Varia

*Petra Wittig**

Corporate Responsibility for Transnational Human Rights Violations under German Criminal Law – Review and Outlook

Abstract

Time and again, cases come to light in which companies in unstable regions have participated in crimes, including human rights violations. However, the economic power over these companies is regularly geographically distant, anchored in the stable regions of the world, e.g. in a corporate headquarters located in Europe, the USA, Canada or Australia, where the economic profit ultimately accrues. Starting from this imbalance, the present essay examines the question of the criminal (co-)responsibility of these power holders using the example of the German legal system. It becomes apparent that the concept of criminal law, which is still based almost exclusively on individual responsibility, leads to deficits in the investigation of the most serious economically driven crimes. Despite this need for reform, however, even *de lege lata* a top management based in Germany can be held (jointly) liable for distant crimes under the concept of "principal's criminal liability" ("Geschäftsherrenhaftung")."

I. Introduction

In the context of globalization, large commercial enterprises (especially in the manufacturing sector) operate on a transnational, i.e. cross-border, level. This can take a variety of forms, for example by selling and distributing goods and services abroad or – and this constellation is the main focus here – by relocating production abroad, especially to developing and emerging countries. Transnational Corporations (TNCs) established in Germany or Europe often do not produce abroad themselves, but either commission foreign group companies (group structures) or independent subcontractors located abroad (supplier structures), and thus take advantage of the global division

* Prof. Dr. Petra Wittig, Ludwig-Maximilians-University (Munich, Germany). The article is published in German in *Höffler* (ed.), Criminal Law Discourse in the Interconnected Society, 2020.

DOI: 10.5771/2193-5505-2020-3-395

https://doi.org/10.5771/2193-5505-2020-3-395 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC-ND

of labour within the framework of Global Value Chains (GVCs).[1] Important decision criteria for the choice of location are the pay gap and the different legal framework conditions ("regulatory arbitrage"), for example in connection with labour safety or security regulations.

However, at the locations chosen for production often exists the risk of serious violations of third parties' rights. To describe such conditions, the term *high risk zones* is used.[2] In many cases, the workers of the subcontracted company abroad are victims of such violations, for example in cases that shocked the German public, such as the factory fire at the Ali Enterprises textile factory in Karachi (Pakistan) on 11 September 2012, which killed 259 people,[3] or the collapse of the Rana Plaza textile factory complex in Sabhar (Bangladesh) on 24 April 2013, which resulted in 1,135 deaths.[4] However, uninvolved third parties can also be affected, as was the case on 2 May 2011, when, in the context of logging operations by the German-Swiss Danzer Group in the Democratic Republic of Congo, criminal offences (such as rape, bodily harm, deprivation of liberty) were committed against villagers by security forces with the support of a former Danzer Group subsidiary.[5]

The term "transnational human rights violations"[6] has established itself as covering transnational violations of legal rights that occur in the framework of the economic activities of companies with global operations, even though – in the traditional sense – human rights refer to the relationship to state actors and are primarily defensive rights against state action.[7] The reason for this is that the question of obligations of due diligence for transnationally operating companies is usually discussed in the context of the

1 See the report of the *Division on Enterprise and Development of UNCTAD*, Global Value Chains and Development. Investment and Value Added Trade in the Global Economy, 2013, iii, https://unctad.org/en/PublicationsLibrary/diae2013d1_en.pdf (date of access: 2.3.2020): "Global investment and trade are inextricably intertwined through the international production networks of firms investing in productive assets worldwide and trading inputs and outputs in cross-border value chains of various degrees of complexity. Such value chains (intra-firm or inter-firm, regional or global in nature, and commonly referred to as Global Value Chains or GVCs) shaped by TNCs account for some 80 % of global trade".

2 For the term "high risk zones", see *Karstedt,* Transnationale Unternehmen und Völkerstrafrecht: Kriminologische Perspektiven, in: Jeßberger/Kaleck/Singelnstein (eds.), Wirtschaftsvölkerstrafrecht, 2015, p. 171.

3 For details, see also the ruling of *LG Dortmund*, BeckRS 2019, p. 388.

4 https://www.bpb.de/politik/hintergrund-aktuell/268127/textilindustrie-bangladesch (date of access: 2.3.2020).

5 https://www.ecchr.eu/fileadmin/Fallbeschreibungen/Fallbeschreibung_Danzer_2014-06-13.pdf (date of access: 2.3.2020).

6 See *Köpferl,* Corporate Social Responsiblity und unternehmerische Verantwortlichkeit für transnationale Menschenrechtsverletzungen, in: Minkoff/Sahan/Wittig (eds.), Konzernstrafrecht, 2020, § 10, margin no 21 et seq.

7 *Herdegen,* Völkerrecht, 2016, § 47 margin no 1; *Reiter*, The impact of international soft law on the criminal standard of care in transnational supply chains, EuCLR 2020 (to be published); considering the direct third-party effect is *Bung*, Nauckes Narrative – Politisches Wirtschaftsstrafrecht statt Wirtschaftsvölkerstrafrecht?, in: Jeßberger/Kaleck/Singelnstein (eds.), Wirtschaftsvölkerstrafrecht, 2015, p. 143 et seq.; for the constitutional framework see also *Momsen/Willumat*, Strafrechtliche Verantwortlichkeit von Unternehmen für Menschen

https://doi.org/10.5771/2193-5505-2020-3-395 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC-ND

state obligation to respect human rights and refers to the same content in material terms.[8] Despite the vagueness of the term, I would like to continue to use it in the following, regardless of whether the exercise of state sovereign powers is relevant to the respective situation.[9]

Human rights apply globally. However, transnationally operating companies based in Germany and their senior executive staff are rarely held legally responsible if violations of legal rights are committed abroad in the course of the company's business activities. The (civil) liability lawsuit against KiK Textilien und Non-Food GmbH on account of the collapse of a commercial building in Pakistan, as well as the lengthy (criminal) investigative proceedings against Lahmeyer International GmbH on account of the closure of two sluice gates of a dam in Sudan (resulting in flooding) illustrate the challenges of pursuing transnational events through the law. Current examples are the investigative proceedings against French cement manufacturer Lafarge for its complicity in crimes against humanity in Syria,[10] and the charges brought in Brazil against German certification company TÜV Süd AG concerning environmental crimes related to the breach of a dam in a Brazilian iron ore mine on 25 January 2019.[11]

This is somewhat at odds with the fact that corporate responsibility for human rights violations has been discussed more and more in the context of Corporate Social Responsibility (CSR) for some time now.[12] In contrast to (neo-)liberal economic un-

rechtsverletzungen – Zurechnung von Verantwortung entlang von Wertschöpfungsketten, KriPoZ 2019, p. 323, 324 et seq.

8 See, for example, the three-pillar structure of the OECD Guidelines for Multinational Enterprises "Protect, Respect, Remedy", which are based on the United Nations' Guiding Principles on Business and Human Rights and in which only the second pillar is aimed at private actors, *Krajewski/Bozorgzad/Heß,* Menschenrechtliche Pflichten von multinationalen Unternehmen in den OECD-Leitsätzen: Taking Human Rights More Seriously?, ZaöRV (76) 2016, p. 309, 314 et seq.

9 A substantive approximation to the concept of human rights violation can be found, for example, in *Momsen/Willumat*, KriPoZ 2019, p. 323, 326, according to which it should be possible to decide, on the basis of a catalogue of criteria, whether the company acts hierarchically in relation to the person concerned "as" a state actor.

10 See in detail for the case *Lafarge Saage-Maaß/Tixeire*, Kriegsökonomien und die Verwicklung transnationaler Unternehmen in Völkerstraftaten – Der Fall Lafarge/Syrien, KJ 2019, p. 70; see also https://www.ecchr.eu/nc/pressemitteilung/historische-entscheidung-im-fall-lafarge/ (date of access: 2.3.2020).

11 https://www.ecchr.eu/nc/pressemitteilung/mitverantwortung-von-tuev-sued-muss-auch-in-deutschland-aufgeklaert-werden/ (date of access: 2.3.2020).

12 *Köpferl* (fn. 6), § 10, margin no 3 et seq.; for the company law implications, see *Walden*, Corporate Social Responsibility: Rechte, Pflichten und Haftung von Vorstand und Aufsichtsrat, NZG 2020, p. 50; *Schneider*, Menschenrechtsbezogene Verkehrspflichten in der Lieferkette und ihr problematisches Verhältnis zu vertraglichen Haftungsgrundlagen, NZG 2019, p. 1369; for the civil law and labour law liability issues, see *Heinlein*, Zivilrechtliche Verantwortung transnationaler Unternehmen für sichere und gesunde Arbeitsbedingungen in den Betrieben ihrer Lieferanten, NZA 2018, p. 276.

https://doi.org/10.5771/2193-5505-2020-3-395 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC-ND

derstanding,[13] this approach encourages companies to not only generate profits, but to be "good corporate citizens" and as such to take into account the non-monetary effects their behaviour has on society,[14] and to take responsibility for them.[15] Companies can meet this social responsibility, first of all, by complying with applicable laws and regulations and, secondly, by integrating social, ecological and ethical concerns regarding consumers as well as concerns regarding human rights into their corporate strategy and business activities.[16] This should clarify (and should in fact be a self-evident truth) that, even if the extent of the obligations arising from Corporate Social Responsibility remains ambiguous in specific terms, companies must comply with the applicable (criminal) law even when they conduct business abroad (in the sense of "Human Rights Compliance") and in the event of violations, those responsible within the company face sanctions.

There has been also some movement on the political level. Until now, the German government has relied on German companies voluntarily complying with human rights standards throughout the supply chain, even if they produce abroad. A certain disillusionment has now set in, with the result that, despite strong opposition from business organisations, the grand coalition government is planning a "supply chain act" ("Lieferkettengesetz") in accordance with a clause in the coalition agreement[17], which will require companies with more than 500 employees to respect human rights standards throughout the scope of their business activities.[18]

This contribution attempts to review the *status quo* of the applicable criminal law with regard to punishing transnational human rights violations,[19] together with a brief outlook on future developments. The focus will be on criminal liability of individuals

13 The title of an article by neoliberal economist *Milton Friedman* in the New York Times is well-known: "The Social Responsibility of Business is to Increase its Profits" (printed in *Zimmermann/Holzinger/Richter* (eds.), Corporate Ethics and Corporate Governance, 2017, p. 173).

14 For fundamental reference, see *Bowen*, Social Responsibilities of the Businessman, 1953, p. 4 et seq.; for the development, see *Fleischer*, Corporate Social Responsibility, AG 2017, p. 509, 517 et seq.; *idem,* Corporate Social Responsibility: Vermessung eines Forschungsfeldes aus rechtlicher Sicht, in: Fleischer/Kalss/Vogt (eds.), Corporate Social Responsibility, 2018, p. 1 et seq.

15 The EU strategy 2011–14 for the social responsibility of corporations (CSR), 25.10.2011 COM (2011) 681 final, 7 et seq. defines CSR as "the responsibility of enterprises for their impacts on society".

16 *EU-Commission*, https://ec.europa.eu/growth/industry/sustainability/corporate-social-responsibility_de (date of access: 2.3.2020); see also *Walden*, NZG 2020, p. 50.

17 Page 156 of the coalition agreement of CDU, CSU and SPD for the 19th legislative period ("Koalitionsvertrages zwischen CDU, CSU und SPD für die 19. Legislaturperiode"), 2018.

18 https://www.lto.de/recht/hintergruende/h/menschenrechte-lieferkettengesetz-wirtschaft-koalitionsvertrag-bdi-bda-bundesregierung/ (date of access: 2.3.2020); see also the initiative of BÜNDNIS 90/DIE GRÜNEN in BT-Drs. 19/16061.

19 See also *Wittig*, Zu Legitimation und Grenzen eines rechtsstaatlichen Wirtschaftsvölkerstrafrechts, in: Jeßberger/Kaleck/Singelnstein (eds.), Wirtschaftsvölkerstrafrecht, 2015, p. 241; *idem,* Die Strafbarkeit des Geschäftsherrn nach deutschem Strafrecht für transnationale Menschenrechtsverletzungen, in: Krajewski/Oehm/Saage-Maaß (eds.), Zivil- und strafrechtliche Unternehmensverantwortung für Menschenrechtsverletzungen, 2018, p. 195.

https://doi.org/10.5771/2193-5505-2020-3-395 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC-ND

for transnational human rights violations under German general (economic) criminal law with its cross-border aspects.[20] It is not a matter of advocating for an extension of criminal law at any price, but rather of applying existing criminal law doctrine to cases in other countries while overcoming deficits in application and respecting the limits of the rule of law.

II. Survey of the Legal Situation

1. International Economic Criminal Law in the Traditional Sense

On the international level, the core crimes of the Rome Statute (ICC Statute) are directly punishable under international law.[21] In addition to these, there are a limited number of international crimes that have a direct commercial connection, such as looting as part of war crimes and forced resettlement as crimes against humanity.[22] Legal persons are not liable under international criminal law (Article 25 para. 1 ICC Statute),[23] despite historical precedents such as the Subsequent Nuremberg Trials against German companies Flick, Krupp, and I.G. Farben.[24]

For the most serious human rights violations, the German Code of Crimes against International Law ("Völkerstrafgesetzbuch" – VStGB) also contains explicit crimes against international law: Genocide, § 6 para. 1 no. 1 VStGB, Crimes against Humanity, § 7 para. 1 no. 1 VStGB and War Crimes, § 8 para. 1 no. 1 VStGB. § 4 VStGB provides for criminal liability by omission if a superior deliberately neglects to prevent a subordinate from committing a crime. § 13 VStGB contains a provision comparable to § 130 of the German Act on Regulatory Offences ("Ordnungswidrigkeitengesetz" – OWiG), which covers intentional and negligent violations of the duty of supervision.[25] However, since many instances of transnational commercial activity do not constitute involvement in an (intentional) international crime, or since it is difficult to prove such an involvement, for example with regard to causation and *mens rea*, it is rare that legal

20 For a discussion of the terms economic criminal law and international economic criminal law, see *Wittig* (fn. 19), 2015, p. 258 et seq.

21 *Satzger*, Internationales und Europäisches Strafrecht, 2018, § 14, margin no 13; *Wittig* (fn. 19), 2015, p. 242 et seq.

22 See *Oehm*, Grundlagen der strafrechtlichen Verantwortlichkeit von wirtschaftlichen Akteuren für Menschenrechtsverletzungen, in: Krajewski/Oehm/Saage-Maaß (eds.), Zivil- und strafrechtliche Unternehmensverantwortung für Menschenrechtsverletzungen, 2018, p. 183 et seq.; *Zerbes/Pieth,* Unternehmerische Verantwortlichkeit für Völkerrechtsverbrechen im Ausland, KJ 2018, p. 67 et seq.

23 See in detail *Ambos*, Wirtschaftsvölkerstrafrecht. Grundlagen der völkerstrafrechtlichen Verantwortlichkeit von Unternehmen, 2018, p. 24 et seq.

24 *Ambos* (fn. 23), p. 19 et seq.

25 See for an illustration of the criminality of the supervisor in international law *Bock*, Völkerstrafrecht und Criminal Compliance – Vorgesetztenverantwortlichkeit im Rechtsvergleich, CCZ 2010, p. 161 et seq.; *Kirsch*, Völkerstrafrechtliche Risiken unternehmerischer Tätigkeit, NZWiSt 2014, p. 215 et seq.

https://doi.org/10.5771/2193-5505-2020-3-395 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC-ND

proceedings based on (national) international criminal law are instigated.[26] The extent to which this should be changed *de lege ferenda* is the subject of some controversial debate, particularly with regard to the criminal liability of legal persons.[27]

2. National General Criminal Law in an International Context

a) Applicability of German Criminal Law

In cases involving territories outside of Germany, the question always arises as to whether German substantive criminal law is applicable at all; if not, it constitutes a bar to proceedings.[28] In the following section, I will assume that the management personnel responsible were in Germany at the time of their actions or omissions, but that the place of success ("Erfolgsort") was abroad. Consequently, German criminal law applies in accordance with §§ 3, 9 German Criminal Code ("Strafgesetzbuch" – StGB) because the place of action ("Handlungsort"), and thus the place of the crime, is in Germany. With regards to the perpetrator, this follows from § 3 StGB in combination with § 9 para. 1 var. 1 StGB for an offence committed, and from § 3 StGB in combination with § 9 para. 1 var. 2 StGB for a crime by omission. For the participant, i.e. an abettor according to § 26 StGB or aider according to § 27 StGB, the application of German criminal law follows § 3 StGB in conjunction with § 9 para. 2 sentence 1 StGB. Additionally, § 9 para. 2 sentence 2 StGB states that this also applies if the participant has acted within Germany, even if the act is not a criminal offence according to the law of the place of its commission.

b) Scope of Protection of German Criminal Provisions

The question of the applicability of German criminal law must be distinguished from the question of the scope of protection of the German criminal provision in question

26 See also *Kaleck*, Die Verantwortung von Unternehmen und Unternehmern für Völkerrechtsverbrechen – die Entwicklung seit den Nürnberger Prozessen, in: Jeßberger/Kaleck/Singelnstein (eds.), Wirtschaftsvölkerstrafrecht, 2015, p. 83 et seq., which shows that in recent decades considerable numbers of international crimes have been committed with the participation of companies.

27 See in general *Ambos* (fn. 23); in favour of criminal liability of legal persons, e.g. *Adam*, Die Strafbarkeit juristischer Personen im Völkerstrafrecht, 2015; *Thurner*, Internationales Unternehmensstrafrecht: Konzernverantwortlichkeit für schwere Menschenrechtsverletzungen, 2012; very far-reaching is the proposal by *Naucke*, Der Begriff der politischen Wirtschaftsstraftat – Eine Annäherung, 2012, p. 9 et seq., which de lege ferenda calls for a "delimited international economic criminal law" as an instrument of human rights protection in times of advanced globalization; for critical responses, *Bung* (fn. 7), p. 139 et seq.; *Wittig* (fn. 19), 2015, p. 242 et seq.

28 *BGHSt* 34, 1, 3 et seq.; *Satzger*, in: Satzger/Schluckebier/Widmaier (eds.), StGB: Kommentar zum Strafgesetzbuch, 4th ed., 2019, Vor §§ 3–7, margin no 20; see also *Köpferl* (fn. 6), § 10, margin no 38.

https://doi.org/10.5771/2193-5505-2020-3-395 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC-ND

in cross-border cases.[29] Criminal law as a national regulatory framework serves primarily to protect domestic legal interests.[30] This is a question of the interpretation of the specific criminal provision, which is the responsibility of the respective courts.[31] On the one hand, the scope of protection of German criminal provisions particularly encompasses violations of individual legal interests (e.g. in cases of homicide or offences involving bodily harm), regardless of the nationality of the affected persons and their geographical location.[32] On the other hand, the scope of protection of a German criminal provision is not invoked if the purely sovereign or public legal interests of a foreign state are involved, e.g. its territorial integrity.[33] However, the legislature can extend the scope of protection to foreign legal interests, as has happened in connection with the implementation of international legal provisions, e.g. by § 11 para. 1 no. 2 lit. a StGB and § 335a StGB for the offences of bribery.[34] The German Federal Court of Justice ("Bundesgerichtshof" – BGH) has now confirmed the applicability of German criminal provisions only indirectly protecting individual legal interests (e.g. environmental crimes according to §§ 324 et seq. StGB) to a case occurring outside Germany.[35] In summary, not every case involving a foreign country, though it may be subject to German criminal law according to §§ 3 et seq. StGB, is at the same necessarily within the scope of protection of a German criminal provision. Critical for establishing whether a case comes within the scope of protection of a German criminal provision is whether (at least indirectly or additionally) individual interests (such as physical integrity, life, freedom, property and assets) are protected. Should this not be so, one must examine if there are special regulations establishing the application of German criminal law to the respective constellation.

c) No Corporate Criminal Liability

Unlike most other legal systems,[36] German criminal law does not currently recognise corporate criminal liability, providing only the possibility of imposing a regulatory fine on legal persons and associations of persons under § 30 OWiG.[37] According to

29 *Satzger* (fn. 28), Vor §§ 3–7, margin no 7; *Köpferl* (fn. 6), § 10, margin no 39.
30 *BVerfG*, BeckRS 2007, p. 32414 margin no 42.
31 *BVerfG*, BeckRS 2007, p. 32414 margin no 42; *BGHSt* 29, 85, 88.
32 *BVerfG*, BeckRS 2007, p. 32414 margin no 42; *BGH*, NJW 2015, p. 423, 425 with further references.
33 *Satzger* (fn. 28), Vor §§ 3–7, margin no 9. On the inclusion of sovereign legal interests of the EU into the scope of protection of German criminal law see *Satzger* (fn. 28), Vor §§ 3–7, margin no 12.
34 See *Momsen/Willumat*, KriPoZ 2019, p. 323, 330.
35 *BGH*, NJW 2015, p. 423, 425 for credit fraud under § 265b StGB.
36 Overview at *Meyberg*, in: Graf (ed.), Beck'scher Online-Kommentar zur OWiG, 25th ed., as of: 1.1.2020, § 30, margin no 3.1.
37 For background information on the missing corporate criminal liability see *Wittig* (fn. 19), 2018, p. 198 et seq.; see for a newer discussion on the introduction of corporate criminal liability *Baur*, Kommt jetzt das „Unternehmensstrafrecht"?, AG 2018, p. 457; *Böttger*, Verbandsgeldbuße (§ 30 OWiG), in: Minkoff/Sahan/Wittig (eds.), Konzernstrafrecht, 2020, § 12,

https://doi.org/10.5771/2193-5505-2020-3-395 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC-ND

§ 30 OWiG, a fine of up to EUR 10 million (§§ 1, 17 OWiG) can be imposed upon a legal person or an association of persons deemed equivalent to a legal person if one of its senior executive staff has committed a criminal offence or a regulatory offence (called "connecting" or "reference" offence) which has either violated the obligations of the legal person or association of persons or which has led or was intended to lead to their enrichment. In combination with the violation of supervisory duties according to § 130 OWiG and the liability of executive bodies and representatives according to § 14 StGB, § 9 OWiG, this compensates the missing corporate criminal liability in German criminal law.

However, a sanction according to § 30 OWiG requires that a natural (executive) person in a legal person or association of persons has demonstrably committed a criminal offence or regulatory offence, which is then attributed to the legal person or association. The fine imposed on the legal person or association will usually be in addition to the punishment of the perpetrator of the offence, i.e. the executive staff member who has acted on behalf of the association. Thus, in the case of transnational human rights violations, a fine can only be imposed if a corporate-related criminal offence or regulatory offence has been committed by an executive staff member.

In contrast, the draft for an Act on the Sanctioning of Associations ("Verbandssanktionengesetz" – VerSanG), which is currently only available as a ministerial draft by the Federal Ministry of Justice (as of 15 August 2019), provides for more severe sanctions, but not for genuine "corporate criminal liability".[38] The hope is that such sanctions will increase the general preventive effect of combating criminal offences and will therefore be more effective than the sanctions currently provided for under § 30 OWiG. For this reason, among other things, the sanctions framework will be increased compared to the current regulatory offences law. Corporate criminal liability is also an issue in the national "Business and Human Rights" action plan, since it is hoped that this will increase effectiveness of the protection of human rights under criminal law.[39] However, even the proposed reform still requires a criminal offence or regulatory offence to be committed by a natural person, that can function as a reference point under the attribution model (§ 3 VerSanG-E).

margin no 9 et seq.; *Rogall*, in: Mitsch (ed.), Karlsruher Kommentar zum Gesetz über Ordnungswidrigkeiten: OWiG, 5th ed., 2018, § 30, margin no 129; *Kohlhof*, Die Legitimation einer originären Verbandsstrafe: Eine straftheoretische Untersuchung, 2019.

38 See in detail *Wittig*, Begründung täterschaftlicher Verantwortlichkeit in Konzernstrukturen, in: Minkoff/Sahan/Wittig (eds.), Konzernstrafrecht, 2020, § 8, margin no 18 et seq.; more severe sanctions can be determined in that, according to § 2 para. 2 VerSanG-E, the requirement of the applicability of German criminal law according to §§ 3 et seq. StGB is to be waived for the offence of the association. With regard to the problem of legitimization of the association's responsibility based on individual attribution (§ 3 para. 1 VerSanG-E) against the background of §§ 3 et seq. StGB as an essential component of substantive criminal law see *Momsen/Willumat*, KriPoZ 2019, p. 323, 333.

39 *Federal Government*, National Action Plan – Implementation of the UN Guiding Principles on Business and Human Rights ("Bundesregierung, Nationaler Aktionsplan – Umsetzung der VN-Leitprinzipien für Wirtschaft und Menschenrechte"), 2017, p. 25.

https://doi.org/10.5771/2193-5505-2020-3-395 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC-ND

d) Criminal liability of individual senior executive staff members for participation by action

aa) Cases in which it can be proven that corporate management staff ordered an offence to be committed abroad will be rare. In such cases, prosecution for abetting according to § 26 StGB can be pursued.

bb) It is also at least conceivable that German senior executive corporate staff could be held indirectly liable for the offence by virtue of (de facto) organisational control[40] over management staff of foreign group companies or suppliers according to § 25 para. 1 alt. 2 StGB. The legal concept of an indirect perpetration by virtue of the domination of an organisational apparatus not only applies within a single company but throughout an entire group,[41] which means that it can be applied not only when employees of a foreign branch or site of a company are instructed to commit violations of legal interests, but also when this instruction is issued to employees of a foreign subsidiary.[42] Since it is recognised in case law[43] that the concept of an indirect perpetration based on organisational control is also applicable to persons not integrated into the organisational structure of the company, a person may also be criminally liable as an indirect perpetrator if offences are committed by initiating regular processes in legally independent subcontracting companies, in particular if the domestic (i.e. German) company exercises a de facto control due to economic dependence of the subcontracting company (outside Germany).[44]

cc) Furthermore, Germany-based executive staff members may be criminal liable for the participation in an offence by directly supporting persons who commit human rights violations abroad (e.g. by paying protection money to terrorists as in the Lafarge case). Here, it is possible to consider such an act as committed by joint offenders according to § 25 para. 2 StGB. Often, however, there has been a contributing act committed only in the preparatory stage of the offence. If in such cases criminal liability for the joint commission of an offence is recognised at all, this act must then be so significant that it makes up for the lack of involvement in the execution stage of the offence.[45]

dd) In most cases, it will only be possible – if at all – to prove aiding according to § 27 StGB by active action. Even if a contribution by a senior executive staff member can be objectively proven, the *mens rea* must also be present. This requires *mens rea*

40 For the application of the legal concept developed by *Roxin*, Straftaten im Rahmen organisatorischer Machtapparate, GA 1963, p. 193 and its critically discussed transferability on corporations see *BGHSt* 40, 218, 236; *BGHSt* 45, 270, 296; *BGHSt* 48, 331; *BGHSt* 49, 147, 163; *BGH*, NStZ 2008, p. 89, 90.

41 *Wittig,* Teilnahmeverantwortlichkeit im Konzern, in: Minkoff/Sahan/Wittig (eds.), Konzernstrafrecht, 2020, § 3, margin no 84 et seq.

42 *Köpferl* (fn. 6), § 10, margin no 42.

43 *Köpferl* (fn. 6), § 10, margin no 42.

44 *BGHSt* 43, 219.

45 For a detailed account see *Joecks/Scheinfeld*, in: von Heintschel-Heinegg (ed.), Münchener Kommentar zum StGB, vol. 1, 4th ed., 2017, § 25, margin no 195 et seq.

https://doi.org/10.5771/2193-5505-2020-3-395 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC-ND

with respect to both the own contribution of the aider and the commission of an unlawful act by the offender ("doppelter Gehilfenvorsatz").[46] In many cases, it will be difficult to establish such *mens rea* beyond reasonable doubt. Nevertheless, circumstances may exist demonstrating that the aider acted with conditional intent (*dolus eventualis*), for example in cases where corporations gain knowledge about such relevant issues while complying with their CSR reporting obligations (e.g. under § 289c para. 3 no. 3 and no. 4 of the German Commercial Code ("Handelsgesetzbuch" – HGB)).[47]

In cases where an objective contribution as well as *mens rea* of the aider can be established, exemption from punishment can come into consideration in accordance with the principles of "neutral aid" ("neutrale Beihilfe").[48] It is largely agreed that an aiding that takes the form of (outwardly) neutral acts which are characteristic for an occupation cannot in general be punishable. Beside its doctrinal classification,[49] the criteria that qualify the aiding as neutral and thus as exempt from punishment under certain conditions are disputed. Here, case law[50] has followed *Roxin's* solution[51], who for this purpose looks at the criteria of knowledge of the aider, the "criminal context" ("deliktischer Sinnbezug") and the for the aider recognisable inclination to commit an offence.

According to *Roxin*, this legal problem occurs "when 'neutral' actions, as carried out in everyday life in thousands of cases – usually within the framework of normal professional practice – in individual cases promote criminal behaviour".[52] In the context of transnational violations of human rights, the question immediately arises as to whether

46 See – pars pro toto – *Joecks/Scheinfeld* (fn. 45), § 27, margin no 96 et seq.

47 For this "demonstration of intent due to the obligation to obtain information" ("Vorsatzbegründung durch Pflicht zur Informationsbeschaffung"), see *Köpferl* (fn. 6), § 10, margin no 17 et seq., 43.

48 For the concept of neutral aid see – pars pro toto – *Joecks/Scheinfeld* (fn. 45), § 27, margin no 49 et seq.; *Wittig* (fn. 38), § 5, margin no 43 et seq.

49 A summary can be found in *Hillenkamp/Cornelius*, 40 Probleme aus dem Strafrecht, 2020, p. 28; see *Niedermair*, Straflose Beihilfe durch neutrale Handlungen?, ZStW (107) 1995, p. 507, 508 et seq.; *Rönnau/Wegner*, Grundwissen – Strafrecht: Beihilfe und „neutrales" Verhalten, JuS 2019, p. 527, 528 et seq.

50 *BGH*, NStZ-RR 1999, p. 184, 186; *BGH*, NStZ 2000, p. 34; *BGHSt*, 46, 107, 112 et seq.; *BGHSt* 50, 331; *BGH*, NZWiSt 2014, p. 139, 142; *BGH*, NStZ 2017, p. 337 with *Kudlich* commenting; *BGH*, NStZ 2017, p. 461; *BGH*, NStZ 2018, p. 328 with *Kudlich* commenting.

51 *Roxin*, Strafrecht Allgemeiner Teil Band II, 2003, § 26, margin no 218 et seq.; consenting *Schünemann*, in: Laufhütte/Rissing-van Saan/Tiedemann (eds.), Leipziger Kommentar zum StGB, vol. 1, 12th ed., 2007, § 27, margin no 17 with further references.

52 *Roxin* (fn. 51), § 26, margin no 218 [„wenn ‚neutrale' Handlungen, wie sie im Alltag – meist im Rahmen normaler Berufsausübung – tausendfältig vorgenommen werden, im Einzelfall einem deliktischen Verhalten Vorschub leisten"]; see for this *Kudlich*, Die Unterstützung fremder Straftaten durch berufsbedingtes Verhalten, 2004; *Rackow*, Neutrale Handlungen als Problem des Strafrechts, 2007; *Schünemann* (fn. 51), § 27, margin no 17 et seq.; *Graf/Jäger/Wittig/Hoffmann-Holland/Singelnstein*, StGB, § 27, margin no 15 et seq. A restriction of the punishability of aid for neutral acts is rejected by e.g. *Beckemper*, Strafbare Beihilfe durch alltägliche Geschäftsvorgänge, Jura 2001, p. 163, 169.

https://doi.org/10.5771/2193-5505-2020-3-395 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC-ND

in this context we can speak of everyday and neutral behaviour at all.[53] This is contradicted by the fact that the danger of committing human rights violations in *high risk zones* is indeed typical and therefore leaves no room for the doctrine of neutral aid. Moreover, economic interactions in this (risk) area are not of an "everyday nature", because they are accompanied by a (at least abstractly increased) risk of a crime being committed. These objections, however, do not call into question the doctrine as such, but merely require economic actors to exercise greater care and supervision, which in turn leads to an increased risk of criminal liability. As a result, neutral aid may become less important, but its fundamental validity in the transnational arena is not affected.

e) Criminal Liability for Omission

aa) In most cases of transnational human rights violations, however, there will be no actual active action, but merely a failure to act on the part of the management staff of the company or at least evidence only of such a failure. The most important group of cases involves companies based in Germany disregarding their supervisory obligations (particularly in the form of non-monitoring of a supply chain).

bb) Because criminal liability for the commission of a crime by omission requires, according to § 13 para. 1 StGB, that offenders are legally responsible for ensuring that the result does not occur, they must hold a so-called guarantor status ("Garantenstellung") and – derived from such status – a so-called guarantor's obligation ("Garantenpflicht"). As a rule, it is not possible to derive a guarantor status in terms of a legal obligation of responsibility from CSR regulations.[54] However, such a guarantor status may arise from what is called the "principal's criminal liability" ("Geschäftsherrenhaftung").[55] This legal doctrine,[56] which has now been recognised in case law, establishes that senior management staff have a guarantor's obligation to prevent subordinates from committing business-related offences. In the cases under consideration here, it is the duty of the domestic (i.e. in Germany) principal to prevent criminal acts being committed abroad.

An act is considered to be business-related if it has an internal connection with the business activity of the perpetrator or with the type of business; it is to be determined in specific and not merely abstract terms; offences committed only opportunely in the

53 Affirming this, see *Ambos* (fn. 23), p. 69; also *Kirsch*, NZWiSt 2014, p. 212, 216; doubting *Wittig* (fn. 19), 2015, p. 253. *Köpferl* (fn. 6), § 10, margin no 43 also talks of the possible need for a context-specific modification which would take into account the existing parameters in cases of transnational violations of human rights; in this sense also *Ambos* (fn. 23), p. 44 with further references regarding the criminal liability of principals ("context-specific flexibility").

54 *Köpferl* (fn. 6), § 10, margin no 45.

55 For the dogmatic foundations of the liability of the principal see e.g. *Utz*, Die personale Reichweite der strafrechtlichen Geschäftsherrenhaftung, 2016; *Wittig* (fn. 38), § 6, margin no 56 et seq.; *Zerbes/Pieth,* Unternehmerische Verantwortlichkeit für Völkerrechtsverbrechen im Ausland, KJ 2018, p. 69 et seq.

56 *BGHSt* 54, 44; 57, 42.

https://doi.org/10.5771/2193-5505-2020-3-395 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC-ND

course of business activity are not encompassed.[57] The business relatedness of the conduct in question, which is a prerequisite for principal's liability[58], will thus normally be present, since the conduct usually serves the business interest of maximising profit.[59] This can at least be assumed if – in line with recent case law[60] – a very broad understanding of business-relatedness is taken as a basis of consideration and the context of the business activity, such as an activity in *high risk zones*, is taken into account.[61]
The liability of a principal for business-related offences is most likely to be established if a violation of a legal interests is committed in a non-independent permanent business unit outside Germany. The scope of the principal's liability within group structures[62] and in relation to legally independent suppliers has not yet been conclusively resolved. From a de facto and economic point of view, however, despite the principle of separation under company law ("Trennungsgrundsatz"), criminal liability of the principal can also come into consideration in group constellations, provided that the parent company has actual or legal control (§§ 308, 323 of the German Stock Corporation Act, "Aktiengesetz" – AktG) over the subsidiary.[63] Assuming this de facto and economic approach, the senior management staff of the domestic purchasing company may also be liable as the principal of a legally independent foreign supplying company. Particularly in a case in which a subcontracting company produces almost exclusively for a single German company, this economic dependence can result in an organizational control by the German principal.[64]

cc) In this context, reference must also be made to § 130 OWiG, i.e. the violation of obligatory supervision in operations and enterprises. § 130 OWiG states that an omission of supervisory measures on the part of the owner of an operation or undertaking can, under certain circumstances, be subject to a fine. In addition to the owner of an operation, the enterprise can also be independently fined (§§ 130 para. 1, 30, 9 OWiG).[65] In this respect, § 130 OWiG is a "transmission belt" for the sanctioning of legal persons.[66] Nevertheless, it serves merely as a catch-all offence which is only ap-

57 *BGHSt* 57, 42, 46; *BGH*, NStZ 2018, p. 648.
58 *BGHSt* 57, 42, 47; *BGH*, NStZ 2018, p. 648; *Roxin* (fn. 51), § 32, margin no 141; *Kühl*, Strafrecht, Allgemeiner Teil, 2017, § 18, margin no 118a.
59 *Ambos* (fn. 23), p. 44 et seq.
60 *BGH*, NStZ 2018, p. 648.
61 For this context specific adaption of the term business-relatedness *Zerbes*, Globales Wirtschaftshandeln als Gegenstand des Straf- und Strafverfahrensrechts: Eine Bestandsaufnahme, in: Jeßberger/Kaleck/Singelnstein (eds.), Wirtschaftsvölkerstrafrecht, 2015, p. 237 et seq.; *Zerbes/Pieth* (fn. 55) p. 74 et seq.; *Ambos* (fn. 23), p. 44 et seq.; *Köpferl* (fn. 6), § 10, margin no 47.
62 See *Minkoff*, Unterlassens- und Aufsichtsverantwortlichkeit im Konzern, in: Minkoff/Sahan/Wittig (eds.), Konzernstrafrecht, 2020, § 6, margin no 36 et seq.
63 *Köpferl* (fn. 6) margin no 46; *Zerbes/Pieth* (fn. 55) p. 72 et seq.
64 *Köpferl* (fn. 6) margin no 46 et seq.
65 *Minkoff* (fn. 62), § 6, margin no 74.
66 *Többens*, Die Bekämpfung der Wirtschaftskriminalität durch die Troika der §§ 9, 130 und 30 des Gesetzes über Ordnungswidrigkeiten, NStZ 1999, p. 1, 8; *Momsen/Willumat*, KriPoZ 2019, p. 323, 331.

https://doi.org/10.5771/2193-5505-2020-3-395 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC-ND

plicable when it cannot be proven that the owner of the operation participated in the criminal or administrative offence of the employee.[67] The unlawful act then means that the owner of the operation failed to undertake the supervisory measures that are necessary and reasonable to prevent the violation of business-related duties. A violation according to § 130 OWiG is thus an offence of omission.[68] It is, however, highly contested as to what extent § 130 OWiG is applicable to group structures in an international context.[69] Although this will have to be evaluated on the basis of the concrete circumstances, the question is likely to be answered in the affirmative if the parent company can exercise influence over the subsidiary by issuing instructions, for example, so that these two legally independent companies appear to be a single economic unit.[70] This issue is exacerbated if the foreign company is not a subsidiary of the group but an independent supplier.[71]

f) Criminal Liability for Negligence

In many cases, senior management staff in Germany will not have acted with intent or knowledge, or at least it will not be possible to prove that they did. In some cases, however, it may be possible to substantiate intent on the basis of existing CSR obligations.[72]

Criminal liability for negligence can only be considered, however, if it is expressly stipulated by the law (see e.g. §§ 222, 229 StGB). Such a criminal liability requires an objective and subjective breach of duty of care where the result is subjectively and objectively foreseeable.

It is particularly difficult to determine objectively which standards of due diligence are to be applied. In this context, the starting point must be the requirements which a diligent and prudent transnationally operating businessman must fulfil in order to avoid violations of legal interests.[73] In order to specify this standard of due diligence

67 Compare *AG Solingen*, NJW 1996, p. 1607; *Bohnert/Krenberger/Krumm*, in: Krenberger/Krumm, Ordnungswidrigkeitengesetz Kommentar, 5th ed., 2018, § 130, margin no 1.
68 *Rogall* (fn. 37), § 130, margin no 38.
69 In detail see *Minkoff*, Sanktionsbewehrte Aufsichtspflichten im internationalen Konzern, 2016; the currently prevailing opinion seems to agree, see *Rogall* (fn. 37), § 130, margin no 27; an overview can be found in *Achenbach*, Verbandsgeldbuße und Aufsichtspflichtverletzung (§§ 30 und 130 OWiG) – Grundlagen und aktuelle Probleme, NZWiSt 2012, p. 321, 325; details for the situation surrounding groups see *OLG München*, BeckRS 2015, p. 14184; *Rogall* (fn. 37), § 130, margin no 27 et seq.; *Minkoff* (fn. 62), § 6, margin no 86 et seq.
70 *OLG München*, BeckRS 2015, p. 14184; on the idea of an understanding of a company in the sense of an "economic unit" established by the Federal Antitrust Authority ("Bundeskartellamt") in the field of anti-trust judicial practice see *ECJ*, EuZW 2009, p. 816; case report of the Federal Antitrust Authority ("Fallbericht des Bundeskartellamtes") B1–200/06; for further details see *Momsen/Willumat*, KriPoZ 2019, p. 323, 331 et seq.
71 See *Momsen/Willumat*, KriPoZ 2019, p. 323, 332; *Zerbes/Pieth* (fn. 55) p. 72 et seq.
72 See 2. d) dd) in this section.
73 See in detail *Reiter* (fn. 7).

https://doi.org/10.5771/2193-5505-2020-3-395 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC-ND

according to criminal law, case law and prevailing doctrine refer to what are called "special standards" ("Sondernormen").[74]

In this context, the question often arises as to the relevance of foreign (i.e. non-German) special standards for determining the standard of due diligence. In principle, it is possible to base the determination of the standard of due diligence on special foreign legal standards which means the application of foreign law ("Fremdrechtsanwendung").[75] With regard to the required protection of legal interests on which the specification of the standard of due diligence is to be based, however, foreign special standards do not have any binding effect but, like all special standards, are at most indicative. The obvious objection that German standards are being imposed on other legal systems as a kind of "criminal law imperialism" can be countered simply by the fact that these standards result from the doctrine of negligence in the German legal system, which is merely applied here to circumstances occurring outside Germany. By contrast, it would be difficult to argue that senior management staff operating at home should be in a privileged position when dealing with foreign issues by allowing them to invoke ineffective foreign special standards.

In the context of the doctrine of negligence, *Reiter* considers whether and to what extent non-binding soft law in international law (e.g. the UN Guiding Principles on Business and Human Rights or the OECD Guidelines for Multinational Enterprises), which obligates companies to respect human rights in their supply and production chains, can have an indicative effect as special standards.[76]

III. Outlook and Conclusion

It would be evident to expand the ICC statute for human rights violations to encompass global economic activity, as *Naucke*[77], for example, proposes with his concept of "borderless international economic criminal law" ("entgrenztes Wirtschaftsvölkerstrafrecht"). This would entail amending national renditions of international criminal law. Here, the question inevitably arises as to how far criminal law can be made more flexible and be expanded with the aim of increasing its effectiveness before it begins to lose its very important status as criminal law which restricts fundamental rights but is nonetheless rooted in the rule of law.

At national level, the introduction of corporate criminal liability is certainly one way of ensuring more effective prosecution of transnational human rights violations by companies. Doctrinal concerns with respect to the culpability and capacity to act of companies contest this, however. Nevertheless, it is probably safe to assume that corporate criminal liability will be introduced in Germany in the future.

74 *Vogel*, in: Laufhütte/Rissing-van Saan/Tiedemann (eds.), Leipziger Kommentar zum StGB, vol. 1, 12th ed., 2007, § 15, margin no 219 with further references; in detail *Reiter* (fn. 7).
75 *Werle/Jeßberger*, in: Laufhütte/Rissing-van Saan/Tiedemann (eds.), Leipziger Kommentar zum StGB, vol. 1, 12th ed., 2007, Vor §§ 3 et seq. Margin no 331, 333.
76 *Reiter* (fn. 7).
77 *Naucke* (fn. 27), p. 9 et seq.

https://doi.org/10.5771/2193-5505-2020-3-395 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC-ND

However, it seems to me to be preferable to apply current German criminal law consistently to senior management staff and employees of transnationally active companies in situations when cases of serious violations of legal interests abroad arise. Certainly, these circumstances pose great challenges to German criminal law doctrine, especially in the area of the doctrine of omission, participation, and negligence, and these should not be downplayed here. Nevertheless, there are currently *de lege lata* also no loopholes in criminal law for managers and employees of commercial enterprises operating globally out of Germany. Criminal law applies also to the economically powerful, also when they are acting transnationally. And even as the law currently stands, the possibility of corporate sanctions in the form of a corporate fine in accordance with § 30 OWiG exists.

Criminal charges – just like civil human rights litigation – can thus become a strategic governance instrument for enforcing elementary human rights in the context of transnational economic activity.[78] However, there is no denying that in legal practice there are still considerable deficits in the application of existing regulations in transnational economic criminal law or in international economic criminal law. As the Siemens case has shown, however, in the realm of bribery offences, a precedent can change a great deal, even on the basis of existing national law, and we should work, each in their own way, towards achieving this change.

78 *Köpferl* (fn. 6), margin no 50.

https://doi.org/10.5771/2193-5505-2020-3-395 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC-ND