Public international law requirements for the effective enforcement of human rights

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Note: This blogpost is part of a series on „Corporate social responsibility and international law" that presents the main findings of the contributions published in August Reinisch, Stephan Hobe, Eva-Maria Kieninger & Anne Peters (eds), Unternehmensverantwortung und Internationales Recht, C.F. Müller, 2020.

1. The UN Guiding Principles on Business and Human Rights (2011) have set forth a process by which Corporate Social Responsibility (CSR) rules are to be further specified. The approach followed is not to impose specific results but to create procedures by which CSR is given further flesh on the basis of a continuing dialogue between all relevant stakeholders.

2. The operationalization of this concept takes place by a three pillar model („protect", „respect", „remedy") based on an approach called „embedded liberalism" according to which the creation of a liberal economic order allowing also for governmental and international intervention is pursued.

3. The „remedies" pillar is the least developed one within the system of the Guiding Principles. Intense discussion and studies are still needed to bring more clarity into this field.

4. In the attempt to bring more clarity into this area guidance can be obtained by discussions that have taken place within the UN in the field of general human rights law and by ensuing academic studies referring to the respective documents.

5. The remedies mentioned in the Guiding Principles are formulated in a relatively „soft" manner, after attempts to create „harder" norms have failed. There are, however, initiatives underway to create a binding instrument in this field. According to the „Zero Draft" for such a treaty much more restrictive rules are envisaged. It is, however, unlikely that such an instrument will meet with the

necessary consensus within the foreseeable future.

6. In Europe, within the Council of Europe as well as within the European Union, various attempts have been undertaken to give further substance to the „remedies". The relevant documents contain both an analysis of the law in force as well as proposals for new instruments to be introduced. These proposals are, however, in part rather far-reaching and thus it is unclear whether they can be realized any time soon.

7. If some pivotal questions shall be identified that have emerged as an issue for further discussion, the following can be mentioned:

7.1. The extraterritorial application of remedies

a) In this context, first of all, the specific approach taken by the US Courts when applying the Alien Tort Statute (ATS) has to be mentioned. However, after „Kiobel" this development seems to have come to a halt.

b) Some hopes are associated with the application of tort law in Europe according to the „Brussels I"- and the „Rome II"-Regulation. However, on this basis European tort law can be applied to human rights violations by companies and subsidiaries abroad only to a very limited measure.

7.2. Criminal law as a remedy

According to some, remedies should be sought more forcefully within the realm of international criminal law. A closer look at the relevant norms reveals, however, that expectations should not be too high as to such an endeavour. International Investment Agreements (IIAs) and Counterclaims

Due to their „asymmetrical" nature (As are intended to protect primarily the investor) IIAs do not offer, at first sight, a suitable basis for holding investors responsible for human rights abuses in the guest state. Recently, however, in the wake of the „Urbaser" case, hopes have come up that counterclaims could be used to such avail. For the time being, however, these hopes are not justified. Nonetheless, attempts are under way to re-draft IIAs so that counterclaims are more easily available and, in general, to emphasize the responsibility of investors.

7.3. The national level

The national level is of decisive importance for finding remedies in the area of CSR. In this context, National Contact Points, National Action Plans and Corporate Social Reporting have to be mentioned. A wide array of initiatives have been taken in this field. Up to this moment the results are, however, not really convincing.

8. The Guiding Principles envisage a vast panoply of judicial and non-judicial initiatives, of State-based and non-State based measures. Many of these measures have to be further specified and tested. It is most probably too early to impose binding obligations in this field as the „Zero Draft“ ultimately intends. Further discussion and a further exchange of experience, as it happens within the „Forum on business and human rights”, seem to be the more promising way to follow.

Full (German) version: *Peter Hilpold,* Maßnahmen zur effektiven Durchsetzung von Menschen- und Arbeitsrechten: Völkerechtliche Anforderungen, in: August Reinisch, Stephan Hobe, Eva-Maria Kieninger & Anne Peters (eds), Unternehmensverantwortung und Internationales Recht, C.F. Müller, 2020, pp. 185 et seq.