Network Social Responsibility c/o Südwind Laudongasse 40, A- 1080 Vienna www.nesove.at

# Human Rights and Business Abroad

## Measures recommended to safeguard Human Rights effectively on activities of Austrian enterprises abroad

When enterprises from the "North" get active in the "global South", inevitably, since the terrible things that happened at "Rana Plaza", the question arises: Who is responsible? What is the responsibility of the enterprises involved in the violation of Human Rights?

Within the European Union human rights are safeguarded remarkable completely by the laws and execution rules assuring the workers' and the consumers' protection. That is not the case outside the EU, at least not by necessity. Cases of fire in textile production plants, harassing and even killing of activists of trade unions, the destruction of the existence of large groups of the population, health damages by the use of poisonous chemicals at the workplace, all these and others attest the violation of human rights as a danger, caused even by Austrian enterprises, whether directly or indirectly via their subsidiaries and their suppliers.

Helpless against inscrutable and complex structures within the enterprises and, moreover, also due to the lack of rights and adequate insurance, the persons concerned cannot oppose the actions they are victim to. As a rule, they are denied claims for compensation and restitution of their "goods".

Typical cases of violations of human rights by enterprises

We are stating five typical cases , where enterprises are involved in violations of human rights. We state these in our function as employees' representative and as an organization working in the field of developmental and social concerns. The following five forms of violation we will state take place in the responsibility of enterprises operating in the "global South". However, they are at present nearly impossible to prosecute. See Kaleck/Saage-Maaß: Corporate Accountability for Human Rights violations amounting to international crimes - The Status Quo and its Challenges:

1. The land acquired for the exploitation of its raw materials

European enterprises via their local subsidiaries or sub-contractors exploit these valuable goods in those areas such as coal and precious metals. Its population is being expelled by force although it has been living on that ground and from its resources for ancient times. The ways to achieve

displacement varies, be them with or without legally taking the people's property, refunding or not, monetary or other forms. In any case it is a fact that they are taken the foundation of their lives. Women are particularly concerned. As e.g. in Ghana their rights to possess ground are limited, they cannot make claims for compensation.

2. Harms to health by extractive and farming industries

European enterprises do harm to health by using pesticides. Some of them are not legalized, not even in Europe. Unfortunately, it is difficult in some cases, to prove the connection between the harm to health and the consequences become obvious only after years or even decades. Non-professional waste management of residual products from farming ruin the quality of the ground and thus the basis for living of its population. In the case of soil exploitation for oil whole areas of the country are regularly destroyed by leakages occurring. This renders them out-of-use for decades. Out-dated methods in mining ruin ground water by dirt, and the air by heavy metals and poisons. Examples are arsenic or mercury.

3. Criminalization and prosecution of social protest

In order to maintain a fruitful climate for investments it is often on the part of the local states themselves that suppress these movements and their organizations (trade union etc.). The enterprises themselves, too, directly act against individuals who make use of their right of demonstration and liberty of opinion, as part of their human rights. The European parent company refers to the juridical autonomy of its subsidiaries and the suppliers in countries of the "global south". Their obligation and responsibility as well as their duty to inform the public is negated in favor of the foundation on which their business rests in these countries of the "global south". The exemplary trials to legally settle the responsibility of the parent company for the subsidiary and supplier industries have been failing so far. Failure is not least due to influencing witnesses, to resist investigations on place, on the lack of possibilities in general to render responsible the parent company for its subsidiary.

4. Irresponsibility along the global value and supply chain

European Enterprises quite usually do not violate human rights themselves, but rather via their subsidiaries and suppliers in the "global south". Even if the subsidiary is by 100% owned by the parent company, it is from the juridical point of view an independent legal person. Still, further difficulty arises since the suppliers are economically independent legal persons. The extended chain of global suppliers is unknown or impenetrable for clarification. The profit of violations of human rights in parent companies and their subsidiaries and supplier-enterprises (violations of the law of working contracts etc.) goes to the enterprises without them being made responsible for it.

5. Investments in war and crises areas

The most striking form of violation of human rights is taking place in military regimes and in dictatorships. Enterprises take part in these violations by gaining profit from those states' power. One example is the suppression of every opposition that has a chance to succeed to realize salary increases. Furthermore, enterprises become part of violations when supplying those states with goods (warfare, chemicals, technical support, etc.) and thus, directly, do support those regimes. At last, we want to point out the cases of violation of human rights that are committed by providing information on those of the opposition who the regime is searching.

The question of the juridical point of view

Three questions come to the fore once going into the juridical responsibility of Austria concerning the activities of Austrian enterprises abroad, when regarding the safeguarding of human rights:
1. How can Austria-based enterprises be obliged to observe human rights violations, when these were caused by them directly or in the course of their subsidiaries or their suppliers business activities?
2. How can sensible sanctions effectively prevent violations of human rights also in general. That is, how can sanctions be a considerable risk for the management?
3. How can the victims of violations be granted sufficient access to Austrian Courts?

Final notes on Austria of the UN-commission for economic, social, and cultural rights.

The Network Social Responsibility has, concerning the extra-territorial obligations for observation of human rights in the economic, social, and cultural domain of Austria actively participated in the civil-society parallel report in August 2013 under the lead of FIAN. It did so in union with the DKA and ECA-Watch in Chapter 4 in concern of "Austria's Export and investment promotion and Corporate Social Responsiblity Policies“ (cf. FIAN Österreich, Austria’s Extraterritorial State Obligations on ESCR, Parallel Report, 2013, 45 S.)
The UN commission in November 2013 stated to be concerned about the absence of control on foreign activities of Austrian enterprises. It did so in its final comments on Austria, dated 29th of November 2013. It publicly asked Austria to assure the uncompromised compliance with all economic, social, and cultural rights; the subjects of these rights are to be adequately supported and safeguarded against violations. This is to be included, too, into appropriate laws and execution rules. These were to be issued jointly with the procedures in the assurance, investigation, and prosecution for compensation. The standard of the enterprises' behavior was to be defined and their imposition made possible (cf UN-AwskR, Concluding Observations, Austria, UN Doc. E/C.12/AUT/CO/4, 13. December 2013, § 12.).

On hard law and soft law

The confusion that exists about the extent and the limits of the foreign activities of Austrian enterprises has also repeatedly been reported by our Network. Where really do exist obligation rules, is obscured by a great number of recommendations and conditions on the international, supra-national, and the national level. Voluntary initiatives and Codices of Conduct hide where effective and indeed obliging rules do exist. To which extent? Up to free will? In which branches of activities? Are options for actions pointed out or recommended?
There exist on top of all a list of reasonable interpretations of yet non-committal (so-called soft law) recommendations on the one side, and (hard law) laws definitely stating approaches, which yet do not conform to the existing rules and the interpretation of laws.
To define statements of law on each, people's, EU's, and Austrian side; to mutually draw the border line between interpretations of law, t h a t is what has been our Interest as far as this study did allow.

Voluntary or regulatory - the dilemma

Since the founding of our network in 2006, we deal with the possibilities and limits of voluntary measures for the achievement of corporate responsibility. The concept of Corporate Social Responsibility (CSR) - so the analysis of our network (cf. NeSoVe: Preciousness or speciousness - "to see or not to see" - that is the question, June 2012) - should be rejected as a concept of mere deregulation and privatization of public decision-making powers. It is contradictory to place restrictions on economic freedom in the hands of economic actors and at the same time wanting them to impose their own self-restraint. There are undoubtedly useful initiatives and measures in the field of CSR, and options for action to demonstrate and live the primacy of production within a reasonable balance between economic success and respect for social and environmental concerns. However, those can only be generally binding and thus only ensured by regulations. The research project "CSR Impact", also funded by the European Commission, and carried out by the Öko-Institut 2013 led to the conclusion that the contribution exerted by voluntary CSR activities on society, is very low indeed (see FIG. www.csr-impact.eu and http://www.oeko.de/uploads/oeko/oekodoc/1816/2013-488-de.pdf).

The work of our network and its members has shown: that concepts of voluntary CSR initiatives do not change the economic trigger and will not make superfluous a further public reaction and call for human rights corporate responsibility.

Although CSR has for 40 years been incorporated into the curricula of management training courses, the obligation to maximize profits remains the supreme principle of the prevailing business conduct of large companies, and does so even if the black numbers of positive balancing is at the expense of the people and the environment.

Even if civil society calls for human rights compliant production and trading through a variety of activities, and if initiatives and measures (Watchdog, boycott, etc.) reinforce this concern, the power of the consumers remains limited to those areas where consumers are directly touched, i.e. at the end of the production chain.

Though, a critical attitude of civil society adopted towards irresponsible corporate governance does have an impact on the reputation of the company, and thus, this is at least perceived as a cost factor and a risk for the management's input. Still, the reputation of the company is not at all decisive for all industries : who, for example, sells weapons technology to war zones, has little reason to worry about negative PR. Negative PR is simply part of the business und used to be thought along not as risk but natural in the origin of that business, however, nowadays, when human rights are being considered.

Even if responsible business practices fair trade, fair production and fair value and a sound supply chain, this war and crises sector will remain for decades a not at all negligible niche product of the conventional economy. Expansion, a necessity in times of falling wages and income, depends on the size of the own wallets and budget, and not yet on the observation of human rights abroad.

Although CSR is nowadays a well-known term for most companies, and often a practice, the credibility of real actions is often more than doubtful. While many just keep CSR initiatives for worthy to obey the law of certification of products, the measures are too easily considered nothing but an

add-on in entrepreneurial PR activities or an add-on to the core business that have nothing or little to do with human rights.

In the article "Violation of human rights, a competitive advantage?" (Gruber / Kaufmann, The ALTERNATIVE, 9/2014) the authors conclude: "Unfortunately, not few transnationally operating companies also compete with each other on human rights violations. So, for example: the less recalcitrant the unionists, and the fewer the workers' rights, the more profitable the production. The same can be said about the environment, because this often increases the cost of production, too. Economic, social and cultural human rights are an obstacle here. This leads of course to the fact that companies which pay attention to the human rights, fall behind in competition - the current situation therefore penalizes those who behave correctly their fellow human beings' human rights".

The hope for a "business case CSR" is limited to three areas, which define or limit the scope clearly:
- Increased willingness of customers
- Cost reduction
- Improved risk management

(see NeSoVe. receipt or non-appearance, that is the question, June 2012)

An effective and comprehensive protection of human rights is not as simple as to be "achieved". To this extent, in the debate on the effect of voluntary CSR initiatives, the thesis of the business case against human rights unfortunately describes the situation very well (cf. Karnani, Aneel, \ The Case Against Corporate Social Responsibility, "The Wall Street Journal, August 22, 2010).

Results of the legal opinion

NeSoVe has engaged the European Center for Constitutional and Human Rights, ECCHR, to analyze independently the legal situation in Austria. Three issues were noted mainly as to human rights violations by Austrian companies in the course of their international activities:
1. There are quite a number of useful binding legal instruments in Austria's national law. The problem lies primarily in effective law enforcement and related resources.
2. On the other hand, typical cases of human rights violations by Austrian companies in their international activities are still regulated and not prohibited by law comprehensively. Here, reforms and law design measures would be appropriate. Our network recommends the policy makers to advocate at the national as well as European and international law the implementation of comprehensive human rights policy.
3. Even at the level of liability for human rights violations by Austrian companies, it is necessary to enable victims of human rights violations that remedy and reparation are made feasible in practice. This concerns the substantive law and the procedural rules that should both be adapted accordingly.

The study analyzes the status quo of international regulations, within the European Union legislation, as well as the Austrian national legislation.

1. International law

On the international level it is determined, essentially, that it is not possible to undertake business on

international treaties directly, since transnational companies are not subjects to international law and thus can neither be directly obligated nor entitled. On the recognition of the major UN human rights treaties, the European Convention on Human Rights and the core labor standards of the International Labor Organization Austria is obliged to respect human rights and to take action in order to prevent that human rights are violated by any company. However, it is still to be clarified to what extent states are obliged to take measures to protect people against human rights' abuses abroad, as well as to what extent human rights' violations are subject to examination, penalties and redress, and shall also be compensated for.

2. Union law

On Union legal level it is determined that there are factors that can allow a more effective protection of human rights by European companies acting abroad. Here, on the one hand, the scope of action of Austria should be exploited as a member state, and on the other hand, a broader implementation of human rights protection should be accelerated through legal reforms.

The first question in filing a lawsuit is the issue of jurisdiction, i.e., whether a case that has happened outside the EU, can be sued within the EU. This does not generally apply to subsidiaries of a European company, if they are resident abroad (Regulation No. 44/2001). However, member states relying on the minimum requirement of the so-called Brussels' I Regulation on jurisdiction, can obtain recognition and enforcement of judgments in civil and commercial matters beyond that minimum (cf. Oguru et.av Royal Dutch Shell and Shell Nigeria under. http://milieudefensie.nl/publicaties/bezwaren-uitspraken/final-judgment/oguru-vs-shell-oil-spill-goi). This flexibility should also be applied to Austria's issues.

Furthermore, the question arises : Which national law is applicable? Only when a court considers the application of Austrian private law, substantive provisions can grab. Basically (Regulation no. 864/2007, Rome II), according to the Regulation on the law applicable to non-contractual obligations the law of the country in which the damage occurs, shall be applicable. Not applicable is the law, where the damage is justified. This is problematic, when the protection of human rights is weaker in non-European countries. The European law knows exceptions that may make the Austrian law even applicable. However, these exceptions are not sufficiently defined in order to ensure that, where applicable human rights violations by Austrian companies operating abroad despite damage occurred abroad may be subject to jurisdiction under Austrian law. In addition, the Union law recognizes a right of the injured to decide the applicable law system for environmental damages. This could be extended to human rights violations.

With respect to the consumer protection the manufacturer of a product is liable for the damage caused by defective products (cf. Lit.e Article 7 of Directive 85/374 / EEC). The use of harmful chemicals or technical products is an important case of corporate human rights violations (see typical case groups). This raises the problem of legal provability. Currently, the manufacturer can not be liable for harms, if he proves that the existing errors in the use have not been scientifically proven as harmful before; but there is no obligation for the manufacturer to prove possible errors according to the current state of the art. A further problem is that the legal right upon Article 11 of the Directive terminates ten years after the product has entered the market. But often, the health damages occur

much later and the cause is difficult to identify (eg if different materials were delivered and were utilized together).

The Union knows restricted European competence in criminal law, by being able to establish minimum rules concerning the definition of criminal offenses and sanctions in the areas of particularly serious crime. Herein structural human rights violations by companies should be included (see Article 83 Treaty on the Functioning of the European Union)

3. National Law

At the national level, constitutional law, trade law, and the civil and criminal law and its procedural rules are examined in terms of their human rights protection through economic activities abroad.

In constitutional law, it is determined that the Federal Constitution knows neither a central provision for the enforcement of fundamental rights nor a horizontal effect of fundamental rights, so that authorities do not need to explicitly state that fundamental rights among private persons take effect. The enforcement of fundamental rights requires the broadening of the fundamental rights catalogue as well as the guarantee of enforcing fundamental rights vis-a-vis private entities. The repeal of the reservation as per Article 50 Federal Constitutional Act for human rights obligations is strongly encouraged.

Concerning the individual criminal law it is striking that the Penal Code does not recognize the concept of human rights violation. Protection against human rights violations is however possible through the protection from violence, the protection of property or the environment. Problematic are the cases in which human rights violations are committed abroad and if so through failure of the decision maker or employee of the company. Clear duty of care and due diligence requirements would be necessary to protect the victims and to guarantee legal certainty.

In this respect, it should be emphasized that Austria affirms criminal accountability for companies by introducing the Act on Corporate Criminal Liability (VbVG). It is also positive that all the provisions of the Criminal Code can be sanctioned also if injured by associations. The problem appears by the lack of resources for law enforcement authorities to actually effectively identify these complexes. It, moreover, appears a problem of equality, because the penalty of a fine, which provides the VbVG as a sanction, has a maximum of 180 units and the daily rate not exceeding 10,000 EUR, amounts to a total maximum of 1.8 million EUR. In order to exploit the preventive effect of VbVG, substantial fines should be imposed to ensure the deterrent impact of possible fines.

Regarding the Austrian private law the tort law knows normalized due diligence according to § 1294 of the Civil Code. It is positive that the Supreme Court recognizes a legal duty to maintain safety for dangerous undertakings. In § 347 of the Austrian Commercial Code (UGB) even a heightened duty of care of business is defined, but this is not applicable in the tort law area, but applies only between companies. Human rights due diligence should be explicitly included and the scope of general and specific duty of care should be clearly defined for better legal protection and legal certainty.

The company law recognizes the general liability of the management board and the supervisory committee of joint-stock Corporations according to §§ 70, 84, 95 Austrian Stock Corporation Act (AktG) and determines the liability for damages in the case of violation. According to § 70 AktG an

obligation is read into it to take into account the interests of employees as well as public interests, which provides in particular a special request to the executive board for complex constellations with international aspects. The duties of the executive board and the supervisory committee should be clearly defined in terms of legal protection and legal certainty.

In the field of administrative law, the trade law is a relevant branch of law to prevent human rights abuses by businesses because it helps to avoid dangers associated with economic activities. According to § 69 of the Austrian trade regulation act (GewO) regulations or laws for the purpose of avoiding danger to life or health of human beings can be adopted. It is unclear whether these standards include protection against foreign activities of Austrian companies. This should be fixed.

The biggest hurdle for human rights claims for compensation are the costs.

Due to the criminal procedural principle of ex officio investigations according to § 2 of the Austrian Code of Criminal Procedure (StPO) theoretically no costs should arise for the victim in a display, because it is investigated ex officio. In practice, victims of human rights violations still occur due to the necessary extensive preparations considerable costs, since the prosecution rarely identify the acts or omissions of decision makers at the company, impair the human rights abroad. Thus, the victims have to bear the costs of gathering evidence, arising prior to the filing of the display.

It is even more difficult in civil proceedings. Here, in principle, the parties have to bear the legal expenses. Because of the principle of parties disposition the evidence is given by the parties. The injured party has got the burden of proof both for the damage, the liability of the entity and the causality between an act or omission of the company and the damage that has occurred. To be able to actually trace the complex cases of human rights violations committed by companies in countries of the "global south", a simplification of the burden of proof on the victim is necessary, such as those known from the law of torts.

It is positive that Austria knows the instrument of legal aid for any person who is unable to meet the costs of implementing the process without affecting the necessary maintenance. It is also positive that it is sufficient for the granting of legal aid that the intended prosecution or defense does not appear as apparently willfully or hopeless. However, a high cost risk remains, since on the one hand only a temporary exemption of costs is granted and on the other hand, the party has to replace the opponent's costs in the case of process loss. Due to the above-mentioned burden of proof difficulties, a partially lost case in front of the court in such complex actions is the rule rather than the exception.

Positive are the legal statutory limitation rules. Civil claims for compensation barred within three years after the damage and after the injuring person were known; otherwise the right of action is barring in thirty years. It is also possible, through the Institute of declaratory action according to § 228 of the Austrian Code of Civil Procedure (ZPO) to inhibit the statute of limitations by acting in the case of not yet concretely foreseeable damages. Offences expire depending on the amount of penalty. It is important to rule on forbearance (e.g. if decision makers violate their duty of guarantee). Here, the limitation period does not begin before the last violation was committed.

NeSoVe recommendations for more effective protection of human rights in the course of activities of Austrian companies abroad

1) Clear due diligence rules for companies in criminal law and in private law

If Austrian companies operate abroad and there violate human rights, these companies must adhere to it. Clear due diligence for companies is indispensible in criminal law. In private law, the legislator should make clear that the due diligence of the company according to §§ 1299 of the Austrian Civil Code (ABGB) and according to § 347 of the Austrian Commercial Code (UGB) also include the respect for human rights. In the interpretation of the normalized due diligence in § 1299 ABGB and § 347 UGB the standards of the UN and the OECD should be considered.

2) Adjustment of the fine frame of the Act on Corporate Criminal Liability

When companies become criminally responsible, the VbVG knows fine as a sanctioning method. Here, the maximum daily rate of € 10,000 for large companies is not a deterrent. The limitation of the daily rates up to a maximum of 180 days cannot be regarded as enough from the point of view of equality standards. The amount of the fine should take into account the company's financial capacity.

3) Improvement of constitutional effect of fundamental rights

The enforcement of fundamental rights requires the broadening of the fundamental rights catalogue as well as the guarantee of enforcing fundamental rights vis-a-vis private entities. The repeal of the reservation as per Article 50 Federal Constitutional Act for human rights obligations is strongly encouraged.

4) Due diligence rules applicable at the registered seat of the company

The question of the applicable law is especially important for the law reform in Austria. Only when a court considers the application of Austrian private law, substantive provisions of private law, how come §§ 347 UGB or 1299 ABGB, can apply. Therefore, the due diligence of a company should be understood as a code of conduct within the Rome II - Regulation (Article 17 Regulation (EC) No 864/2007.) That further means that Austrian law is to be applied when companies based in Austria violate their due diligence with effect abroad.

5) Simplifying and reversal of the burden of proof

In front of the judge it is often not possible to bring the evidence. Individuals act against transnational corporations and their lack of obligation to provide information. In civil law, the so-called principle of parties disposition gives the parties the duty to evidence. Especially in cases of complex corporate structures and unavailable information, the burden of proof should be applied throughout, as they are already known in tort law. In human rights lawsuits against companies the judge should also have the possibility to ask for more evidence. This includes special human rights training for judges, prosecutors and lawyers.

6) Jurisdiction of the Austrian courts through its subsidiaries

Under Regulation No. 44/2001 Austrian civil courts must recognize no jurisdiction in actions against foreign-based subsidiaries of Austrian companies. Complaints on the same facts that are simultaneously directed against an Austrian parent company and a foreign subsidiary must not be judged by a single court in Austria. Article 60 of Regulation No. 44/2001 should be amended to provide that the subsidiary can be sued at the headquarters of the parent-company, if there are

complaints against the parent-company or if the subsidiary is economically controlled by the parent-company. The same should also apply to subcontractors who are highly economically dependent of the parent-company and manufacture the products that are sold under a brand name of the parent-company alone of this and her subsidiaries.

7) Legal aid and decision on legal costs
The legal cost of a particular civil proceedings are usually the first and insurmountable hurdle for victims of human rights violations. It is positive that in Austria the opportunity to indigent parties exists, to request legal assistance if the application does not clearly appear willfully or hopeless. But the risk of legal costs in the event of the loss process remains. It would make sense to rule the decision on legal costs with regard to the financial resources of the parties.


Download: http://www.netzwerksozialeverantwortung.at/pages/publikationen.php

(November, 17, 2014)