Transnational Supply Chains, Human Rights and Criminal Liability

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Abstract

Should Western companies or their management be criminally liable for the violation of human rights, even if third parties such as subsidiaries or business partners and their employees outside the territory of western countries directly commit them? As multi-stage supply chains increasingly dominate the modern global economy, this question is becoming both more complex and urgent. The initiative for a German "Supply Chain Act" exemplifies possible perspectives for potentially necessary legislative action and nevertheless contains risks for a criminal justice system governed by the rule of law. Still, several tragic cases highlight the general need for action to ensure decent working conditions, combat human trafficking, prevent illegal arms trafficking, and reduce corruption since all are interrelated with those cases and significantly increase the risk of human rights violations. These recent cases should be taken into consideration to design a more holistic approach to protect human rights against solely profit driven operations by multinational companies.

We develop a model of imputation for such acts below but also point out the difficulties connected to the expansion of national criminal law to overseas cases and a boundless attribution beyond the individual corporate entity. Modified organizational and supervisory duties provide a basis for liability for negligent acts. However, this liability must be limited to cases in which human rights violations could have been prevented by careful management. The violation of human rights therefore does not open up a completely new area of punishable conduct; nonetheless the adequate protection of those affected by severe corporate wrongdoing requires more effective measures for criminal prosecution.

I. Criminal Law and Human Rights

1. Case Studies

The globalized economy is increasingly characterized by transnational supply chains.[1] Production facilities in the global South, and in some cases in South East Europe serve as suppliers or subcontractors for companies whose headquarters and sales markets are located primarily in the global North or West. It is true that this has also resulted in positive developments in the regions concerned, which is discussed under the catchword "social upgrading".[2] However, from the perspective of the companies the purpose of such supply chains is primarily to take advantage of cheaper production conditions than are available in their own countries. Similar to the age of industrialization, which was also characterized by profit maximization (some would say "unrestrained capitalism"), prominent cases today also emphatically show the dark sides of this global expansion of value chains. One of these dark sides is the disregard for the basic needs of people at the production sites which repeatedly leads to human rights violations. One may remember the collapse of the

[1] See *UNCTAD,* Global value chains and development. Investment and value added trade in the global economy, 2013, S. 16, suggesting that 80% of global trade was conducted in such manner, for further reference: *Artndt/Kierzkowski,* Fragmentation: new production patterns in the world economy, 2001; *Feenstra,* Journal of Economic Perspectives 12 (1998), 31 et seqq.

[2] *Barrientos/Gereffi/Rossi,* International Labour Review 150 (2011), 319; *Bernhardt/Pollak,* Environment and Planning 48 (2016), 1220; *Gimet/Guilhon/Roux,* International Labour Review 154 (2015), 303; *Milberg/Winkler,* International Labour Review 150 (2011), 341; see Oxfam study on the changing role of women: *Oxfam* (ed.), Trading away our rights. Women working in global supply chains, 2004, S. 17.

Rana Plaza factory in Bangladesh on April 24, 2013, which claimed the lives of 1135 people, or the fire at the factory of *Ali Enterprises* in Karachi, Pakistan, which was a supplier to the German textile company *KiK*, on September 11, 2012, which claimed 289 lives. [3] Another example is the breach of the "*Barragem I*" dam in Brazil, in which more than 270 people lost their lives on January 25, 2019, and in which the German based testing company *TÜV Süd* and its subsidiaries´ employees are currently being held criminally liable.[4] Can the companies or responsible employees be prosecuted for negligent or even conditionally intentional killing of the victims or for destroying the infrastructure and thus the livelihood of an entire locality?

2. German Constitutional Framework

The question must first be asked whether and to what extent criminal law - or law in general - can respond to human rights violations not primarily carried out by state actors. Traditionally, human rights refer to the relationship between state actors and individuals. In the classical sense, familiar from the dogmatics of constitutional or fundamental (the German constitution, the “Grundgesetz” or Basic Law uses this term and sees fundamental rights as “basic rights”) rights - human rights are primarily individual defensive rights against state action.[5] Thus, in German criminal law the focus from the perspective of fundamental and human rights is on the protection of the accused against the intervention of the investigating authorities in criminal proceedings.[6] Hence, these fundamental rights define the grounds and limits of the criminalization of conduct.[7] Thus, the obligation of private actors ("direct third-party effect") to uphold fundamental and human rights is rejected,[8] especially in light of the recognition of the state's duty to protect.[9] However, it is also acknowledged that fundamental and human rights as an objective set of values have effects on the relationship between subjects of private law, for example in the interpretation of general clauses under civil law (indirect third-party effect).[10]

The idea of a direct fundamental rights obligation of private parties has not been discussed in depth in German Supreme Court jurisprudence either.

For example, in the earlier case law of the German Federal Labor Court, non-state actors are considered also bound by fundamental and human rights if they pose a "quasi-state"

[3] In summary: https://www.ecchr.eu/fall/mehr-show-als-sicherheit-zertifikate-in-der-textilindustrie/ (accessed October 31, 2019) and https://www.ecchr.eu/fall/kik-der-preis-der-arbeitsbedingungen-in-der-textilindustrie-suedasiens/ (accessed October 31, 2019) the latter case was the subject of civil proceedings before Dortmund Regional Court - now terminated by a judgment dismissing the action, see LG Dortmund, 10.01.2019, Ref. 7 O 95/15.

[4] https://www.ecchr.eu/fall/das-geschaeft-mit-der-sicherheit-die-rolle-von-tuev-sued-beim-brumadinho-dammbruch-in-brasilien/, last accessed on November 28, 2019.

[5] BVerfGE 61, 82, 101; following the classical understanding of fundamental rights as a means of preserving the "*status negativus,*" cf. fundamentally on this concept: *Jellinek,* System der subjektiven öffentlichen Rechte, 1905, p. 103; specifically with regard to the consequential effects in international criminal law: *Ambos,* Wirtschaftsvölkerstrafrecht, 2018, p. 24.

[6] Cf. as a representative but all the more emphatic: *Beulke,* Strafverfahrensrecht, marginal no. 5.

[7] See on this only: *Roxin,* AT/I, § 2 marginal no. 1 et seqq.; on the socio-contractual (and to that extent state-theoretical) foundation of criminalization: *Momsen,* Die Zumutbarkeit als Begrenzung strafrechtlicher Pflichten, 2006, p. 34 et seqq.

[8] Cf. with special emphasis also on the EU Charter of Fundamental Rights: *Besselink,* The Protection of Human Rights post-Lisbon, 2012, p. 63; *Emmerich-Fritsche,* Archiv des Völkerrechts 45 (2007), 541.

[9] BVerfGE 128, 226 = Neue Juristische Wochenschrift 2011, 1201 marginal no. 48 and 59 - Fraport; on this argumentation also: Gurlit, Neue Zeitschrift für Gesellschaftsrecht 2012, 249, 250 in particular with reference to the difficulties of a direct fundamental rights obligation emphasized by Canaris, Archiv für die civilistische Praxis 184 (1984), 201, 204 with regard to the systematics of the fundamental rights barriers.

[10] Fundamental: BVerfGE 7, 198 - Lüth; comprehensive: Maunz/Dürig/*Herdegen,* GG, Art. 1 para. 3 marginal no. 52 ff; from which, however, no fundamental right obligation of private parties is to result, dev.: *Böckenförde,* Der Staat 29 (1990), 1, 10.

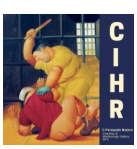
threat to individual freedoms on the basis of their social and economic power (direct third-party effect).[11] In this respect one could speak of a "situation of endangerment typical of fundamental rights"[12] from the perspective of the individual, an idea that is also applied in the literature to the relationship between companies and individuals outside of the employment relationship.[13] Similar approaches can be found in U.S. constitutional law discussions.[14] The rationale obviously is the systematically different role of the *human dignity* argument which in case law rulings of the U.S. Supreme Court and most U. S. State Courts have the function of an intrinsic value in the justification of legal decisions rather than a specific fundamental right.[15] Human dignity does not have a comparable formal and institutional position dominating the state-citizen relationship in the U.S. Constitution as it has in the German Constitution. Hence, obligations or duties to protect individuals are more easily transferred to private actors within the U. S. system. Human dignity can therefore more easily be included as an additional perspective of protection in obligations based on other considerations. Increasing attention is paid as well to commitments of non-state actors to human rights.[16] This is discussed even at the level of international law, for example through the creation of a corresponding working group of the UN Human Rights Council[17] or at the level of soft law with the UN Guiding Principles on Business and Human Rights[18].

3. Applicability to the German Criminal Justice System

Applied to German criminal law, the following picture emerges: first and foremost, the protective purpose of such offenses can be directed toward the preservation of human rights, which address the state or its officials themselves. This applies, for example, to offenses conducted by administrative or police officers.[19] Consider, for example, a police officer who unjustly uses force to persuade a defendant to make a statement during questioning and is thus liable to prosecution (e.g. under Section 340 German Criminal Code) for bodily harm and abusing administrative function and (e.g. under Section 343 of the German Criminal Code) for extortion of testimony. This is an unjustified encroachment on the fundamental right of the accused to physical integrity (in accordance with Article 2 Paragraph 2 Sentence 1 of the German Constitution). In addition, this violates the fundamental right for human dignity (which is embodied in Article 1 Paragraph 1 German Constitution) and at the same time constitutes a violation of the UN Convention against Torture and thus a violation of human rights.

However, according to the classic understanding of the constitutional dogma as described above this does not necessarily apply to companies as they are not directly bound by

[11] BAGE 1, 195, 191 ff; 4, 274; 13, 168, 174 ff; after, this view was abandoned in BAGE 48, 122, similar considerations were taken up again with regards to standards set in collective agreements within the meaning of Section 3 (2) TVG: BAG NZA 2011, 751, 757, cf. for works agreements: BAGE 120, 308.
[12] A terminology used by the BVerfG especially when rejecting the fundamental right of legal persons under public law, cf. BVerfGE 21, 362, 369; 45, 63, 79; 61, 82, 105.
[13] *Emmerich-Fritsche,* Archiv des Völkerrechts 45 (2007), 541, 544; *Fischer-Lescano/Maurer,* Neue Juristische Wochenschrift 2006, 1393, 1394 et seq; *Spießhofer*, Neue juristische Wochenschrift 2014, 2473; 2475*; Teubner,* Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 63 (2003), 1.
[14] *Mudelinski,* International Affairs 77 (2001), 31; *Paust,* Vanderbilt Journal of Transnational Law 35 (2002), 81.
[15] *Rao*, Three Concepts of Dignity in Constitutional Law, Notre Dame Law Review86:1 (2011), 183; vgl. auch *Paust*, Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content Howard Law Journal, Vol. 27, No. 1 (1984) 145; *O'Mahony*, There is no such thing as a right to dignity, International Journal of Constitutional Law, Volume 10, Issue 2, 30 (March 2012) 551.
[16] A comprehensive overview is provided by: *Ambos,* Wirtschaftsvölkerstrafrecht, 2018, p. 24 et seq.
[17] Die sog. open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, die am 26.06.2014 eingerichtet wurde.
[18] *HRC,* Res. 17/4 v. 06/16/2011.
[19] Comprehensive on the specific wrongful content of official offenses: *Amelung*, Festschrift für Dünnebier, p. 503 et seq.; *Dedes*, Festschrift für Lackner, p. 791; *Heinrich*, Der Amtsträgerbegriff im Strafrecht, 2001, p. 210 et seq; *Singelnstein*, Strafbare Strafverfolgung, 2019, p. 131 ff; LK/*Sowada*, pre § 331 marginal no. 12 et seq.



human rights. If, for example, a company employee commits an act of violence "on the occasion of his work"[20] this constitutes a serious violation of legal rights and a criminal act but not necessarily appears as a violation of human rights. The often overwhelmingly strong position of multinational companies creates some specific social significance which could be compared to the relation between individual and the state. However, this may create a comparable risk for fundamental and human rights as it is known by the use of administrative power despite the lack of direct involvement of state actors. This becomes particularly clear in some regions of the world, where tasks of the public welfare are taken over by private companies. The beginning of corporate responsibility for human rights which has often been questioned in the debate on human rights accountability is decisively shaped by this. Various international regulations are also opening up to this understanding such as the UN Guiding Principles on Business and Human Rights (UN doc A/HRC/17/31).

Consequently, a criminal law approach to prosecute human rights violations by companies must also be linked to this power imbalance between the company and the individual. First, the criminal act must be closely related to the company's activities. Then, as in the example of police brutality above, corporate policies and procedures will have to be unable or not designed to prevent the commission of such crimes. Corporate organizational deficiencies, in other words, shed light on the conflict between human rights violations and business interests.

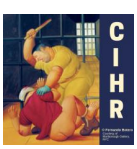
However, what makes a *violation of legal rights* by the company a *human rights violation*? The decisive factor is likely to be that the company acts "like" a state actor against the people affected:

- The company must act at a certain position of power;
- possibly in close cooperation with authorities,
- rather from a relationship of equilibrium with them;
- which may well result from corruption
- or is caused by the economic importance of the company for the state;
- as well, a multinational company can also attain a subject position comparable to a (smaller) state in the context of international law and social reality.

In summary, if any of these criteria applies the company is situated hierarchically and significantly above the affected people at the level of state authority. At present, these considerations are reflected in the provisions on the criminal liability in cases of human trafficking, trafficking in weapons, and corruption / bribery offenses. The new draft German Corporate Sanctions Act assumes that a corporate offense *could also be a criminal violation of human rights* with respect to the aforementioned offenses.[21]

From the perspective of criminal law, a violation of human rights generally appears as conduct attributable to a corporation of a certain severity, already prohibited by criminal law, that endangers the livelihood of a majority or group of people, and is committed in a specific social and hierarchical context. *Ambos,* for example, sees the overlap between economic and international criminal law in the examples mentioned at the beginning of this paper, leading to the concept of international economic criminal law.[22] However, it is precisely the context of corporate organizational deficiencies noted above that play a decisive

[20] See, for example, prominently the *"Oxfam scandal"* in which employees of the aid organization Oxfam in Haiti are accused of sexual offenses in their work after the 2010 earthquake, https://www.theguardian.com/world/2018/jun/15/timeline-oxfam-sexual-exploitation-scandal-in-haiti (accessed October 31, 2019).
[21] Cf. RegE, p. 75.
[22] *Ambos,* Wirtschaftsvölkerstrafrecht, 2018, p. 14; referring to *Naucke*'s conception of a political economic criminal law that had as its object the preservation of spaces of freedom from destruction by economic power, see



role in establishing corporate liability, not the "human rights context."[23] However, it does appear as a crucial criterion for prosecuting.[24]

4. Corporate Responsibility and Criminal Law

Thus, the organizational responsibility of the management needs to be discussed.

a) Legal Framework

If a legal interest is also protected against negligent acts e.g. in the context of bodily injury and homicide offenses, the organizational responsibility described above can be used to justify individual criminal attribution. With a view to the recent cases presented above, the involvement of such legal interests, quite in contrast to other areas of white-collar criminal law, is probably not a purely academic exception. [25] On this basis the supply chain actually becomes a chain of liability in one direction and a chain of attribution in the opposite direction.

Outside violent crimes, there are a great number of offenses companies can be held liable for regarding human rights violations. But these offences are primarily intentional – they require *mens rea*. Of course, civil law shows crucial differences under common law as negligence, recklessness or even ignorance of the law are punishable. This applies, for example, to the corruption offenses discussed in more detail here. Corporations cannot be held responsible in the context of negligent offenses of commission and omission; Instead, the business owner and the corporation can separately and independently be fined[26] for organizational deficits. Independent corporate liability would also be extended by the recently presented draft bill on corporate sanctions if implemented in Germany. In the case of overseas offenses, imputation on the basis of so-called principal's liability is also[27] conceivable, although this ultimately reaches its limits (which are mandatory under criminal law) for other reasons to be discussed in more detail below.[28]

b) Central Problems

However, if corporate supply chains are viewed purely from a factual perspective the justification of criminal liability along the supply chain faces two central difficulties.

First, the issues regularly arise in cases in which company employees acting directly on behalf of the corporation are outside national (German / European/ US) territory where the respective jurisdiction applies and are also not national citizens. This raises questions of the law on the application of criminal law but also of international mutual legal assistance in criminal matters from a procedural perspective. The latter cannot be considered in more

Naucke, Der Begriff der politischen Wirtschaftsstraftat - Eine Annäherung, 2012, p. 4.

[23] Apart from the fact that an organizational deficit can, of course, be the starting point for attribution, as will be explained in detail.

[24] Accordingly, the working definition in the research project with the Center for International Human Rights at the John Jay College of Criminal Justice at the City University of New York (CUNY).

[25] In many cases, human rights violations in the form of deficient working conditions or child labor will also have an impact on health, etc., which is already protected under criminal law against negligent violation. Accordingly, some of the more recent ones in some European states and in Canada are also designed. In this regard, *Momsen/Schwarze*, Criminal Law Forum Special Edition 2018, 567, 592 with further references.

[26] Sections 130 (1), 30 OWiG German Act on Regulatory Offences – ARO).

[27] Which has now also been recognized by the Federal Court in Criminal Matters: BGH CCZ 2012, 157; Neue Zeitschrift für Strafrecht 2018, 648.

[28] In all of this, however, the company as such is not placed at the center of consideration, but rather the question of the reason and limits of an attribution of company-related actions of company employees remains, cf. on the controversy between organizational and attribution models, especially with regard to international criminal law: *Ambos,* Wirtschaftsvölkerstrafrecht, 2018, p. 40 et seqq.; *Meyer,* Schweizerische Zeitschrift für Strafrecht 131 (2013), p. 78 et seqq.

detail in the context of this article.

Secondly, the supplier company is regularly not only separate from the Western principal or ordering company under corporate law but also isn´t subject to its instructions. From this point, therefore, the question arises if there can be a scope of specific organizational duties that go beyond the boundaries of an individual corporation under national company law and international trade law.

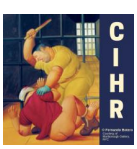
II. Organizational Accountability for Human Rights Violations

Against this background, an example of accountability for human rights violations can be achieved with regard to organizational deficits within the company. Here, two points of reference seem to be crucial: negligence and bribery (both in business transactions and involving public officials).

1. Organizational Responsibility within the Framework of Negligent Wrongdoing

A common example for corporate liability resulting from the violation of organizational due diligence resulting in negligence exists in the area of product liability. In both the US and Germany whoever produces or distributes products might be criminally liable if a user is harmed by the product whether it is a car, food or pharmaceuticals. Thus, in its well-known "Lederspray" decision, the 2nd Circuit of the Federal Court in Criminal Matters derived a liability of the members of the management body of a company which distributed a product harmful to health specifically from their formal position and duties as managing directors.[29] The actual duties of care, in this case related to production and product monitoring, are incumbent on the company as such. Needless to say, it is not an individual duty of an individual member of the management body to personally fulfill e.g. technical duties of care. However, the management faces an organizational and monitoring responsibility with regard to compliance with these product-related duties of care.[30] Thus, an organization-related approach is established by subsequent allocation of the duty of care within the concept of negligence.[31] Seeking for a precise identification of such individualized duties of care derives from the principle of individual guilt which applies to substantive criminal law as a (German) constitutional principle. Every complaint of negligence means in essence "you should have done better or should have acted more carefully" as the perpetrator "could have acted in that way" because s/he was fully capable of behaving appropriately. With a "top down" perspective[32] a "general responsibility" of the management could be assumed with no (or little) regard to possible vertical distributions of tasks in the company´s organizational structure.[33]

[29] BGHSt 37, 106, 114 - leather spray.
[30] In addition, the management makes the decisions incumbent upon them, for example, regarding the product recall - recognized by the Senate on an admittedly dogmatically questionable basis, cf. BGHSt 37, 106, 115; critically on the reason for and limits of this position of obligation under criminal law, for example: *Hilgendorf*, Produzentenhaftung, p. 139; *Kuhlen*, NStZ 1990, 566, 568; *Puppe,* Juristische Rundschau 1992, 30; *Roxin*, AT/II, § 32 marginal no. 199; *Schünemann*, Festgabe BGH vol. IV, 621, 638.
[31] Cf. on this in detail already: *Schmidt-Salzer,* Produkthaftung vol. I, para. 1146 et seqq*; ibid.*, Neue juristische Wochenschrift 1988, 1937, 1940 who in particular shows that this concept had been developed and established by the the French *Cour de Cassation* as the so called "*responsabilité pénale du chef de l'entreprise"* in the 1950s (*Cour des Cassation,* Bull. Cass. 1959, 493, p. 955; later: *Cour d' Appel de Rennes,* Rec. Dalloz 1973, p. 663.); specifically commenting on BGHSt 37, 106 - Lederspray for example: *Hassemer, Produktverantwortung,* p. 62 ff; *Kuhlen,* FS BGH IV, p. 647, 663.
[32] *Schmidt-Salzer,* Produkthaftung Vol. I, para. 1147.
[33] *Bosch,* Organisationsverschulden, p. 372 et seq.



The ”Lederspray” (leather spray) judgement by the Federal Criminal Court still had to consider the attribution of responsibility in an individual company. But the standard of consideration is considerably extended in the cases discussed here. As already indicated above, the position of the management of an ordering company with regard to such companies separated from the ordering company under company law or just act as their contractual partners is at issue. However, any legal separation between the ordering company and the supplier company under corporate law makes it more difficult to identify the specific obligation concerning negligent misconduct or omissions.

Nonetheless, this leaves the question of the concrete scope of the organizational and supervisory duty, even if its starting point does not conflict with written law even in civil law jurisdictions. The difficulties in applying criminal law are comparatively minor in this respect on the basis of the "organizational due diligence standard" developed by the 2nd Circuit of the Federal Court in Criminal Matters, as the organization-related breach of the duty of care occurs under that jurisdiction where management acts. The fact that the criminal act directly violating third party interests occurs abroad is not relevant with regard to the theory of ubiquity common to nearly every jurisdiction (e.g. exemplified in Section 9 German Criminal Code).[34] Therefore, it is sufficient for the applicability of criminal law that the offence is committed on the respective territory (or that an act to be committed by law was omitted). Of course, this does not clarify the actual reason for imputation: the actual standard of care and its violation. However, this becomes the essential criterion with respect to the rule of law and to limit borderless attribution.

2. Corruption as an Indicator

Creating organizational responsibility with regard to corruption (bribery) offenses in connection to business activities of the supplier companies encounters further questions.

a) Corruption and Human Rights

First, it must be discussed if the bribery offenses could be linked functionally to human rights. Traditionally, both the case law of the highest courts in Germany and the prevailing opinion among German scholars[35] emphasize that corruption or bribery offenses consistently serve to protect legal interests such as the integrity and purity of administrative conduct, the public trust placed in the administrative branch and the market competition.[36] Although some are challenging this legal conception in the light of recent legislative developments[37] bribery offenses are still not prominently covered under the umbrella of human rights in the German discussion.

1a) Damage Dimensions beyond the Traditional Definition of Legal Interests

However, adherence to this traditional concept of corruption or bribery offenses means that these “hidden” dimensions of damage caused by the offenses are often completely ignored or at least rarely considered at all. Nevertheless, particularly economic studies convincingly demonstrate the significance of corruption in the occurrence of violations of

[34] For more details, see *Ambos*, Internationales Strafrecht, § 1 marginal no. 17; *Rotsch,* Zeitschrift für international Strafrechtsdogmatik 2010, 168, 170.
[35] On Section 299 StGB cf. for example: BT-Drs. 13/5584, 9, 12; 18/4350, 21; 18/6389; BGHSt 10, 358, 367; BGHSt 31, 207, 210; BGHSt 49, 214, 229; in the literature, for example: MüKo-StGB/*Krick,* § 299 marginal no. 15 with further references.
[36] RGSt 72, 237, 241 et seq.; BGHSt 10, 237, 241 et seq..; 14, 123, 131; 15, 88, 96; *Fischer* § 331 marginal no. 2; Sch/Sch/Heine/*Eisele,* § 331 marginal no. 7; LK/Sowada, pre §§ 331 et seqq. marginal no. 37.
[37] Cf. comprehensively on the so called “business owner model” and its implications for the determination of legal interests in the context of Section 299 StGB: *Grützner/Helms/Momsen,* Zeitschrift für Internationale Strafrechtsdogmatik 2018, 299.

fundamental and human rights as well as environmental damage.[38]

As economic approaches in particular suggest, this follows on the one hand from the economic consequences of corruption in both the private and the public sector.[39] On the other hand, however, this dimension of damage also results from the consequences of public administration decisions that are no longer guided by objective and public-interest standards. This understanding was developed in particular by German scholar Knut Amelung with reference to Niklas Luhmann's "Systems Theory", who explained the basis of legitimacy of the criminal liability of official corruption primarily in terms of its social function.[40] Considering an official act in breach of duty carried out on the basis of a bribe can in turn lead to building permits[41] or safety certificates being issued without a corresponding objective basis.[42] Especially the well-known details on the facts of the "Barragem I" dam breach in Brazil seem to make this case an exemplary example.[43] Of course, it should be noted that a singular conception of legal property based on the official act in breach of duty or the anti-competitive preferential decision as the final result of the execution of the unlawful agreement encounters difficulties in legitimizing the legislative formulation of corruption or bribery offenses.

2a) Economic Consequences and Corporate Liability

In particular, the broader economic consequences of corruption can occur even if the illegal agreement is not "executed" (the bribe not paid) which would be considered sufficient for criminal liability under German law. Nevertheless, corruption and, to some extent apparently necessary bribery drives up the costs of corporate and entrepreneurial activity in comparison with its benefits. This kind of "bribe culture" causes damages in macro-economic as well as in micro-economic perspectives and influence corporate decisions on whether or not to do business in some countries, which can have a negative effect on the local GDP.[44] As a result there are also consequences for local standards of living through employment and self-employment. With regard to the protection of internationally enshrined human rights, such as the right to work contained in Art. 6 ICESCR or the right to an adequate standard of living contained in Art. 11 ICESCR, this would be of central importance.

Furthermore, there is the consideration that precisely this corruption-related cost increase could provide an incentive to exceed the legal framework of corporate activity for the purpose of cost reduction.[45] In the sense described above, this could also affect the safety of

[38] Summarizing: Final Report of the Human Rights Council - Advisory Committee on the issue of the negative impact of corruption on the enjoyment of human rights, UN General Assembly, 5.1.2015, A/HRC/28/73; *Sepúlveda Carmona/Bacio-Terracino*, in: Boersma/Nelen (Hrsg.), Corruption & Human Rights: Interdisciplinary Perspectives, 2010, S. 25 et seqq.; *Hensgen,* Korruption: ein ungerechtfertigter Eingriff in internationale Menschenrechte, 2017, S. 67 et seqq., S. 73 et seqq.

[39] Mit jeweils unterschiedlicher Akzentuierung: *Al-Marhubi*, Economics Letters 66 (2000), 199, 201; *Blackburn/Powell*, Economics Letters 113 (2011), 225, 227; *Keefer/Knack*, Economics and Politics 7 (1995), 207, 226 et seqq.; *Mauro*, Quarterly Journal of Economics 110 (1995), 681; *Rose-Ackerman/Palifka*, Corruption and Government, S. 29.

[40] *Amelung,* Rechtsgüterschutz und Schutz der Gesellschaft, 1972, p. 349; with reference to: *Luhmann,* Grundrechte als Institution, p. 114; *Ders,* Das Recht der Gesellschaft, 2nd ed.

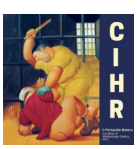
[41] *Ambraseys/Bilham*, Nature 469 (2011), 153 et seqq.

[42] *Bertrand/Simeon/Rema/Senhil,* The Quarterly Journal of Economics 122 (2007), 1639; *Momsen/Schwarze*, Criminal Law Forum Special Edition 2018, 567, 592; *Ramasastry*, Closing the Governance Gap in the Business and Human Rights Arena: Lessons from the Anti-Corruption Movement, in Human Rights Obligations of Business 162-90 (Surya Deva & David Bilchitz eds., Cambridge University Press 2013).

[43] https://www.ecchr.eu/en/press-release/complaint-against-tuev-sued/.

[44] Vgl. etwa die Untersuchungen von: *Gyimah-Brempong,* Economics of Governance 3 (2002), 183; *Keefer/Knack,* Economics and Politics 7 (1995), 207, 226; *Mauro,* Quarterly Journal of Economics 110 (1995), 681.

[45] To summarize: *Rose-Ackerman/Palifka,* Corruption and Government, pp. 29 et seqq.



a company's employees, even if a bribed official does not actually perform any official acts in breach of his duties. This is the case, for example, if the company refrains from complying with or enforcing costly occupational safety regulations, of which the Ali Enterprises/KiK case mentioned at the beginning of this article is a tragic example.[46] But there are also empirical studies that point to correlations between tax avoidance and evasion[47] and the rate of inflation which also affect the circumstances of life for individuals.[48] Ultimately, this also leads to studies that link the occurrence of corruption with an increase in general inequality (measured by the so-called "Gini" index).[49] Considering these consequences of bribery may have significant implications for possible legislative action in the field of corporate human rights accountability.

b) Limitations of Current Concepts of Liability to Capture Corruption-Related Due Diligence Violations in Transnational Value Chains

However, German criminal and regulatory offenses law provides provisions sanctioning breaches of corporate due diligence that encourage or at least do not prevent the commission of bribery by company employees. The attribution is linked to the interplay between the criminal offenses of bribery or corruption found in core criminal law and the organizational and supervisory duties of the Act on Regulatory Offenses (ARO / OWiG).

1b) Criminal Law

In recent years, criminal law on corruption in particular has become a prime example of the international expansion of the scope of e.g. US, German and British criminal law (FCPA, German law against conducting bribery in foreign countries [IntBestG], UK-Bribery Act). Thus, in 2015, with the second "Anti-Corruption Act"[50], the legislature decisively expanded the scope of application of the provisions of German criminal law governing bribery in commercial transactions (Section 299 GCC) and of public officials (Sections 331 et seq. GCC). At the same time, this law also contained a number of significant additions, which can be attributed primarily to an obligation under international law to implement the Council of Europe's Criminal Law Convention on Corruption.[51]

Both bribery in the course of business and bribery of public officials are also punishable at the level of the offense if a foreign matter is at issue. Thus, in the case of Section 299 of the Criminal Code the agreement to do wrong can also relate to preferential treatment over a competitor in foreign competition. At the same time, Section 335a GCC in particular criminalizes both the person actively bribing an official of a foreign state and the foreign official himself as a passive bribee.[52] However, criminal liability is no longer limited to cases in which the briber acts with the intention of obtaining an advantage in international business dealings. Whereas the international extension of criminal liability was long just for the

[46] https://www.ecchr.eu/fall/kik-der-preis-der-arbeitsbedingungen-in-der-textilindustrie-suedasiens; more in fn.3.
[47] *Ghura,* IMF Working Paper No. 125, 1998; *Imam/Jacobs,* IMF Working Paper No. 270, 2007; *Tanzi/Davoodi,* IMF Working Paper No. 182, 2000.
[48] *Adam/Bevan,* Journal of Public Economics 89 (2005), 571; *Al-Marhubi,* Economics Letters 66 (2000), 199, 201; *Blackburn/Powell,* Economics Letters 113 (2011), 225, 227.
[49] *Li/Xu/Zou,* Economics and Politics 12 (2), 155, 180 f., albeit relativizing the results of *Mauro,* Quarterly Journal of Economics 110 (1995), 681.
[50] Anti-Corruption Act of November 20, 2015, Federal Law Gazette I p. 2025.
[51] For a summary of the international influences on criminal law relating to corruption, see MüKo-StGB/Korte, § 331 Marginal no. 27 et seqq.
[52] Section 334 GCC in conjunction with Section 335a (1) no. 2 lit. a GCC and Section 334 GCC in conjunction with Section 335a (1) no. 2 lit. a GCC.

sake of the protected interest of international competition[53], this must now[54] be seen as protecting the "fairness of foreign official conduct".[55] However, the focus on this legal asset has not remained free of criticism[56] which is also relevant to the introduction of the duties of care at issue here and will be considered more in detail below.

The scope of application of German criminal law is extended under the broadly conceived "active personality principle"[57] irrespective of the location of the offense or the enforcement of sanctions, in particular if the perpetrator is German.[58] Thus, German criminal law is applicable usually when a German company employee works abroad and makes bribe payments to a foreign employee. The latter is then liable and to be prosecuted und German criminal law. However, if the offender is not a German citizen, German criminal law cannot be applied. Consequently, German criminal law does not apply to non-German national employees of the supplier company or companies who offer a bribe to a foreign public official abroad.

With respect to punitive sanctions, applicability to foreign cases is limited from the outset to cases in which the perpetrator is German and the offence is punishable at the place of the offence. An exception for certain foreigners encountered in Germany who have committed a crime abroad remains of little significance for the constellations of interest here. In this respect, problems arise once again in the light of the citizenship of the company employees in the supplier company.

Approaches involving the International Criminal Court by seeing corruption as a crime against humanity within the meaning of the general clause included in Article 7 (1) (k) of the Rome Statute,[59] as well as other ways of "new criminalization" by way of adapting the Rome Statute[60] encounter their own and specific problems which cannot be examined in greater detail within the framework of this article.

2b) Administrative / Regulatory Offences Law

Whereas in the United States or the United Kingdom it is possible to impose criminal punishment on corporations it is not in Germany. In Germany, still no corporate criminal law exists unless the respective draft legislation is passed. Conservative politicians have found the economic damages incurred by COVID-19 as a striking argument against the draft and

[53] Cf. *Krause/Vogel*, Recht der internationalen Wirtschaft 1999, 488, 491; *Westhoff,* Recht der internationalen Wirtschaft 1999, 950, 951; *Randt*, Betriebsberater 2000, 1006, 1008; *Schmitz,* Recht der internationalen Wirtschaft 2003, 189, 193.

[54] BT-Drs. 18/4350, p. 24.

[55] *Haak,* Auslandsbestechung, p. 181; *Kudlich/Hoven*, Zeitschrift für internationale Strafrechtsdogmatik 2016, 345, 350; NK-StGB/*Kuhlen*, Section 335a marginal no.9; *Walther,* Der Betrieb 2016, 95; in detail and in the result agreeing with this conception of legal property: *Hoven,* Auslandsbestechung, 2018, p. 524 et seq.

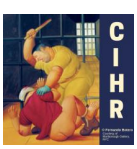
[56] There is particularly impressive talk of "criminal law imperialism": *Horrer,* Bestechung durch deutsche Unternehmen im Ausland, 2011, p. 252; *Isfen,* Juristenzeitung 2016, 228, 233; NK-StGB/*Kuhlen,* § 335a marginal no. 9; *Schünemann,* in: Hoven/Kubiciel (ed.), Das Verbot der Auslandsbestechung, 2016, pp. 25, 36.

[57] MüKo-StGB/*Ambos,* pre § 3 marginal no. 28; *Böse/Meyer*, Zeitschrift für internationale Strafrechtsdogmatik 2011, 336, 342; *Schröder,* Juristenzeitung 1968, 241; *Vogler*, Festschrift für Maurach, 595, 597 ff; LK/*Werle/Jeßberger,* pre § 3 marginal no. 234.

[58] Section 5 no. 15 b) GCC - European public official with office in Germany; Section 5 no. 15 c) GCC - offense committed against German public official abroad; Section 5 no. 15 d) GCC - offense committed against European public official or equivalent public official pursuant to Section 335a GCC who is in turn German (sic!), cf. in detail with examples: *Kudlich/Hoven,* Zeitschrift für internationale Strafrechtsdogmatik 2016, 345, 350.

[59] *Bantekas,* Journal of International Criminal Justice, Ed. 466 (2006), 466, 474; *Starr,* Northwestern University Law Review 101 (2007), 1257, 1281.

[60] For an extension of the Rome Statute, for instance: *Ocheje,* Leiden Journal of International Law ed. 15 (2002), 749; *Eboe-Osuji,* African Perspectives on International Criminal Justice, ed 132, p. 25; and even before the Rome Statute came into force, in the sense of a general recognition as a subject of international criminal law: *Kofele-Kale,* The International Lawyer, ed 34 (2000), 149.



seem to have effectively blocked any progress to strengthen corporate criminal liability in the legal code. However, as already indicated above and with regard to the commission of corruption offenses from within the company the (German) perspective shifts from criminal law to the law of administrative offenses when considering the organizational responsibility of the company management. In this context, Section 130 ARO is a central instrument for linking organization-related deficits that facilitated the commission of the offense to the company. This is because the fine is linked to the fact that employees of a company commit criminal offenses, such as corruption offenses, that could have been prevented by proper supervisory measures carried out by the owners or directors.[61] From the perspective of the amount to be imposed on the corporations there is no significant difference between Germany, the United States or Britain. However, the effect of a formal criminalization will be preventive. For the sake of preventing multinational companies from violating human rights the final success of the German draft act on corporate crimes might be important.

3b) "Intercompany" Division of Labor

One of the organizational characteristics of supply chains is that the companies involved are regularly separate entities under corporate law and are only in a business relationship with each other as fundamentally independent contractors within the framework of the fulfillment of an obligation under a contract for work and services.[62] Section 130 ARO has traditionally only been applied to criminal or regulatory offences committed within the sphere of an individual legal entity. Therefore, Section 130 ARO is primarily interpreted against the backdrop of corporate law. Extending obligations beyond an individual company has only been discussed with reference to corporate groups but still is controversial.[63] Older rulings by the Federal Court in Criminal Matters are rather cautious in this respect.[64] However, particularly in antitrust law a concept of "the company" is established by court practice and on the part of the Federal Cartel Office giving up a view focused purely on the legal entity in the corporate law sense and instead following the idea of the company as an "economic unit" as its basis.[65]

Precisely these argumentative topoi were taken up by the Munich Higher Regional Court in a more recent decision concerning Section 130 ARO.[66] Accordingly, the extent to which the parent company can exercise influence over the subsidiary company, for example by issuing instructions, appeared as the central criterion to decide whether two separate companies will be seen as one "economic unit".[67] If this is the case, the duties of the parent

[61] Cf. comprehensively on the structure of Section 130 ARO: *Grützner/Leisch,* Der Betrieb 2012, 787; *Grützner,* in: Handbuch Wirtschaftsstrafrecht, Momsen/Grützner (eds.), ch. 4 marginal no. 22 ff; KK-OWiG/*Rogall,* § 130 marginal no. 1.

[62] Where the question naturally also arises with reference to the duties of managing directors under company law, see *Grützner/Leisch,* Der Betrieb 2012, 787, 790.

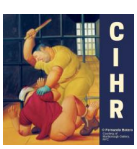
[63] Critically: *Bosch,* Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht 177 [2013], 454, 462 et seq.; *Brettel/Thomas*, Compliance und Unternehmensverantwortlichkeit im Kartellrecht, 2016, p. 36 et seq. *Bürger*, Wirtschaft und Wettbewerb 2011, 130, 135 f; *Graf,* Festschrift für Feigen, 2014, 37 ff; *Hellmann/Beckemper,* Wirtschaftsstrafrecht, marginal no. 959; *Hermanns/Kleier,* Grenzen der Aufsichtspflicht in Betrieben und Unternehmen, 1987, p. 25; *Koch,* Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht 171 [2007], 545, 570 ff, 573; *ibid.,* Die Aktiengesellschaft 2009, 564 ff; *Petermann*, in Der Sanktionsdurchgriff im Unternehmensverbund, Eisele/Koch/Theile (eds.), pp. 99 ff, 105 et seq.; *Aberle/Holle*, in: Der Sanktionsdurchgriff im Unternehmensverbund, Eisele/Koch/Theile (eds.), pp. 117, 118 et seq.; *v. Schreitter,* Neue Zeitschrift für Kartellrecht 2016, 253 et seq.; *Ransiek*, Unternehmensstrafrecht, 1996, p. 105 f.; in favor: Graf/Jäger/Wittig/*Niesler*, § 130 OWiG marginal no. 52; HK-OWiG/*Ziegler,* § 130 marginal no. 16; KK-OWiG/*Rogall,* § 130 marginal no. 27.

[64] BGH Gewerblicher Rechtsschutz und Urheberrecht 1982, 244, 247.

[65] Cf. for example: ECJ Europäische Zeitschrift für Wirtschaftsrecht 2009, 816; Bundeskartellamt case report on B1-200/06 (Etex).

[66] OLG Munich, Strafverteidiger 2016, 35.

[67] OLG Munich, Strafverteidiger 2016, 35 reflecting the concept of *Caracas,* Verantwortlichkeit in internationalen Konzernstrukturen nach § 130 OWiG, 2014, p. 87 et seq.; similar argumentation already concerning the review of



company's management also extend to the subsidiary.

For the cases examined here, this establishes a supervisory duty of the German or US ordering company towards the companies involved in the supply chain. Of course, a separation of the two actors under company law still must be analyzed. This is because it cannot automatically be assumed that there is a power to issue instructions in the relationship between the client and the contractor along the supply chain. This applies all the more with regard to the suppliers of the producing contractual partner, who are even further away from the perspective of the US or German client company.

In cases in which the Western ordering company is the main or only client of the supplier company[68] this might be interpreted as an "economically conditioned" power to issue instructions by virtue of dependency. However, despite the certainly significant position of the client it still seems doubtful to see this as an economic unit in the sense that both companies serve the same overriding purpose. Still it must be considered that the supplier company continues to fulfill only its contractual obligations as a subcontractor.[69] The fact that this can be seen as a group situation with a corresponding "enforcement of the supervisory obligation" would presuppose a specific link going beyond this. For example, the joint use of infrastructure, not least in the area of compliance management systems (CMS), or the contractual adoption of safety standards or certification procedures in accordance with the specifications of the client company could be considered.

III. Accounting Law to Protect Human Rights

With the penalties and fines under accounting law the protection of human rights is complemented from a rather unexpected perspective. With the "Act to Strengthen Non-Financial Reporting by Companies in their Management and Group Reports (CSR Directive Implementation Act)"[70], the German legislature fulfilled its implementation obligations under EU law with regard to the so called “CSR Directive” (Directive 2014/95/EU) in April 2017. Certain corporations and parent companies in corporate groups were already required to provide information on "non-financial performance indicators" in their management reports.[71] However, this obligation was limited to disclosures on environmental and employee matters and was only mandatory to the extent that they are of significance for an understanding of the business performance or position of the corporation or corporate group. Now[72], this obligation has been decisively expanded and also decoupled from the previous management report-specific restrictions.[73] In particular, disclosures on respect for human rights (Section 289c (2) No. 4 HGB) and measures to prevent corruption (Section 289c (2) No. 5 HGB) must now be made explicitly. However, the reporting obligation also extends to disclosures on risks to human rights and the commission of corruption

a termination of a managing director's employment contract due to failure to take supervisory measures concerning the subsidiary: OLG Jena, Neue Zeitschrift für Gesellschaftsrecht 2010, 226, 228.

[68] For a detailed discussion of this captive structure, see *Gereffi/Humphrey/Sturgeon,* Review of International Political Economy 12 (2005), 78, 86-88.

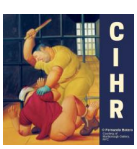
[69] On this idea, which also serves to substantiate the opinion of the OLG Munich: KK-OWiG/*Rogall,* § 130 marginal no. 27.

[70] BGBl. 2017, I, p. 802 et seq.

[71] German Trade Law [Handelsgesetzbuch – HGB] Section 289 (3) HGB and section 315 (3) HGB.

[72] Sections 289b et seq. HGB for corporations and sections 315b et seq. HGB for parent companies of corporate groups (Section 290 HGB)

[73] I.e. in particular on the necessity of the information to understand the business situation.



offences arising from business relationships.[74] In this respect, the reporting obligation already laid down in the law also covers the constellations of transnational value chains examined here. This also applies to due diligence processes relating to the supply chain. [75] This also applies with regard to the reporting obligation of the group parent company. This obligation under accounting law is then flanked by specific penalties and fines.[76] Thus, the general violation of the now extended reporting obligation leads to the imposition of fines, for example, on the members of the body authorized to represent the company and the company itself may also be subject to a regulatory fine. In addition, the scope of the criminal offense of accounting fraud is extended to the misrepresentation or concealment of the circumstances of the corporation or the group with regard to the aforementioned reportable facts.

Overall, this results in an obligation to organize the financial statements that true and complete information is also provided with regard to the non-financial statement. Compliance here means nothing other than ensuring adherence to the requirements of accounting law. However, this obligation to prepare the annual financial statements truthfully with regard to compliance with human rights results in an organizational and monitoring obligation to ensure that the company has actually implemented the measures it has set itself within its organizational group (or that of the attributable companies), at least to the extent specified. Thus, an obligation to take measures to prevent human rights violations can be substantiated on the merits.

However, this obligation is considerably weakened because it is determined by three variables: First, the company must be affected by the reporting obligations, requiring a certain size (number of employees) of the company. Second, there are far-reaching exceptions to the obligation to report on business partner-related circumstances. In principle, this reporting obligation only exists insofar as the information is significant and the reporting is proportionate. [77] Third, priority to attach to human rights protection at least remains (under some aspects) at the discretion of the company. In principle, the “CSR Directive” and its implementation in German Accounting Law only requires that corresponding information be provided and that it corresponds to reality. A certain quality of the measures taken does not yet follow from this.[78] Therefore, this appears to be another example of the extension of commercial criminal law through acts of disposition on the part of a potential defendant.[79]

However, the focus will also be on the primarily economic question of how the public perception of a company's corporate social responsibility relates to its economic strength, particularly with regard to the sale of its products. For it is precisely in this respect that the criminal and regulatory transparency obligations could have a particular influence on the actual corporate organization with regard to the protection of human rights. In addition, statements made to customers that create an image of a particularly "responsible manufacturer" of a product may also be relevant for criminal offenses related to deception. In this case, criminal liability for fraud or, in particular, for "fraud derivatives" such as criminal

[74] Section 289c (3) No. 4 HGB.
[75] Section 289c (3) No. 1 HGB. Cf. on this idea already the explanatory memorandum to the CSR Directive, BT-Drs. 18/9982, p. 50 f. Explanatory Memorandum to the CSR Directive, BT-Drs 18/9982, p. 49; cf. also GAS 20.270 as amended by DRAES 8.
[76] Set out in Sections 331 et seq. HGB.
[77] Explanatory Memorandum on CSR-RLUG, BT-Drs. 18/9982, p. 49.
[78] *Momsen/Laudien* in Momsen/Grützner, Wirtschaftsstrafrecht, 2nd edition, ch. 6 C marginal no. 55.
[79] For a detailed discussion, see *Momsen*, Zeitschrift für die gesamte Strafrechtswissenschaft 131 (2019), p. 1009, 1024 et seq.

advertising[80] is conceivable where proof of financial loss attributable to a mistake is not necessary.[81] However, current investigations at numerous German car manufacturers brought up certain evidence of corresponding developments towards a coverage of product-related deceptions in particular, which are also supported at the procedural level by reduced requirements for the scope of the official duty to clarify in the case of mass fraud.[82]

IV. A Framework for Legislative Actions

It turns out that despite some encouraging approaches there is a need for reform. This concerns first democratically legitimized standards of care. They must reach further than the current legal situation with regard to the international scope of corporate criminal and regulatory law.

The respective obligation would also not only have to extend to measures in the company itself, but also to such measures with regards to supplier companies and thus the business partners. More than in the case of internal compliance measures, the focus here would have to be on identifying risks of violations of legal rights in the sense described above as a result of the supplier's business activities. This brings questions of business partner due diligence into focus.

This is comprehensively addressed e.g. by the OECD's Due Diligence Guidance for Responsible Business Conduct of May 2018[83] and is as well already reflected in German law for example with the reporting obligations under accounting law described above.

1. "Just Soft Law" – How to Legitimize Corruption-Related Due Diligence Obligations?

However, if corruption-related due diligence is involved there are problems of legitimacy. It must be borne in mind that these due diligence obligations primarily serve to protect foreign legal interests. This applies particularly clearly (but not exclusively) to those duties of care that relate to the bribery of foreign public officials in factual constellations to which (German) criminal law is not applicable. Even if the legislature assumed it would be possible to transfer the above-described traditional legal definition of corruption offenses to foreign cases without further ado constitutional concerns[84] raised in this context remain significant and call into question the legitimacy of the current conception of corruption offenses as a protected good beyond the scope described above. The more traditional approach to protect competitors could serve as a rather weak auxiliary consideration. It would be better to look for a different basis of legitimacy for the introduction of such due diligence requirements. However, as described at the beginning of this article the significance of corruption for the violation of human rights is a much more convincing approach.

[80] Section 16 (1) of the German Unfair Competition Act (UWG).
[81] *Grützner/Boerger/Momsen*, Corporate Compliance Zeitschrift 2018, p. 50 et seqq.
[82] Cf. (by way of example) the line of case law of the 4th Criminal Senate on the (lowered) requirements for the taking of evidence in mass fraud cases: BGH Neue Juristische Wochenschrift 2014, 2132, 2133; Neue Zeitschrift für Strafrecht 2019, 40.
[83] http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf#_ga=2.20476920.1177007353.1560008710-263230428.1560008710 (zul. abgerufen am 31.10.2019).
[84] Cf. only NK-StGB/*Kuhlen,* § 335a marginal no. 9 et seq.; *Schünemann,* in: Hoven/Kubiciel (ed.), Das Verbot der Auslandsbestechung, 2016, pp. 25, 36. However, the legitimacy deficits are smaller, given the so called "supranational" nature of the EU, if bribes are paid to public officials in EU member states, see NK-StGB/*Kuhlen,* § 335a marginal no. 11 This can be particularly relevant for suppliers from Southeast Europe.

In this respect, the prohibition of foreign bribery[85], as well as more extensive organizational and due diligence obligations, could serve precisely to prevent human rights and environmental violations through the business activities of German or US companies abroad. These harmful effects would also be attributable to the Western company and its management if they are brought about not only by bribes paid by the company's own employees abroad but also by the commissioning of supplier companies and their (sub)suppliers and service providers - provided that such actions are carried out there. Liability for "business activity" also covers the creation and maintenance of a supply chain. However, the associated problems of how close companies within the chain are connected cannot be described as having been conclusively overcome. This applies above all in view of the rather indirect relationship between the act of corruption and the violation of human rights - which incidentally is not a prerequisite for the act as a result of the corruptive agreement. Therefore, it will be essential to differentiate between corruption-related human rights violations and more direct human rights violations e.g. conducted by security teams.

2. The Rule of Law and Human Rights

In order to maintain a criminal justice system that is based on the rule of law and respects human rights we must not close our eyes to problems of legitimacy. In this respect, criminal law may not solely focus on the victims. Within the framework of the procedural conduct of criminal proceedings the presumption of innocence would of course not be suspended. The complex requirements of international mutual legal assistance in criminal matters must also be observed if usable evidence is to be obtained. The partial waiver of this requirement, as can be seen in the fight against "international terrorism," for example, must be viewed critically from the perspective of a criminal law based on the rule of law. Thus, the overly broad model of liability afforded under the model of terrorism offenses cannot be recommended for a comparable form of liability for business activity under suspicion of corruption. As well, the simple existence of a supply chain as such cannot be the basis for criminal liability; there must be explicit criminal conduct with attributable human rights violations. Even in the case of the most serious violations of human rights and/or the environment, it remains important to observe the basic principles of the rule of law. This means that sufficient and reliable evidence must be specifically established. A penalty for accidental damage, even if it is severe and the consequences tragic, is arbitrary. The decisive factor is therefore that risks were recognizable with careful organization and supervision and could have been prevented with reasonable means.

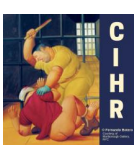
3. Concept: Extended Accountability for Human Rights Violations in High-Risk Areas

Comprehensive accountability for human rights violations is dependent on the context of their commission and must address negligence as well. Thus, it seems reasonable to create a criminal offense that addresses different dimensions of damage regarding human rights violations.

Under this framework obligations to prevent human rights violations that occur during the course of corruption, human and illegal arms trafficking or child labor must be part of the future organizational obligations, from the standpoints of the requirement of certainty, the concept of *ultima ratio*[86] and the likelihood of obtaining usable evidence. Therefore, human

[85] In general, on this legitimation approach of criminalizing foreign bribery albeit with different accents: *Böse,* Zeitschrift für international Strafrechtsdogmatik 2018, 119, 128; *Hoven,* Auslandsbestechung, 2018, p. 535 et seq; *Pieth,* in: Das Verbot der Auslandsbestechung, Hoven/Kubiciel (ed.). pp. 19, 22 et seq; *Zimmermann,* Das Unrecht der Korruption - Eine strafrechtliche Theorie, 2018, p. 707 et seqq.

[86] Cf. on this *Momsen* loc. cit. Likewise, the principle of subsidiarity in criminal law could be made fruitful here



rights violations might be described as a specific add-on to crimes of corruption, trafficking in human beings or arms trafficking. The death of workers or people living in the area, serious damage to health, damage to the health of a large number of people, particularly serious damage to the environment might be caused by the wrongdoings mentioned before and could be seen as specific human rights violations.[87] As well, the violation of human rights that can be implemented as aggravating circumstances to violent offenses as murder, negligent homicide, assault or coercion and may become part of sentencing guidelines. It would be conceivable to require recklessness with regard to the serious consequence since there would already have to be an objective breach of the duty of care within the framework of the predicate offense and not at least a restriction beyond the individual standard of negligence is required.

However, the concept of a human rights violation relevant under criminal law must be defined and codified in concrete terms. Otherwise, there is a risk of a boundless expansion of criminal law which in turn would threaten the rights protected in the Human Rights Convention and substantially expand prosecutorial discretion.

4. Outlook

We started with questioning whether national criminal law is thus suitable for preventing human rights violations or at least making their prosecution more effective and if prosecution on a national level could serve the interest of the violated humans and remain in compliance with rule-of-law standards at the same time. The answer is a very cautious "yes." Creating a realistic risk of being convicted as a member of a European or North American management team for human rights violations by using cheap production sites may have some deterrent or preventive effects. It might curtail otherwise unrestrained profiteering and may ensure solvent liability partners to the victims. However, criminal law is no substitute for responsible economic policy.

(*Dubber* 53 Am. J. Comp. L. 679 (2005); *Prittwitz* in FS, Das deutsche Strafrecht, Subsidiär, fragmentarisch, ultima ratio (1995), 387 ff; *Roxin,* Strafrecht AT Bd. 1 (4th ed.) § 2 marginal no. 28 ff; *Vormbaum* Zeitschrift für die gesamte Strafrechtswissenschaft 123 (2011) 660 et seqq.) as well as the void-of-vagueness doctrine in U.S. law (Cornell Law School Legal Information Institute, https://www.law.cornell.edu/wex/vagueness_doctrine; *Skilling v. United States,* 130 S.Ct. 2896 (2010).

[87] In this case - in contrast to Section 289c (2) No. 4 of the German Commercial Code, for example - the principle of legality (Article 103 (2) of the German Basic Law) would require a catalog of the relevant international treaties, for example in the annex to the Act.