constitute about 88 % of the total labour force. Girls account for 78 % of the total child labour population. The social background of these working children indicates that most of them (87 %) were tribal people, dalits and "low caste" people. Marginal farmers and poor agricultural labouring families account for 65 % of the total families.

The children are mainly employed for carrying out cross-pollination activities. Each individual flower has to be emasculated and pollinated by hand. The Hybrid cottonseed production is a highly labour and capital-intensive activity. It requires ten times more labour and four and half times more capital than producing cotton. Children are also employed for other activities such as sowing, inter-cultivation and harvesting. The involvement of an adult labourer is mainly confined to activities like ploughing, sowing and application of fertilizers and pesticides. Seed producers extend loans to parents of children at a very crucial time of summer when work is not available in the village and when they are most likely to face financial problems. Parents feel pressured to send their daughters to work in the cottonseed fields, in order to respect the agreement settled earlier in the season. Though the initial agreement between the farmer and parent of the child usually is for only one crop, it was observed that in most of the cases the agreements were extended for later crop seasons through additional loans.

The desired profit margin of the subcontracting trans-nationals exerts pressure on the wages which seed farmers pay to workers. On the average, children were paid about 30 % less than the adult female and 55 % less than the adult wage rate in the market. Children work for long hours around 9-10 hours per day and 10 to 13 hours in peak season. After returning from the field they are also made to do some work at the employer's house.

In the case of Karnataka, the wage rates are fixed for the whole season at the time of the signing of the agreement. During 2003-04, the daily wage rates paid in cottonseed farms varied between Rs 17 to Rs 25. Except in the case of young children (below 10

years), who are paid Rs 2 to Rs 5 less, the wage rates are the same for everyone, irrespective of their age and gender. No payment is made for non-working days and holidays are not given.

The use of pesticides is very high in commercial cotton cultivation (accounting for nearly 55 % of total pesticide consumption in India). Children working in the cottonseed fields were directly exposed to poisonous pesticides for prolonged periods. In cottonseed cultivation, work is carried out even during the days when pesticides are sprayed in the fields. Hence, compared to workers in ordinary cotton fields, children working in cottonseed fields are more directly exposed to pesticides for long hours. In October 2004, child rights groups reported the death of 11 children in the Kurnoor district employed in cottonseed production due to the exposure to dangerous pesticides.

### Human Rights obligations of India

Hunger and malnutrition continue at a high level in India, in spite of surplus production in food grains. About 40 % of children under the age of 5 in Andhra Pradesh are malnourished.

The reasons are that the surplus food does not grow in the fields of the hungry – most of whom are landless agricultural workers – nor do these families have the purchasing power to buy the surplus food. Under the International Covenant on Economic, Social and Cultural Rights article 2.1, India is duty-bound to use the maximum of available resources to realise the human right to food. India violates this Covenant, as it denies – in the face of sufficient resources – hungry people's access to food. The lack of proper agrarian reform policies (which would include the “untouchable” dalit population), the absence of effective protection of tribal land rights, the absence of minimum income systems and the malfunctioning public distribution systems must, therefore, be seen as violations of the human right to food. This has been harshly criticised by the Indian Supreme Court in recent years.

In order to survive periods of joblessness or draught, the landless families must take up loans with farmers, sometimes giving their children into debt bondage, as is the case with most children in the case mentioned. Moreover, the families are forced by their dire needs to go along with unacceptable working conditions.

India has legislation against child labour and is duty-bound to liberate the children from such working conditions. It should be clear from the human rights analysis so far, that action against child labour just addresses the tip of an iceberg of continuous violations of the affected families' human right to an adequate standard of living, including food. In the respective cases at hand the families need guaranteed work and /or income, for example, under the new National Rural Employment Guarantee Act and a basic income scheme.

For the children in question, India violates article 13 (right to education) of the said Covenant, in particular 13.2 (a) “Primary education shall be compulsory ...”. Moreover, it violates the respective standards in the 86th Amendment (2002) to the Indian Constitution.

### Extraterritorial Human Rights Analysis

Bayer – through its affiliate Proagro – profits from these human rights violation: Subcontracting the cottonseed production by way of seed organisers, as the links between the company and the farmer, favours a semi-feudal system with a tendency to low cottonseed prices for the farmer – and, therefore, an incentive to employ bonded-girl child

labour. The company provides the foundation seed, and the seed organiser collects the produce. The Company then conducts three quality tests and then pays the organiser. It takes 3-4 months for the farmers to get the payment.

When German corporations do business abroad, they must be aware of the human rights environment in which they operate and of the implications of their activities for the persons affected. They have to make sure that they do not cooperate with partners employing practices contrary to human rights, such as child labour. They also must make sure that their own policies do not lead to the destruction of human rights standards of affected persons. So far, the Indian authorities have not taken effective measures to protect these children's rights. Germany – due to its obligations under the Covenant – has to take measures individually and in cooperation with the Indian government against those practices of Bayer which tolerate or even promote child labour. This may include the possibility of legal action taken against Bayer under German law. It may be recalled that European states have already exercised their obligation to protect children's rights in Asian or African countries by extraterritorially expanding their domestic legislation prosecuting sex-tourists in their home countries.<sup>23</sup> A similar measure is warranted in the current situation: Even though Bayer was not directly hiring child labour, it went along with this practice in the contract labour system it had established.

### **Performance of the German government concerning its extraterritorial obligations**

The German government so far has failed to take serious action in the case<sup>24</sup>: Neither did it have bilateral talks with Indian authorities on this issue, nor did it raise the issue on the EU level, trying to protect children indirectly employed by other Europe-based seed transnationals. The government did, however, facilitate an exchange of views between the ILO and Bayer on the measures taken by both sides to address the problem.

When German NGOs lodged a complaint against Bayer, under the procedures of the OECD Guidelines on Multinational Enterprises, members of ministries participated in talks. The government acknowledges that the employment of children is contrary to human rights. At the same time, it underlines that the OECD guidelines are voluntary and not binding and that the exercise of “social responsibility” of TNCs is up to them.

### **Recommendations to the German government**

The German government should take a clear position on Bayer's responsibilities under human rights and should take measures to make Bayer discontinue the current practice of subcontracting farmers practicing child labour. These measures might include the extraterritorial expansion of the respective German legislation – and the application of such legislation to Bayer. Moreover, the German government should be clear about the fact that the human rights violations in the case described go beyond the issue of child labour. The government should be aware of the fact that Bayer and its subcontractors profit from violations by India (and the international community of states) of the girls' families' human rights to food, to work, to social security. Most of the affected families are exploited on the basis of their destitution, which in turn results from the mentioned human rights violations. Any remedial measure should therefore include the rehabilitation of these families' rights to food, work, social security and education.

## Home state regulation of multinational companies

Trans-national corporations increasingly acknowledge “corporate responsibility”. This, however, is far from sufficient under human rights law, which requires states to protect economic, social and cultural rights. This implies that TNCs (as any other third party) have to submit to political and legal measures taken by states individually and in cooperation among states intended to protect human rights. States, on the other hand, are obliged to take such measures and to enact and enforce regulations protecting human rights. According to the report of the UN Special Rapporteur on the Right to Food “The obligation to protect requires States to ensure that their own citizens and companies, as well as other third parties subject to their jurisdiction, including transnational corporations, do not violate the right to food in other countries.<sup>25</sup>”

According to the legal expert Surya Deva, there are four major arguments why it makes sense to strengthen accountability of transnational or multinational corporations (MNCs) in their home country to effectively address their responsibility for human rights violations in home countries:

“Firstly, the bargaining power of host states – a majority of which are developing and in competition with each other for the investment from MNCs – is significantly less than that of home states throughout the entry and operation of MNCs. (...) Secondly, attaining effective jurisdiction over corporations based overseas is fundamental to the success of any model of extraterritorial regulation. It is easier to reach a subsidiary through the parent rather than vice versa, as it is the parent corporation which exercises control over its subsidiaries and/or affiliate sister concerns. (...) Thirdly, given that a developed legal system and the availability of resources are prerequisite for the operation of extraterritorial regulation, home states, which generally possess these preconditions, are better placed to implement the extraterritorial model. (...) Fourthly, chances of conflict arising out of extraterritoriality are greatly reduced if a home state model is adopted, because the economic, social and legal structures of home states provide that human rights standards are defined at a higher level in these states than they are in host states.<sup>26</sup>”

So far, there has been no parliamentary initiative in Germany to adopt legislation which would impose extraterritorial liability on TNCs for the breach of human rights standards. In the absence of such legislation, the OECD Guidelines for Multinational Enterprises “are potentially one of the most promising instruments available for holding companies accountable for human rights abuses. While they are voluntary in nature, their advantages are the governmental implementation mechanisms, the complaint procedure and their world-wide applicability for all companies from adhering countries.<sup>27</sup>” The instrument’s distinctive implementation mechanisms include in some countries the operation of National Contact Points (NCP), which are government offices in both home and host states, charged with promoting the Guidelines and handling complaints presented against TNCs. However, the OECD Guidelines are not binding on the activities of TNCs. The case of Continental in Mexico has been presented to the German NCP, which, unfortunately, has not proven to be very effective (see case description). The responsible German authorities should, therefore, consider inviting legal expertise on the possibilities of (and obstacles to) legal action in such situations – and on the ways and means to overcome such obstacles including the possibility of

legislative initiatives. Such an initiative would benefit from examples how other countries allow for legal action against corporations who abuse human rights abroad. What should be kept in mind though is that any regulatory system which is exclusively dependent on state-based regulation (home and host state), will leave loopholes and should, therefore, be complemented by an international regulatory mechanism. Such a mechanism could be developed on the basis of the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, adopted by the UN Sub-Commission on Human Rights in 2003.

Holding companies accountable for human rights violations is not the only field where regulation of companies is relevant. A human-rights-based approach to export and investment promotion is equally important. Special attention has to be given to the question in which circumstances the promotion of exports and foreign investment of German companies abroad is likely to contribute to human rights violations<sup>28</sup>. This question has received special attention in the debate on binding environmental and human rights guidelines for export credit agencies (ECAs), which provide export credit and investment insurance to companies who want to do business abroad<sup>29</sup>.

## Financing whose development?

In his report to the UN Commission for Human Rights in 2004, the UN Special Rapporteur on the Right to Housing reported that “Development-induced displacement has seen an even greater intensification in recent years as a result of processes of economic globalisation. In effect, economic liberalisation policies and structural adjustment programmes have made the dilemma of development-induced displacement all the more urgent.<sup>30</sup>” These policies and programmes have, to a large extent, been influenced by policy advice and funding from multilateral development banks (MDBs).

### 6 India: World Bank support to the coal mining sector – the case of Parej East

Large open pit coal mining projects run by the para-owned Coal India Limited (CIL) in the Karanpura Valley in India might ultimately destroy some 1.100 sq km of land and forests, including 200 villages, destroying the livelihoods of some 200.000 people – many of them indigenous people (Adivasis). CIL operates 90 % of the coal mines in India. Parej East is one of 24 CIL-mines displacing at least 10.000 people. It has benefited from an IBRD loan of 530 Mio USD (1997) for promoting the Indian coal sector – as well as from an IDA-loan of 63 Mio USD in the form of an “Environmental and Social Mitigation Project” (1996). In July 2000, the second 50 % of the IBRD promotional loan was cancelled when bank management had criticized that CIL was not meeting cross-conditionality.

The intention of the “Coal Sector Environmental and Social Mitigation Project” was to enhance India's capacity to deal more effectively with the environmental and social issues of coal mining operations. One would expect that this project would contribute to an improvement in the human rights situation in communities affected by coal mining. However, in the case of the Parej East mine it has been documented that this was utterly insufficient. In many cases people were forced out of their homes by violence or by other more subtle methods of persuasion (blind signatures by illiterate inhabitants, false promises of economic wealth by monetary transfers and especially by well-paid jobs in the mine). Once resettled, they faced a highly unsatisfactory situation at the resettlement sites where especially potable water and access to school for the children are extremely rare. Social mitigation and rehabilitation plans are not only supposed to grant social justice but also to improve living standards. However, they are deficient in many regards. First, those social projects do not cover all of the affected persons nor are they established in accordance with the affected peoples' wishes and needs. Second, compensation levels and rehabilitation measures according to the rehabilitation plans are often insufficient. Finally, in spite of binding compensation and rehabilitation standards, CIL does not always abide by them when dealing with project affected people.

#### Effectiveness of the World Bank's monitoring and complaint procedures

In 2001, the victims of the Parej East mine – with the support of the local NGO Chotanagpur Adivasi Sewa Samiti (CASS) filed a complaint with the World Bank Inspection Panel. The Inspection Panel found the following additional World Bank irregularities in the mitigation project: No proper resettlement plan, inadequate compensation for

housing, no participation in choice of resettlement site, inadequate housing plots, lacking income restoration. In fact, the Inspection Panel confirmed most claims of the victims in its report to the World Bank Board. However, the management action plan failed to address important issues like replacement land: out of 1.172 displaced persons in Parej East, no one has received replacement land for agriculture as required as “preferable” by the World Bank operational directives. On July 22, 2003, the World Bank Board approved the Panel’s investigation report and the Management Report and Recommendations. The project had already been closed in June 2002, but the Board agreed that the Bank would continue to supervise the project as long as necessary<sup>31</sup>. The Board asked management to periodically brief the Inspection Panel on progress and requested that management provide a progress report to the Board within one year. Progress reports have been submitted to the Board in February 2004 and April 2005. The progress report of April 2005<sup>32</sup> and reports by CASS reveal that major issues have still not been addressed. For example, “management reported that progress had been slow in the attempts to expedite the recognition of customary land tenure to allow compensation”, or that “the subsistence allowance the Parej East 1994 Resettlement Action Plan provided (for those who did not opt or qualify for jobs) has yet to be paid<sup>33</sup>”.

### Human Rights obligations of India

During the process of construction and enlargement of the Parej East mine, indigenous peoples living in Hazaribagh, Jharkhand, had and continue to suffer severe hardship caused by involuntary resettlement and inadequate rehabilitation. The Parej East mine is only one example of similar cases in the same region. A number of rights under the International Covenant of Economic, Social and Cultural Rights to which India is a state party, were violated:

- The adivasis’ right to access land is violated: people are evicted from their land without access to adequate replacement land. Others, whose villages are not displaced, find their ancestors’ land and their natural resources degraded or destroyed and are thus left without any means for subsistence.
- Their right to feed themselves is violated because the state failed to protect (or properly compensate) the affected persons against the destruction of their former resources for subsistence (e.g. agriculture, natural forest products). Moreover very few realistic alternatives (of paid employment) are available for them in order to sustain themselves and their families.
- Their right to water is violated: open-cast mining leads not only to the destruction of the forest land and the villages, but also to the destruction of water sources and wells. The water conditions in the remaining villages, and also on the resettlement sites, are bad: there are not enough water sources. Others are polluted and do not provide drinking water.
- Their right to housing was violated when the state did not protect the adivasis’ houses from being torn down without provision of resettlement sites.
- Their cultural rights are violated when the state failed to protect the adivasis’ sacred places against being destroyed by CIL.

## Extraterritorial human rights analysis

The Inspection Panel found several instances of non-compliance with Bank-internal policies, especially the policy on Involuntary Resettlement – Operational Directive (OD) 4.30. These instances of non-compliance not only touch on internal policies but also on human rights standards as listed above. The Panel found that “this non-compliance was especially serious during the preparation and early implementation phases of the project<sup>34</sup>”. This means that the Board of Executive Directors approved the project which in its design did not comply with human rights standards. Therefore the German government in the context of the World Bank failed to respect the rights of the project affected persons.

## Performance of the German government concerning its extraterritorial obligations

The German government and its representatives in the World Bank have received regular information on the human rights situation in Parej East from management, the Inspection Panel and NGOs. The Ministry of Development Cooperation – in its communication with FIAN and others on this case – has shown some concern. It is not known, however, whether the German government has taken any initiative in the World Bank regarding this case which would match its obligations.

### Recommendations to the German government

The German government should not support projects which lead to a violation of human rights. It should develop guidelines which spell out its human rights obligations in multilateral development banks (MDBs) as well as reporting procedures to parliament. During future reviews of the accountability mechanisms of MDBs, the German government should take the initiative to strengthen human rights principles.

## Germany's human rights obligations in multilateral development banks

When human rights are violated in the context of a project financed by a multilateral development bank or as a result of policies promoted by this institution, all actors involved are jointly responsible. The major responsibility lies with the victim's state, which fails to respect or protect human rights. However, the respective multilateral development bank (MDB) and the German government, as one of the most influential member states, should from the outset avoid any actions that violate human rights or that could have a negative impact on the full realisation of human rights, limiting the policy space of the partner state. As was argued in chapter 2, limited influence and a lack of effective control cannot be used as an argument to avoid accountability.

Besides respecting human rights, the MDB and the German government should ensure that the partner state and private companies respect human rights in the implementation of common projects. MDBs are very much involved in influencing the ability of project-affected people in claiming their economic, social and cultural rights. In several cases, the German government has tried to influence the human rights situation in specific projects by insisting that MDB-supported projects respect the internal guide-

lines of the MDB on social and economic standards. Also, it has supported independent monitoring mechanisms. Still, many projects have major implications for the human rights of project-affected persons. This raises at least three sets of questions for German policy-making in the MDBs: first, what kind of development projects and concepts are MDBs promoting? Are such development projects compatible with a human-rights approach to development? Second, is it in line with Germany's extraterritorial obligations to support a government or a private company which has a record of being unable or unwilling to respect human rights? Third, how can victims of human rights violations claim their rights if the national judicial system is not working in the interest of the victims? These issues are dealt with in more detail elsewhere<sup>35</sup>.

In order to implement its extraterritorial obligations in the context of MDBs, the German government should develop guidelines which spell out Germany's human rights obligations in the MDBs. Little is known about the voting of German Executive Directors on individual projects or policies on the board of MDBs. Transparency is a crucial prerequisite to making the German government more accountable. The German Executive Directors in the MDBs make policy decisions with far-reaching implications for human rights world-wide. The budget of all MDBs combined is estimated to be ten times as much as the budget of the German Federal Ministry for Economic Cooperation and Development (BMZ), yet staff capacity to advise the Executive Directors on the compliance of their decisions with Germany's extraterritorial obligations is very limited. Human rights mainstreaming and human rights capacity-building should, therefore, go hand in hand.

The case of the Parej East coal mine in India shows that monitoring and complaint procedures available to the project-affected people are not always effective. One major reason is that the complainants are not seen as rights-holders in the process. The World Bank has only recently recognised that human rights are relevant to its work. It is, however, still far from understanding that the World Bank, as an institution, is bound by international human rights law (be it directly or through its members) and that it has to assume responsibility for human rights violations in the context of projects funded by the World Bank or of policies promoted by it. The German government should, therefore, take a two-track approach to comply with its obligations under the International Covenant on Economic, Social and Cultural Rights and other international human rights treaties: On the one hand, it should ensure that its own decisions in multilateral development banks do respect, protect and contribute to the fulfilment of human rights; on the other hand, it should actively promote the international human rights accountability of multilateral development banks, for example by promoting a reporting procedure for MDBs based on article 18 of the International Covenant on Economic, Social and Cultural Rights.

## Conclusion

Many human rights problems cannot be fully understood without asking the question of how international economic and political power is shaping national politics. The cases in this publication indicate that activities of a state such as Germany have substantial influence on the realisation of human rights world-wide. The International Covenant on Economic, Social and Cultural Rights obliges the states parties to cooperate internationally and to provide assistance so that economic, social and cultural rights will be realised. This obligation should be understood as the obligation to respect human rights of individuals and groups no matter where they live. Moreover, states have to protect economic, social and cultural rights, and to contribute to the fulfilment of these rights also outside their borders. This understanding has been underscored in several general comments by the UN Committee on Economic, Social and Cultural Rights and has recently been confirmed by the UN Special Rapporteur on the Right to Food.

Extraterritorial state obligations towards a person living outside its borders are not meant to replace the obligations of the state where this person resides, but complement them. The case studies in this publication have started with the analysis of the national obligations before assessing the role of the German state and other actors such as German companies and international financial institutions (IFIs). The case studies show the implications that acts and omissions of a state like Germany can have for economic, social and cultural rights in other countries. Trade and investment agreements, as well as conditions placed on lending from IFIs, limit the policy space of states. In a case where a conflict between trade and investment agreements and human rights becomes apparent, or when a state is approaching the German government for support in order to regain its ability to protect and fulfil rights, Germany is under the obligation to cooperate with this state. Where the state itself is unwilling to respect, protect and fulfil rights, Germany should actively seek dialogue as part of its extraterritorial obligation to protect economic, social and cultural rights. When acting in part with international organisations, states parties to the Covenant must ensure that their actions and decisions as part of these organisations take due account of human rights. So far, accountability for actions taken in international financial institutions is extremely limited. A major concern in this regard is that votes taken on the board of Executive Directors of IFIs are generally confidential. The same lack of transparency can be observed in relation to negotiations of trade agreements. In these fora, the lack of transparency and accountability is reinforced by the fact that Germany is acting as part of the European Union.

So far, the German government has taken the approach that economic, social and cultural rights are important in its cooperation with developing countries. In its development policy action plan on human rights 2004-2007, the Ministry for Economic Cooperation and Development (BMZ) has emphasised that

“Human rights represent a global vision, which finds its normative expression in international conventions and covenants. As a result, human rights are no longer regarded (solely) as an internal matter for individual states but as a touchstone of the commonly held values of the international community, binding on all concerned. This means that, in development policy, all the partners involved largely share the same standards and can use this as a springboard for a dialogue between equals.<sup>36</sup>”

The International Covenant on Economic, Social and Cultural Rights obliges the states parties to cooperate internationally and to provide assistance so that economic, social and cultural rights will be realised. This obligation should be understood as the obligation to respect human rights of individuals and groups no matter where they live. Moreover, states have to protect economic, social and cultural rights, and to contribute to the fulfilment of these rights also outside their borders.

The case studies show the implications that acts and omissions of a state like Germany can have for economic, social and cultural rights in other countries.

The German government has taken the approach that economic, social and cultural rights are important in its cooperation with developing countries.

The German government has emphasised that coherence between all policy fields is necessary to address human rights properly.

While the action plan describes human rights as binding values, it does not reflect that Germany has obligations under international law to respect, protect and fulfil human rights. In its last report on the implementation of human rights in German policies, the German government has emphasised that coherence between all policy fields is necessary to address human rights properly. It concludes that human rights mainstreaming – in the sense of achieving coherence between these policy fields and of introducing a human rights approach to all these policy fields – is the guiding theme and a constant task of the human rights policy of the German government<sup>37</sup>.

### Recommendations to the German government

Extraterritorial obligations emanating from international human rights represent a much needed instrument for designing and implementing policies which provide a response to the challenges of globalisation. Based on the discussion of the case studies, the following recommendations to the German government can be made:

- The German government should take a proactive approach to extraterritorial obligations. It should promote extraterritorial obligations through mainstreaming and institutionalising these obligations in its executive branch, including the effort to increase in capacity to analyse the implications of German policies on human rights outside its territory. This should explicitly include trade and investment policies as well as decisions taken in multilateral development banks.
- The German government should instruct and enable institutions and individuals who represent the German state in other countries to take Germany's extraterritorial obligations into account, for example when negotiating and interpreting bilateral investment agreements.
- The German government should invite legal expertise on the possibilities of (and obstacles to) legal action in cases where German companies are involved in human rights abuses in other countries. Such expertise should present recommendations on the ways and means to overcome such obstacles including the possibility of legislative initiatives.

## Notes

- 1 Fons Coomans in Fons Coomans and Menno T. Kamminga (eds) "Extraterritorial application of human rights treaties", Antwerp/Oxford, 2004, p.186
- 2 The extraterritorial application of national laws might be sensible in some instances for a state to comply with extraterritorial human rights obligations under international law. This however needs a very careful approach.
- 3 See for example contributions in Fons Coomans and Menno T. Kamminga (eds) "Extraterritorial application of human rights treaties", Antwerp/ Oxford, 2004; Dirk Lorenz "Der territoriale Anwendungsbereich der Grund- und Menschenrechte. Zugleich ein Beitrag zum Individualschutz in bewaffneten Konflikten", Berlin, 2005; Bernhard Schäfer "Zum Verhältnis Menschenrechte und humanitäres Völkerrecht. Zugleich ein Beitrag zur extraterritorialen Geltung von Menschenrechtsverträgen", Potsdam, 2006
- 4 For an overview on international jurisprudence on the extraterritorial application of human rights law see John Cerone "Out of Bounds? Considering the Reach of International Human Rights Law", Center for Human Rights and Global Justice Working Paper Number 5, 2006
- 5 Preamble of the International Covenant on economic, social and cultural Rights
- 6 Adapted from UN General Comment 12, §15, of the Committee on ESCR <http://www1.umn.edu/humanrts/gencomm/escrcom12.htm>
- 7 UN Committee on Economic, Social and Cultural Rights „General Comment 12. The Right to adequate Food”, 1999
- 8 UN Document E/CN.4/2005/47
- 9 For an overview on extraterritorial obligations as identified by the UN Committee in its General Comments, see annex of Rolf Künemann "The extraterritorial scope of the International Covenant on Economic, Social and Cultural Rights", Bonn/Herne/Heidelberg/Stuttgart, 2003
- 10 Rolf Künemann in Fons Coomans and Menno T. Kamminga (eds) "Extraterritorial application of human rights treaties", Antwerp/Oxford, 2004, p.222ff
- 11 The extraterritorial obligation to contribute to the fulfilment of economic, social and cultural rights implies that states have to ensure that they use the maximum of available resources to guarantee these rights where the national state is unable to do so. So far, however, there are many open questions on how to operationalise this obligation. For a discussion see Rolf Künemann "Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights", in Fons Coomans and Menno T. Kamminga (eds) "Extraterritorial application of human rights treaties", Antwerp/Oxford, 2004, p. 224ff and Virginia Mantouvalou "Extending Judicial Control in International Law: Human Rights Treaties and Extraterritoriality" in International Journal of Human Rights; Vol. 9, No.2, June 2005, p. 157ff
- 12 UN Document E/C.12/GC/18
- 13 "140. Finalmente, en lo que respecta al tercer argumento estatal, la Corte no cruenta con el mencionado tratado firmado entre Alemania y Paraguay, pero según lo dicho por el propio Estado, el referido tratado permite la expropiación o nacionalización de las inversiones de capital de una de las partes contratantes "por causa de utilidad o interés público", lo cual podría justificar la devolución de tierras a los indígenas. Asimismo, la Corte considera que la aplicación de acuerdos comerciales bilaterales no justifica el incumplimiento de las obligaciones estatales emanadas de la Convención Americana; por el contrario, su aplicación debe ser siempre compatible con la Convención Americana, tratado multilateral de derechos humanos dotado de especificidad propia, que genera derechos a favor de individuos y no depende enteramente de la reciprocidad de los Estados." Corte Interamericana de Derechos Humanos "Caso comunidad indígena Sawhoyamaya vs. Paraguay. Sentencia de 29 de Marzo de 2006"
- 14 [http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l\\_031/l\\_03120020201en00010024.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_031/l_03120020201en00010024.pdf)  
Note in particular principles (8), (24), articles 12.1 and 14(3): "The community has chosen a high level of health protection as appropriate in the development of food law, which it applies in a non-discriminatory way whether food or feed is traded on the internal market or internationally. (8)"
- 15 "As leaders we have a duty therefore to all the world's people, especially the most vulnerable and, in particular, the children of the world, to whom the future belongs (§ I.2); We resolve, to have, by the year 2015, halted, and begin to reverse, the spread of HIV/AIDS, the scourge of malaria and other major diseases that afflict humanity (§ III.19); We encourage the pharma-

- ceutical industry to make essential drugs more widely available and affordable by all who need them in developing countries (§ III.20); We resolve Africa build up its capacity to tackle the spread of the HIV/AIDS pandemic and other infectious diseases (§VII.28).”
- 16 See also UN General Assembly Resolution S-26/2, Declaration of Commitment on HIV/AIDS, adopted 27 June 2001
  - 17 Such as Res. 2005/24 on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, and The Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, res. 2003/16, adopted by the UN Sub-Commission on the Promotion and Protection of Human Rights, § 12 (duty to respect and to contribute to the realisation of economic, social and cultural rights, such as the highest attainable standard of physical and mental health.
  - 18 See in particular General Comment no. 14 (2000) on the right to health, paras. 39, 42, 45.
  - 19 See for example Armin Paasch “Der Handel mit dem Hunger. Agrarhandel und das Menschenrecht auf Nahrung“, 2006, p.16ff
  - 20 The UN Committee on economic, social and cultural Rights has addressed this issue in its Concluding Observations on the state report of Canada in Mai 2006 “68. The Committee reminds the State party that, although trade liberalization has a wealth-generating potential, such liberalization does not necessarily create and lead to a favourable environment for the realization of economic, social and cultural rights. In this regard, the Committee recommends that the State party consider ways in which the primacy of Covenant rights may be ensured in trade and investment agreements, and in particular in the adjudication of investor-State disputes under chapter XI of the North American Free Trade Agreement (NAFTA).”
  - 21 Caroline Dommen “The WTO, International Trade, and Human Rights” in Michael Windfuhr (ed) “Beyond the Nation State. Human Rights in Times of Globalization”, Uppsala, 2005, p. 57f
  - 22 For a more detailed discussion of the case see Cornelia Heydenreich and Martin Wolpold-Bosien “Eine andere Conti ist möglich. Die erfolgreiche Kampagne zur Verteidigung mexikanischer Arbeitsrechte gegen den deutschen Reifenkonzern Continental AG”, Köln/Berlin, 2006
  - 23 For example in the Chemouil Case in France 10/2000, and the Kilpatrick Case in the U.K. 2/2006.
  - 24 This assessment and the subsequent details are based on the German government’s reply to a parliamentary “Kleine Anfrage”, 30.03.2006.
  - 25 UN Document E/CN.4/2005/47
  - 26 Surya Deva “Acting extraterritorially to tame multinational corporations for human rights violations: who should ‘bell the cat’?”, Melbourne Journal of International Law, Vol. 5, 2004, p. 50f
  - 27 Cornelia Heydenreich “The OECD Guidelines for Multinational Enterprises” in Windfuhr (ed), 2005, p.253
  - 28 For a discussion of the German policy on export and investment promotion see Heike Drillisch and Nikola Sekler “Bilaterale Investitionsabkommen und Investitionsgarantien. Konzept, Kritik und Perspektiven”, WEED, 2004
  - 29 For a discussion of the legal issues involved see Özgür Can and Sara L. Seck “The legal obligations with respect to human rights and export credit agencies”, ECA-Watch, Halifax Initiative Coalition, ESCR-Net, 2006
  - 30 UN Document E/CN.4/2004/48, para. 30
  - 31 The Inspection Panel „Annual Report. July 1, 2004, to June 30, 2005“, p. 51
  - 32 Management report to Board on outstanding issues April 2005, <http://siteresources.world-bank.org/EXTINSPECTIONPANEL/Resources/statusonout-standingissues04052005.pdf>
  - 33 The Inspection Panel „Annual Report. July 1, 2004, to June 30, 2005“, p. 52
  - 34 The Inspection Panel „Annual Report. July 1, 2004, to June 30, 2005“, p. 49
  - 35 Brot für die Welt / EED / FIAN “Germany’s extraterritorial human rights obligations in multi-lateral development banks. Introduction and case study of three projects in Chad, Ghana, and Pakistan”, Stuttgart/Bonn/Köln/Heidelberg, 2006
  - 36 Federal Ministry for Economic Cooperation and Development, “BMZ Concepts. Development policy action plan on human rights 2004–2007. Every person has a right to development. German development policy approach to respecting, protecting and fulfilling political, civil, economic, social and cultural human rights”, 2004, p.7
  - 37 Auswärtiges Amt „Siebter Bericht der Bundesregierung über ihre Menschenrechtspolitik in den auswärtigen Beziehungen und in anderen Politikbereichen“, 2005, p. 15



## Globalising economic and social human rights by strengthening extraterritorial state obligations

Extraterritorial obligations are human rights obligations of states towards people living outside their territories. Governments have so far largely ignored these obligations, although international treaties like the International Covenant on Economic, Social and Cultural Rights provide the legal basis. There is a need to strengthen extraterritorial obligations by demonstrating how policies of one state have negative effects on the enjoyment of human rights in other countries. This will contribute to a better understanding of the nature of extraterritorial obligations, and facilitate the universal implementation of human rights.

In 2001, Bread for the World, EED, FIAN Germany and FIAN International presented a first report on Germany's extraterritorial obligations related to economic, social and cultural rights. In the following years, the organisations have collaborated with a wide range of civil society actors as well as legal experts, to document more cases. Some of these cases are presented in this report.

### Earlier publications

- Germany's extraterritorial human rights obligations in multilateral development banks. Introduction and case study of three projects in Chad, Ghana and Pakistan, 2006
- Seven case studies on the effects of German policies on human rights in the South, 2005
- Documentation in the form of a written report for the United Nations on the effect of German policies on social human rights in the South. Handout for partner organisations, 2004
- The extraterritorial scope of the International Covenant on Economic, Social and Cultural Rights. Background lecture, written by Rolf Künnemann, 2003
- Compliance of Germany with its international obligations under the International Covenant on Economic, Social and Cultural Rights. Special focus: the right to adequate food, written by Michael Windfuhr, 2001



#### Brot für die Welt

Reinhard Koppe / Michael Windfuhr  
P.O. Box 10 11 42  
D - 70010 Stuttgart  
Tel +49 -711 -2159 -380 / -743  
Fax +49 -711 -2159 -368  
r.koppe@brot-fuer-die-welt.de  
m.windfuhr@diakonie-human-rights.org  
[www.brot-fuer-die-welt.de](http://www.brot-fuer-die-welt.de)



#### FIAN – Deutschland. e.V.

Ute Hausmann  
Düppelstraße 9 - 11  
D - 50679 Köln  
Tel +49 -221 -70 200 72  
Fax +49 -221 -70 200 32  
u.hausmann@fian.de  
[www.fian.de](http://www.fian.de)

#### FIAN – International

Rolf Künnemann  
P.O. Box 10 22 43  
D - 69012 Heidelberg  
Tel +49 -6221 -653 00 -40  
Fax +49 -6221 -830 545  
kuennemann@fian.org  
[www.fian.org](http://www.fian.org)



#### Evangelischer Entwicklungsdienst e.V.

Nicole Podlinski  
Ulrich-von-Hassell-Straße 76  
D - 53123 Bonn  
Tel +49 -228 -8101 -2519  
Fax +49 -228 -8101 -160  
nicole.podlinski@eed.de  
[www.eed.de](http://www.eed.de)