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Criminal Liability of Companies for Crimes in their Supply Chain

A comparative study of Namibian and German law

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II. List of Abbreviations

AG: Lowest German court

AU: African Union

BGH: German court, similar to the Namibian Supreme Court

CARE: Cooperative for Assistance and Relief Everywhere

CEO: Chief Executive Officer

CPA: Namibian Criminal Procedure Act 51 of 1977

ECCHR: European Center for Constitutional and Human Rights

ECJ: European Court of Justice

EU: European Union

FATF: Financial Action Task Force

GG: German Basic Law (basically the Constitution)

GWG: German Money Laundering Act

ICC: International Criminal Court

ICCPR: International Covenant on Civil and Political Rights

ICESCR: International Covenant on Economic, Social and Cultural Rights

ICJ: International Court of Justice

IRG: German International Cooperation in Criminal Matters Act

LG: German court

NGO: Non-governmental organisation

OWiG: German Regulatory Offences Act

OLG: German court, similar to the Namibian High Court

POCA: Namibian Prevention of Organised Crime Acts 2 of 2004

StGB: Criminal Code

StPO: Criminal Procedure Act

UN: United Nations

OECD: Organisation for Economic Co-operation and Development

1 Introduction

> "*I think for an incident of this magnitude, [the collapse of the clothing factory Rana Plaza] to occur, we are talking about a systemic failure, where there are multiple responsibilities and, more strongly, culpabilities*." (Jami Terzi)[1]

This thesis searches for answers to the question as to how companies can be held liable for crimes in their supply chain. As it aims at contributing to the international discussion on the topic of business and human rights, a comparative approach between Namibian and German law is chosen.

The above-mentioned citation of Terzi, the director of CARE International, refers to the collapse of the garment factory Rana Plaza in Bangladesh in April 2013. The labourers in Rana Plaza were forced to work although there were visible cracks in the wall of the building and the police had issued a warning not to enter the building. When the building collapsed, more than a thousand Bangladeshi workers died, while many others got injured. The owner of the Bangladeshi factory was convicted of corruption while the trial for murder is still pending.[2] Unfortunately, this is not the only example of multifaceted crimes committed in supply chains of German and Namibian companies. Further examples are corruption, crimes against the environment and assault.

As Terzi says, companies have to be held accountable for their morally condemnable conduct. The reasons are manifold. According to the German scholar Techmeier, companies tend to breach the law if it increases their profits.[3] He says that in areas where no possibilities of technical innovations exist anymore there is a tendency to develop innovations to avoid criminal sanctions instead.[4] The manufacturing trade is an example for such a field. The academic Punch states that in general companies search for countries with the least possibility to be prosecuted for their conduct.[5] Furthermore, the conduct of the supplied enterprise definitely has an influence on the production conditions. On the one hand, the corporation can influence them in a positive way e.g. by claiming good working conditions. On the other hand, it can use its power in a negative way when it turns a blind eye to the production conditions. It can even encourage

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[1] Cited by BBC, 3rd May 2013, *Can Bangladesh clothing factory disasters be prevented?* available at: http://www.bbc.com/news/business-22382329 (last accessed 28th May 2018).
[2] Kanti, S. 29.8.2017, last visit 12.12.2017, available under: http://www.aljazeera.com/news/2017/08/rana-plaza-owner-jailed-years-corruption-170829161742916.html (Foreign).
[3] Techmeier (2012) p. 285-286 (German).
[4] Techmeier (2012) p. 289 (German).
[5] Punch (1996) p. 249 (International).

cheapest working conditions in exerting an extreme price pressure. As the supplied business only asks for economic value, it has played a significant part in the crimes against workers. The companies do not assume their responsibility, but shirk it in blaming other stakeholders. That leads to the conclusion that the conduct of transnational businesses often does not comply with ethics.

But as moral arguments do not convince judges, this thesis searches for legal provisions to hold companies liable for their morally condemnable conduct. It tries to find the culpabilities which Terzi mentions. It proposes measures in the criminal law to punish companies for crimes in their supply chain. It answers the question on how supplied companies like Benetton and KiK in the Rana Plaza instance can be held liable. It addresses the problems of crimes happening in low-wage countries in particular.

The structure is based on the application of Namibian and German legislation on supply chain liability, a comparison and recommendation for amendments. The first chapter deals with the general notion of criminal liability. This lays the theoretical basis for holding establishments liable. The second chapter enlightens the particular offences with which CEOs and their enterprises can be charged. Firstly, corporate liability is focused on. It is shown how the director can be held liable in his official function and how the legal person can be held liable. In a second step, the thesis searches in how far international standards for business and human rights can be enforced via national law. Additionally, the thesis answers as to how the leader of the supplied corporation can be held liable for the offences of money laundering and handling of stolen property. Since this paper covers a transnational topic, I will be reflecting on the principles of extra-territorial jurisdiction in the fourth chapter. This paper will conclude by giving recommendations and an outlook dealing with other jurisdictions and further research.

2 Theories of Criminal Liability

To begin with, it has to be reasoned why the company should be held liable for crimes in its supply chain. For that, this chapter will provide a theoretical background on criminal liability.

According to the positive approach, a crime is every conduct that has been declared as unlawful, blameworthy and punishable. Hereby, the principle of legality is crucial. The conduct has to be clearly defined as a criminal offence before the crime was committed. The law has to be interpreted narrowly and ambiguities have to be solved in favour of

the accused and analogies are prohibited.[6] Furthermore, the conduct has to comply with the definitional elements of a crime to amount to criminal liability.[7] Additionally, unlawfulness has to be proven. This means that the conduct has to be contrary to society's perception of justice.[8] The list of defences is not closed. An applicable defence is the socially adequate behaviour for example. Lastly, the necessary fault has to be proved. This is either intention or negligence, except for strict liability which does not require fault. It has to be either proven for the head of the supplied company himself or can be imputed to him or the corporation.

However, the positive approach does not provide assistance for lawmakers, as they are creating criminal law. For them, it clearly has to be established where the boundaries of criminal law are.

First of all, the principle of subsidiarity prevails. Criminal law shall only be used as ultimo ratio.[9] German scholars say that the law on regulatory offences is a good addition to criminal law.[10] There are proposals for other ways to address the issue of crimes in the supply chain. An example is corporate social responsibility, e.g. code of conducts.[11] Nevertheless, as they are not legally enforceable, they might be used to just polish the business image without changing anything in the production conditions. Some academics praise certification systems as being the adequate response towards ignorant business behaviour.[12] However, their impact is very limited compared to government actions. Furthermore, it has been claimed of states to set incentives for ethically correct behaviour, e.g. legislation concerning investment that set rewards.[13] Although this is a tool addressing prevention, it is not as effective as criminal law. Incentives are not as strong as the fear for criminal punishment. Another proposal refers to the different delictual and contractual claims in private law to address this problem.[14] However, it is dependent on a victim suing, which may be hampered by ignorance or lack of financial means. As a conclusion, criminal law provides for the most effective tools, concerning deterrence and prevention.

[6] Art. 12 (3) Constitution (Namibia); Kemp et al (2015) p. 17 (South African); Art. 103 (2) Basic Law (German).
[7] Kemp et al. (2015) p. 6 (South African).
[8] Snyman (2015) p. 102 (South African).
[9] Kudlich / Oğlakciowğlu (2014) p. 18 (German).
[10] Ibid (2014) p. 19 (German).
[11] Clapham (2006) p. 197; Frynas (2003) p. 181 (International).
[12] Garcia-Johnson (2003) p. 153 (Foreign).
[13] De Schutter (2003) p. 100 (European); Ryngaert (2015) p. 129 (International).
[14] Hübner (2018) pp. 61ff. (German); Punch (1996) p. 253 (International).

Criminal law does not in itself have a legitimacy but has to be based on the notion of justice and should not use the perpetrator as a tool to promote the common good.[15] Therefore, the companies should not be abused to prevent human rights violations in low-wage countries. Instead they should be held accountable if they did something that is condemned by society.

In the case of an endangering conduct, the person can only be held liable, if he knows, that this conduct is endangering the legally protected interest.[16] However, certain knowledge can be seen as a prerequisite of business behaviour, e.g. that corruption harms society. This also has to be applied on supply chain liability. It cannot be expected from the retailer to foresee and prevent a crime if there is not a risk of this crime in the supply chain. Hence, a risk assessment has to be conducted.

One aim of criminal law is the protection of interests like life, physical integrity, property, freedom and dignity, public morality, public welfare and the preservation of the state.[17] Hence, those interests of the workers in the factories must be protected. On the one hand, no member of the society is harmed by the crime committed abroad in the production. On the other hand, due to globalisation, the connection between the interests of the world-wide community is increasing.

Furthermore, public morality can be used in Southern Africa as a justification for the establishment of criminal liability.[18] It can be said that corporations are breaching moral and cultural values in not caring about the conditions in the production of their goods. It is definitely morally condemned to produce at the expense of human lives. And so it is to support such a system.

Also, theories of criminal punishment find application here. This comprises of the absolute theory, namely retribution and relative theories including prevention, deterrence and reformation.[19] Courts always apply a combination of those theories.[20]

Retribution is an important factor when dealing with the question which courts shall take jurisdiction. Justice requires an effective and fast enforcement of punishments. This is less likely to be guaranteed by a low-wage country. This argument stands, although the

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[15] Jakbos (2011) pp. 8ff. (German)
[16] Ibid p. 8 (German).
[17] Kemp et al (2015) p. 8 (South African).
[18] Ibid p. 8 (South African).
[19] Ibid pp. 22-23 (South African); Listzs, ZStW 3 (1883), 35 (German).
[20] *S v Zinn* judgement of 31st May 1969 (2) SA 537 (A) (South African applicable in Namibia); Jakobs (2011) p. 27 (German).

theory of retribution is pushed in the background in Germany. Still it is used as an addition to the relative theories.[21]

One aim of criminal law is deterrence. A criminal behaviour is established when someone decides to give something else a higher priority than complying with the law.[22] An example is someone who does not pay taxes in order to make more profits. Therefore, the potential perpetrator must be allured from his own wishes to commit the crime, the gravity of the punishment has to outweigh the benefit received through the offence. The state should use psychological force to make the members of society follow.[23] The tools of deterrence can be directed against the society in general or the perpetrator individual.[24] Enterprises have to be deterred from influencing the production in such a way that crimes are likely to be committed. Therefore, high sanctions have to be put on convicted companies to outweigh the financial gain through the crime in the supply chain. Furthermore, public authorities have to increase their efforts to discover business-related crime. The more likely it is to be caught the higher the deterrence.

Another aim is prevention of further crimes. This is established if the perpetrator is put in prison. This theory looks at the danger that results from the person.[25] This can be applied for CEOs which habitually and persistently commit crimes. The winding up of transnational entities should not be applied in a broad manner as they play a crucial role in improving the economic situation in low-wage countries. As the retailer instructs the production, many jobs are created. Nevertheless, working conditions in line with human dignity have to be guaranteed.

Reformation changes the perpetrator in so far that he does not want to commit a crime anymore. It has to be a psychological change. It is for example achieved via education.[26] The state can try to change the mind-set of CEOs to produce at the expense of human lives. It has to encourage a thinking in line with human dignity.

The German jurist Radbruch names justice, deterrence, legal certainty as foundation pillars of criminal law.[27] Justice dictates that entities are deterred from infringing into others' rights. The duties of corporation acting on an international sphere have to be made clear.

[21] Jakobs (2011) pp. 16-19 (German).
[22] Ibid p. 9 (German).
[23] Feuerbach (1800), cited by Jakobs (2011) p. 20 (German).
[24] Jakobs (2011) p. 22 (German).
[25] Ibid p. 23 (German).
[26] Kemp et al. (2015) p. 23 (South African).
[27] Radbruch (1932) 87 ff. (German).

Criminal law aims at regulating the interaction between individuals to prevent abusive behaviour. It shall create trust that the other person will comply with society's perception of such interaction.[28] This can easily be adapted to business relationships. The consumer relies on the enterprise to behave in a manner which is compliant with the ethical convictions of society. Due to his trusts in the enterprise, he buys the products.

Corporate criminal law comprises of all crimes that have been committed in abuse of a position of trust, which is essential in business relations, and does not only harm an individual but an interest of society as a whole. Corporate crimes are often shaped by an anonymity between perpetrator and victim. Hence, the perpetrator does not feel blameworthy. Often corporate crimes are complex and difficult to investigate and prosecute. Furthermore, internationality of crimes increases the complexity. Often the prosecution is stopped due to the difficulties to receive evidence.[29]

The German academics Kudlich and Oğlakcioğlu hint that certain systems force corporations to commit crimes, e.g. if the competitors pay briberies, the corporation must also commit corruption to stay competitive.[30] This has to be considered when dealing with supply chain crimes. The required conduct must always have been possible. If the production conditions cannot be influenced in so far to prevent endangering workers' lives and no factories with better production conditions exist, it cannot be expected from the retailer to prevent the crime. In that exceptional instance, he cannot be held liable. If he can influence the production conditions or can change the producer, e.g. as there is an increasing supply for fair-trade goods, then the retailer can be held accountable for his conduct. The argument that it is combined with a loss of profits cannot be used as a defense in so far as it does not mean exorbitant losses which endanger the existence of the enterprise.

In interpretation of corporate crimes, it should not only be referred to civil law realities but moreover to factual economic realities. The border is the prohibition of analogies in criminal law.[31] The current corporate liability adapts to the instance where the majority of the production is conducted by the enterprise itself. However, in a globalized world the production is more and more outsourced. Therefore, the criminal liability has to be adapted to the situation, that many parts of the production which used to be in-house have been outsourced to foreign countries.

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[28] Jakobs (2011) p. 13 (German).
[29] Kudlich / Oğlakciowğlu (2014) Ibid p. 5-10 (German).
[30] Ibid p. 8 (German).
[31] Ibid p. 34 (German).

It is important to keep in mind that the liability of the supplied business does not replace but supplement the one of the supplier.

3 Criminal Offences Applicable to the Supplied Company

After having established why enterprises should be called to account, this chapter deals with the specific offences to hold companies and directors liable.

3.1 Liability for corporate crimes

The liability for crimes in the supply chain can be established via corporate liability. This is a way to hold the company and the director in his official capacity liable. Both Namibian and German law provide for such provisions although the approach is different.

3.1.1 Namibia: Corporate Liability

In Namibia, a crime by the supplier could be imputed to the other entity via s 332 Criminal Procedure Act[32]. Unfortunately, the court in the Kapia case[33] did not use the chance to clarify open questions concerning corporate liability. The court rejected the application of the prosecutor to amend the charges towards s 332 (5) CPA instead of the crime of fraud. Hence, the court found that the accused is liable for fraud in his personal capacity.

3.1.1.1 Accused Person

The persons who can be accused according to s 332 CPA are the legal person of the supplied enterprise (para 1), the de iure director (para 5), and the de facto director[34], who controls the enterprise. According to s 234 (2) (b) (i) Namibian Companies Act, a director is controlling a company if he or his appointee is in the leadership position of the establishment and can appoint and discharge the majority of the other directors.[35] Another indicator of total control is that more than 50 % of the share capital is owned by

[32] 51 of 1977 (Namibian).
[33] *Kapia v S* judgement of 21st August 2015 (CC 09-2008) [2015] NAHCMD 195 (Namibian).
[34] *S v Marks* judgement of 1st March 1965, 1965 (3) SA 834 (W) at 843 (South African applicable in Namibia).
[35] S 234 (2) (b) (i) Companies Act 28 of 2004 (Namibian).

the director or his nominee.[36] The control has to cover major decisions concerning policy and business.[37]

3.1.1.2 Crime by Another Person

First of all, a crime has to be committed by another person. Concerning that crime, all elements, culpability and unlawfulness have to be proven. The conduct has to be an act, not an omission. The crime can be any other crime that is not inflicted by the instrumentality of one's own body like rape.

An example is the factory owner of Rana Plaza. He is liable for murder.[38] People died as a result of the collapse, which is a realisation of the created risk by the conduct of the owner and the managers. The conduct of the managers forcing workers to enter can be imputed to the director.[39] The owner knew about the missing security standards and the high danger his workers faced. Therefore, he acted intentionally.

3.1.1.3 Permission

Another element is the permission. For the situation of supply chain liability, an implied permission can be seen in remaining silent despite knowing about the conditions. Normally, silence cannot be seen as carrying a statement. Exceptions can be made when a reasonable belief is created or the retailer controls the supplier.

Firstly, accepting goods without complaining about it can lead to the reasonable belief on the side of the supplier, that his conduct is permitted. The retailer knows about the crime and does not complain about it. The factory owner is aware about the knowledge of the retailer. The supplied entity monitors the quality and if necessary raise complaints. This leads to the reasonable expectation at the producing enterprise that, if the retailer knows, he will complain. If the director knows about the working conditions in the factory, his silence can be interpreted as approval. In accepting that the production is done in a certain factory, the whole working conditions in as far as it can be externally observed, are impliedly permitted. This is also supported by the courts' interpretation of reckless behaviour of s 424 Companies Act[40]. It was ruled that liability for omission is created if a supine attitude is given.[41] If the CEO shows such an attitude towards the crimes committed by the factory, he must be held liable.

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[36] S 234 (2) (b) (i) Companies Act 28 of 2004 (Namibian).

[37] *S v Marks* judgement of 1st March 1965, 1965 (3) SA 834 (W) at 842 (South African applicable in Namibia).

[38] s 76-106 of the Bangladesh Penal Code 45 of 1860 (Foreign).

[39] s 312 Bangladesh Labour Act 42 of 2006 (Foreign).

[40] 61 of 1973 (Namibian).

[41] *Howard v Herrigel NO a.a.* judgement of 8th March 1991 (130/89) [1991] ZASCA 7 at 46 (South African after 1990, of persuasive value for Namibian courts according to Zongwe (2017) p. 13 and the common

A second possibility of implied permission is control. This is supported by the statement of judge Langa "If an employer, being able to control a physical act of a servant of which he or she is aware and which would constitute a crime, forbears to prevent it, such forbearance constitutes an implied authority to commit the act."[42] Although in this particular instance it was said about an employer-employee relationship, this can also be applied to external persons, as he deals with corporate liability. Hence, if it can be proven, that the supplied company is able to control the conditions in the factory, it can be held liable. Indicators for control are clear instructions concerning quality and quantity of the goods, supervision of the production and the exercise of a big market power.

3.1.1.4 Constitutional interpretation

The statutory interpretation of permission in s 332 CPA is supported by the constitutionalist interpretation. S 332 CPA interpreted in light of Art. 8 of the Constitution leads to the conclusion that the bigger the infringement of the dignity of human beings in the supply chain, the higher the responsibility of the director to prevent it. With regards to the value judgement of the Constitution[43] it has to be considered that a director cannot ignore the degrading treatment of workers. This applies although the crimes did not happen in his own company and are not directed against Namibians. However, it shows a dire attitude against humanity which is prohibited by the Constitution. Hence, the Constitution requires to prevent and punish this behaviour. Therefore, the element of permission has to be interpreted broadly in a way to include incentive and encouraging conduct of the enterprise to commit the crime.

3.1.1.5 Furthering the Interest of the Company

The conduct of the factory owner has to comply with the condition of furthering or aiming at furthering the interests of the supplied company. If the director abused his position as a director for his own interests, he cannot be held liable in his official capacity.[44] Normally, the crime is committed in order to lower costs, e.g. missing security standards. The supplied company directly benefits from these cost savings, as they have to pay less for the goods. Therefore, the crime furthered the interests of the retailer.

3.1.1.6 Culpability

practice of courts, e.g. *Attorney-General of Namibia v Minister of Justice a.o.* (P.12/2009) [2013] NASC 3 (4th April 2013) at 71) (Namibian).

[42] *S v Coetzee a.o.* judgement of 6th March 1997 (CCT50/95) [1997] (3) SA 527 at 68 (South African of persuasive value).

[43] *S v Acheson* judgement of 23rd April 1990 [1991] (2) SA 805 (NM) at 813 (Namibian).

[44] *S v Kapia* judgement of 11th May 2018 (CC 09/2008) [2018] NAHCMD 124 at 15 (Namibian).

The culpability of the person committing the crime is imputed to the retailer. In s 332 (1) CPA expressly intention is imputed. It goes without saying, that then also negligence is imputed. Intention is much more connected with the mind of the person acting then it is in the case of negligence.[45] The supplied business cannot raise the defence of mistake of fact or law. Due to research and media reports, in certain fields, e.g. the garment production in Bangladesh, the clothing stores have every information to foresee the possibility of life-threatening working conditions in the factories. The media plays an important role in establishing suspicion on part of the companies.

3.1.1.7 Director's Defence: no Ability to Prevent

If the previous elements are given, the presumption of a corporate crime arises.

The managerial head can defend himself if he did not know about the crime to be committed and he could not have prevented it, according to s 332 (5) CPA. If he did not had knowledge about the crime, he cannot be held liable. The information of the crime happening could reach him via a quality control conducted in the factory, a NGO, a worker or someone else.

The company cannot raise that defence. The South African academics Kemp et al. propose to think about implementing that defence also for the legal entity.[46] I would recommend that, too. However, I would restrict the defence towards reasonable ignorance, to exclude wilful ignorance.

3.1.1.8 Interim Findings

A lot of crimes in the supply chain can be linked to the enterprise. As long as an implied permission can be derived from the conduct of the enterprise or the exercise of control, the crime can be imputed to the enterprise.

3.1.2 Germany: Missing Supervision

In Germany, the managerial head can be held liable for omission to prevent the supply chain crime according to s 13 (1) Criminal Code StGB.

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[45] Those arguments were brought forth in the South African case, dealing with the same section: *Ex parte Minister van Justisie: In re S v Suid-Afrikaanse Uitsaaikorporasie* judgement of 28th September 1992, (130/91) [1992] ZASCA 175 at 12,21 (South African of persuasive value).

[46] Kemp et al. (2015) p. 244-245 (South African).

3.1.2.1 Accused Person

In Germany, the de iure and de facto director can be held liable. The de facto director is liable in the same manner as a de jure director if the latter permitted the conduct of the former, according to s 14 (1) StGB.[47] Indicators of a de facto leader are the fulfilment of managerial tasks. Examples are instances in which the person organizes the company, influences the accounting and the business relations to other companies and appears internally and externally as if he would be the director.[48] If the person totally controls the supplier, organisational fault can be considered. This is the case if he commits a crime in abusing the structure of obedience and replaceability of employees.[49]

Despite the missing criminal liability of entities, s 30 OWiG provides for the possibility to impose a regulatory sanction on a business if its president in his official position breached the law.[50] The reasoning to deny criminal liability is the missing mind of a corporation which makes it impossible to establish intention nor negligence.[51]

3.1.2.2 Guarantor Duty

The first element of a guarantor duty can be established via the director's duty to prevent crimes linked to his business according to s 130 (1) Regulatory Offences Act OWiG. The crime has to be the realisation of a danger inherent to the enterprise.[52] As already a private duty can establish a criminal guarantor duty,[53] a fortiori an administrative duty which is much closer connected with the aims of criminal law. Hence, if the director does not supervise, he creates a legally condemned danger.

3.1.2.3 Crime by Another Person

As under Namibian law, it has to be established, that a crime by another person has been committed.

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[47] BGH judgement of 7th March 2006 – 3 Ss 190/05 – NJW 2006, 1364 – insolvency – at 20-22 referring to s 14 Criminal Code StGB; BGH decision of 22nd September 1982 – 3 StR 287/82 – NJW 1983, 240 at 240 – de facto director (German).

[48] BGH judgement of 11th February 2008 – 2 ZR 291/06 – NJW-RR 2008, 1066 – de facto director 2; BGH judgement of 22nd September 1982 – 3 StR 287/82 – NJW 1983, 240 at 240 – de facto director (German).

[49] BGH decision of 3rd July 2003 – 1 StR 453/02 – JR 2004, 245 at 80 – indirect perpetrator drugs; BGH decision of 26th July 1994 – 5 StR 98/94 – NJW 1994, 2703 at 2706 – wall snipers (Keßler-Streletz) (German).

[50] BGH decision of 9th May 2017 – 1 StR 265/16 – NJW 2017, 3798 at 3799ff. – tax evasion via omission (German).

[51] Münchener Commentary StGB / *Freund* / Vor s 13 ff. recital 147; although Snyman brings that argument, but eventually turning towards the approval of corporate criminal liability (2015) p. 245 (South African).

[52] BGH judgement of 20th October 2011, BGHSt 57, 42 = 4 StR 71/11 – NJW 2012, 1237 at 1238 – Bullying (German).

[53] BGH judgement of 6th July of 1990 -2 StR 549/89 – NJW 1990, 2560 at 2562 – leather spray (German).

3.1.2.4 Link to the Company

This crime has to be linked to the company itself. Therefore, it has to be committed in fulfilling business tasks.[54] The crime has to be the result of a danger connected with the business.[55] The person must not exceed his authority.[56] One cannot argue that breaches of the law are generally out of the scope of duties. Otherwise the aim of this provision would be perverted.

In the bullying case[57] liability of the manager was neglected because it was not seen as the realisation of an inherent danger in the company. This is given for example if the crime was instructed by the director or is part of the business policy. [58] Furthermore, it was argued amongst scholars to establish the link when the conduct was in the interest of the company.[59] This would be an approximation towards s 332 Namibian Criminal Procedure Act.

The crime must be able to be linked to the production or the transport. Crimes resulting from missing security standards are linked to the building of the factory. Every good received from that factory, is linked to that production conditions. As production is part of the supply chain of the wares, there is a link to the initial crime. Furthermore, the crime often saved money e.g. in not complying with all security standards. Hence, it is possible to establish a link between the crime happening in the supply chain and the retailer as it was committed due to financial reasons.

However, the establishment of liability for crimes that were committed by a subsidiary or supplier is only possible in exceptional circumstances.
S 130 Regulatory Offences Act OWiG applies expressly only to employees which belong to the same business of the CEO. The provision obliges the director to prevent structural problems in his own enterprise. However, it already has been expanded towards third persons who are employed for jobs related to the business.[60]

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[54] Ibid at. 1238 (German).
[55] Nomos Commentary Corporate Law 2017 / *Burchard* / s 13 StGB recital 35 (German).
[56] Karlsruher Commentary 2014 / *Rogall* / s 130 recital 46 (German).
[57] BGH judgement of 20th October 2011 – 4 StR 71/11 - NJW 2012, 1237 at 1238– bullying (German).
[58] Ibid at 1238 (German).
[59] Karlsruher Commentary 2014 / *Rogall* / s 130 recital 92 (German).
[60] Nomos Commentary OWiG 2016 / *Ziegler* / s 30 recital 47 (German).

Private law courts established the duty to control the subsidiary[61], e.g. concerning the book-keeping.[62] In criminal law, liability of subsidiaries has been applied only in certain circumstances. The courts require a de facto influence, namely that the instruction by the parent company influenced the behaviour of the subsidiary in so far that a danger for corporate crimes had been created. If the subsidiary is free in his decision making, then there is no duty to supervise by the parent company.[63] In a decision dealing with a company of limited liability, the BGH said, that the liability depends on whether they are de facto controlled by the parent, which for example has more than 50 % of shares in the subsidiary. If the legal independency of the subsidiary is not undermined by de facto independence, liability of the parent is established.[64] This is the case where both companies form a concern, and the subsidiary is legally dependent on the parent company.

German scholars differ in their opinion. It ranges from establishing the link with every subsidiary[65] towards neglecting the extension towards other companies totally[66]. The German scholar Gürtler states, that a total control of the subsidiary is necessary to establish liability as a perpetrator. However, he says that if the subsidiary is not completely controlled, the conduct of the parent company can amount to participation.[67] He states as an example a control agreement according to s 291 Stock Corporation Act. However, the sole personal contact with the director of the other enterprise does not establish even accomplice liability, according to Gürtler.[68]

A broader approach to link the crime to the company is done by the EU in implementing the notion of the single economic unit with regards to antitrust law. The dependency is not defined legally but commercially: it does not depend on control but on sphere of influence. The company can raise the defence that it was not able to prevent it (as he did not have the authority to do so) or that he suffered an unpreventable error of the legal regulations.[69] If both enterprises can be seen as an economic unity, there is a duty to supervise. The crucial question is how far the supplied establishment can influence the

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[61] Definition of subsidiary in s 18 Shares Act AktG (German).
[62] OLG Jena judgement of 12th August 2009 – 7 U 244/07 – NZG 2010, 226 at 228 – civil duty to supervise subsidiary (German).
[63] OLG Munich judgement of 23th September 2014 – 3 Ws 599, 600/14 – duty to supervise the subsidiary (German).
[64] BGH judgement of 16th July 1985 – 2 ZR 275/84 – NJW 1986, 188 at 189,191 – liability of the concern of a Ltd (German).
[65] Karlsruher Commentary 2014/ *Rogall* / s 130 recital 27 (German).
[66] Nomos Commentary OWiG 2016 / *Ziegler* / s 30 recital 12; Beck Commentary OWiG 2017 / *Gürtler* / s 130 recital 5a (German).
[67] Beck Commentary OWiG 2017 / *Gürtler* / s 130 recital 5a (German).
[68] Beck Commentary OWiG 2017 / *Gürtler* / s 130 recital 5a (German).
[69] ECJ judgement of 10th September 2009 – C-97/08, at 15 – Akzo economic unit (European).

decision making in the factory. If the retailer has a huge market power, this control is given. It is a vicarious liability which leads to an imputation of the whole crime to the retailer. He is then held liable for the crime committed by the supplier. As EU law is binding in Germany, this principle should be applied to all fields of company law beyond antitrust law.

3.1.2.5 Necessary, Reasonable and Adequate Measure

The due diligence standard includes the duty to adequately and reasonably appoint, select and supervise the management. All objectively necessary, reasonable and adequate measures have to be taken.[70]

Further detailed tasks are to inform the subordinates about their legal duties[71] and to conduct frequent controls about compliance[72]. This conduct has to be possible in the particular circumstance. [73] The required measures depend on the individual size of the company. [74] If the director refers the duty to another person, he still is liable for the proper fulfilment of that duty. [75] The concrete tasks depend on the size of the entity[76] and the dimension of the connected dangers.[77] Possible measures that are adequate in the case at hand are conducting inspections in the production. Hereby, it can also be relied on NGOs or other reliable organisations.[78] He has to supervise, whether the factory owner is exercising his duty to supervise his employees.

3.1.2.6 Mitigation of Risk of Crime

The causation requirement says that the omitted act must have at least mitigated the risk of the crime to happen.[79] Therefore, the director must have created a legally condemned

[70] BGH judgement of 25th July 1985 – KRB 2/85 - NStZ 1986, 34 at 34 - prevention of antitrust crimes (German).
[71] OLG Koblenz judgement of 3th March 1989 – 1 Ss 38/89 – ZLR 1989, 711 at 713 – duty to inform subordinates (German).
[72] BGH judgement of 10th December 1985 – KRB 3/85 NJW 1987, 267 at 267 – organisational duties (German).
[73] Karlsruher Commentary 2014 / *Rogall* / s 130 recital 44 (German).
[74] Nomos Commentary Corporate Law 2017 / *Burchard* / s 13 StGB recital 16 (German).
[75] OLG Hamm judgement of 27th February 1992 – Ss OWi 652/91 – NStZ 1992, 499 at 499 – division of labour (German).
[76] BGH judgement of 20th October 2011, NJW 2012, 1237 at 1238 -> Bullying; Nomos Commentary Corporate Law 2017 / *Burchard* / s 13 StGB recital 16, 35 (German).
[77] Compendium corporate law, Wabnitz / Janovsky chapter 4 recital 43 (German).
[78] According to the Bangladesh Accord on Fire and Building Safety, 13th May 2013, available at http://bangladeshaccord.org/wp-content/uploads/the_accord.pdf (last accessed 30th April 2018) (Foreign).
[79] Commentary StGB 2017 / *Heinrich* / Vor s 13 recitals 124 ff.; Puppe (2000) p. 95 (German).

danger that came into existence in form of the result. [80] The defence can be raised that the result would have also occurred in case of legal behaviour.[81]

It depends on the individual circumstance whether the omission increased the risk of the crime. It has to be admitted, that the supervisions that has been conducted as a reaction towards the Rana Plaza incident, lead only to slight changes.[82] Nevertheless, keeping silent furthers the whole system of neglecting liability which increases the disposedness to commit a crime. Research on business conduct which effectively prevents crimes is necessary.[83]

3.1.2.7 Unlawfulness

It is no defence, that another organisation would have contracted with the factory anyways because everyone is held liable for his conduct, no matter what others would have done.[84]

The company can neither raise the defence of the socially adequate behaviour ("sozialadäquat"). On the one hand, society does not condemn business deals. On the other hand, if there is a high tendency, that the supplier committed a crime related to the contracted good, this defence is not accepted anymore. The German courts decided, that a normal business behaviour turns to be criminal, if it is obvious that the partner will commit a crime. The foreseeing of a simple risk is not enough.[85] Production areas which are shaped by human rights violation lead to the conclusion, that in buying the good, an exploitative and life-threatening system is supported. The crime has to be of a certain degree of obviousness e.g. in the supply of goods from conflict areas or the low-wage garment industry.

3.1.2.8 Culpability

[80] BGH judgement of 20th November 2008 – 4 StR 328/08 - BGHSt 53, 55 at 60 – car race; Commentary StGB 2017 / *Heinrich* / Vor s 13 recital 84 (German).
[81] Commentary StGB 2017 / *Heinrich* / Vor s 13 recitals 119ff. (German).
[82] Webermann, 24th April 2018, *Nach Rana-Plaza-Unglück - Mehr Sicherheit, aber…*, available at http://www.tagesschau.de/ausland/rana-plaza-gedenken-103.html (last accessed 30th April 2018) (Foreign).
[83] For example by Clean Clothes Campaign: *Follow the Thread. The Need for Supply Chain Transparency in the Garment and Footwear Industry*, 20th April 2017, available at https://cleanclothes.org/resources/publications/follow-the-thread-the-need-for-supply-chain-transparency-in-the-garment-and-footwear-industry/view (last accessed 30th April 2018) (International).
[84] Commentary StGB 2017 / *Heinrich* / Vor s 13 recital 100 (German).
[85] BGH judgement of 21st December 2005 – 3 StR 470/04 – BGHSt 50, 331 at pp. 9-10 (German).

The director's intention or negligence towards the crime has to be proven. It does not need to cover the result, only the risk of an offence being committed.[86] If numerous reports about hazardous working conditions in factories are published, every company being supplied by such factories foresees the possibility of such crimes in the own supply chain. Then the supplied company cannot raise the defence of mistake of fact, according s 16 StGB.

3.1.2.9 Interim Findings

Liability for corporate crimes is established in a subsidiary relationship in Germany. The subsidiary must be totally controlled as if the both companies are one enterprise. For all other suppliers, the link is not close enough. Furthermore, the crime has to be committed by an employee in fulfilment of his tasks and the director must have been able to mitigate the risk of the crime.

3.1.3 Comparison

In both countries, the director can be held criminal liable for neglecting duties inherent to his position. The Namibian liability of the CEO depends on the accountability of the company. Every corporate crime can be imputed to the director if he had knowledge of it and could have prevented it. In Germany, it is the other way around. Misconduct of the director has to be established first, before the legal person can be sanctioned. Own culpability of the director has to be established whilst in Namibia, the culpability of the person committing the crime is imputed to the managerial head.

One point of criticism is the Namibian defence for the director. It is too extensive as he can rely on mere missing knowledge to escape liability. The managerial head should not be in a better position if he intentionally ignored crimes happening than if he investigated into the matter. The director has to prevent society from harm imposed by his employees. This is solved better in the German law, which does not accept the defence of missing knowledge as it obliges the leader to supervise his employees.

Both Namibian and German law provide for the possibility to sanction a company. The main difference lies in the field of law where it is placed. The former provides only for an administrative liability whilst the latter established it in criminal law. Also, here the Namibian law provides for an imputation of the culpability whilst in Germany the whole notion of criminal liability fails due to the reasoning of missing culpability of a legal person.

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[86] Karlsruher Commentary OWiG 2014 / *Rogall* / s 130 recital 19 (German).

I argue in favour of criminal liability as it has a more deterrent effect and provides for more possibilities to sanction, like winding up. The strongest argumentation in favour of criminal liability of the legal entity is the corporate veil namely the complex structure in a company which makes it difficult to establish the responsible person.[87] The establishment has to be forced to have a good organisation as the high danger of companies to breach the law is very high.[88] Another reason is, that the association benefits from the action of their representatives.[89] Additional, its appointees should be encouraged to comply with the law. This can be done much more effective if their conduct has not only consequences for themselves but for the whole association.[90] Furthermore, criminal law triggers a duty to prosecute.[91] As it is justified, to sanction a company under administrative law, it is also under criminal law. Also, Wohlers and Kudlich argue that s 30 OWiG is of the same nature as a criminal sanction.[92] Even internationally a criminal liability of corporations has been established in certain areas.[93]

Another point of differentiation is the scope of crimes that trigger liability. In Namibian law, it is much easier to include conduct of external persons. However, the liability of the director is more restricted compared to German law, as actual knowledge of the crime has to be given, whilst in German law, dolus eventualis is sufficient.

In Namibia, the difficulty lays in proving the permission, whilst in German law the control is the most challenging. The provisions overlap, in so far that permission can also be established if the company is controlled. Another possibility is a conduct that creates a reasonable belief of permission.

My biggest criticism on corporate liability in Germany is the necessity of control over the supplier before liability is accepted. The reasoning behind is that every entity which is legally independent has the duty to supervise itself. Liability is only established, if the subsidiary is not able to supervise his own company because of the influence of the parent company.[94] However, I would not replace the liability of the supplier but supplement it. I agree, that only a possible behaviour can be expected from companies.

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[87] *S v Coetzee a.o.* judgement of 6th March 1997 (CCT50/95) [1997] (3) SA 527, cited by Shivute in *Attorney-General of Namibia v Minister of Justice a.o.* (P.12/2009) [2013] NASC 3 (4th April 2013) at 71 (Namibian); survey amongst German prosecutor offices available in Kirch-Heim (2007) p. 247; Münchener Commentary StGB / *Joecks* / § 25 recital 20 (German).

[88] Otto (1993) p. 25.

[89] Kirch-Heim (2007) p. 18.

[90] Ibid p. 19.

[91] Proposal by North Rhine-Westphalia for a law on the introduction of a criminal liability of companies and associations, Parliamentary documents Bt-Drs. …/13 p. 23.

[92] Wohlers / Kudlich, ZStW 121 (2009) 712.

[93] Art. 10 (3) UN Palermo Protocol (International).

[94] Nomos Commentary OWiG 2016 / *Ziegler* / s 130 recitals 13-15 (German).

Control can be a factor amongst others taken into consideration to determine possibility. Market power, the possibility of reporting to NGOs, to the police or to the media and negotiations, relying on external certification systems are other possible tools, that are independent from the direct control the enterprise has on the decision-making process of the supplier. And still they are effective and can be used. In addition, essential duties of supervision cannot be given to another person. The question of control should not be one of liability but of the degree of liability.[95] Hence, in determining whether the supplied company is a perpetrator or a participant, the extent of de facto control is a determining factor. The German scholar Gürtler started to think in that direction.[96] In contrast to him, I would not restrict his proposal towards subsidiaries but expand it to all suppliers.

The extend of exercised control which definitely has a huge influence on the preventability of the crime shall not be defined by the companies. Otherwise, they could easily neglect their responsibility. As the amount of exercised control is in the hands of the company, they can decide about their responsibility whereas this is the part of the state. Additional, the behaviour of the companies to increase the distance towards the supplier, to not control them, also leads to a higher risk of crimes. The factories are encouraged to commit the crime as nobody will know about it. For those reasons, the state should put duties on companies to control their supply chain. This has to be made dependent on the economic possibilities. It has to be considered to not influence the market too much, so that small enterprises can survive. The duty to investigate has to be made dependent on the size of the company. Close relationships between business partners have to be encouraged, to increase responsibility and reliability, especially concerning the core goods of the company, e.g. the cocoa of a chocolate factory. An example of a state obliging a company to exercise control is Italy. This legislation put in the due diligence standard for companies the requirement that to exercise the necessary control.[97] It will depend on the individual circumstance in how far control can be inflicted.

All in all, the national legislation on corporate liability does not cover all crimes in the supply chain.

3.2 Violation of an International Due Diligence Standard

A more comprehensive due diligence standard than the Namibian and German is established by international standards for business and human rights. They can be used

[95] This is approved by Beck Online Commentary OWiG 2015/ *Beck* / s 130 recital 31 (German).
[96] This is supported by Gürtler in Beck Commentary OWiG 2017 / *Gürtler* / s 130 recital 5a (German).
[97] Art. 6 of Legislative Decree 231/2001 (Foreign).

to sue the director in his official capacity. Examples with which this paper will deal are the UN Guiding Principles on Business and Human Rights[98] and the OECD Guidelines on Multinational Enterprises[99]. A standard beyond that with overlapping content is the ILO Tripartite Declaration.[100]

3.2.1 UN Guiding Principles on Business and Human Rights

The UN Guiding Principles on Business and Human Rights were developed by the special representative of the UN Secretary for Business and Human Rights, John Ruggie. He conducted extensive consultations with governments, companies, business associations, NGOs, investors, academics and international organisations from 120 countries.[101] Hence, those Principles take into consideration the needs of all stakeholders. The UN Human Rights Council endorsed them in June 2011 as an interpretation of the Universal Declaration of Human Rights. It is based on the UN Framework for Business and Human Rights, which is a recommendation paving the way for a binding international legislation addressing business and human rights.[102]

3.2.1.1 Legal Force in Namibia and Germany?

The crucial question is, whether the UN Principles are binding.

According to the majority opinion, the UN Principles are classified as soft laws.[103] The enforceability of soft law is highly disputed.[104] Although they are not binding, judges can use them in interpreting national law, e.g. in interpreting Art. 8 of the Namibian Constitution or Art. 1 of German Basic Law GG. An example lays in the fact that the UN Principles form part of the aspirations of the international community.[105] As a consequence, those standards have the potential to become customary law, if they are practiced by many states.[106] Then they can be applied via Art. 144 Namibian Constitution and Art. 25 German Basic Law GG.

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[98] Of 16th June 2011 (International).

[99] First adopted in 1976, last updated on 25th May 2011 (International).

[100] of Principles concerning Multinational Enterprises and Social Policy, established by the ILO November 1977 (International).

[101] His submission can be found here: *Public consultation on draft U.N. Guiding Principles for Business and Human Rights attracts input from 120 countries*, 2th February 2011, New York/Geneva, available at https://www.business-humanrights.org/sites/default/files/media/documents/ruggie/public-consultation-on-guiding-principles-press-release-2-feb-2011.pdf (last accessed 17th May 2018) (International).

[102] para 1 (International).

[103] Caroni / Pedretti (2012) p. 64; Saage-Maß NK 2014, 232 (International).

[104] See e.g. Goldmann (2015) p. 432 (International).

[105] *Ex Parte Attorney-General, Namibia: in Re Corporal Punishment by Organs of State*, judgement of 5th April 1991 (3) SA 7 – 1991 NR 178 (SC) at 188 (Namibia).

[106] Ungern-Sternberg (2011) pp. 39-41 (International).

A different approach is to say, that the Principles are already applicable today.[107] They can be seen as an interpretation of human rights. As the Principles are described by the UN Human Rights Offices as not being intended to create new obligations,[108] I would argue, that they do not create new laws but only apply the existing human rights standards towards businesses. As a conclusion, they do not derive their enforceability from custom but from binding human rights documents, like the ICCPR. Hence, as fundamental human rights are applicable in Namibia and Germany, so are the Guiding Principles. In the same way, as fundamental rights have an influence on all fields of law, so can have the Principles.

3.2.1.2 Establishment of a Guarantor Duty

The UN Principles can be used to establish a guarantor duty to prevent crimes related to the supply chain. The ECCHR follows this approach.[109]

A guarantor duty is established by a conduct that creates a danger.[110] There has to be a causal link between the danger and the result. The result of the crime must be the realisation of the risk.[111] The company in not complying with the required business conduct, creates a danger of crimes committed by production companies. In putting price pressure on the factories and not caring about the working conditions, the factories are forced to cut costs. The crime is then the realisation of that danger.

Overall, businesses bear the responsibility to not infringe upon human rights. Although it is the sole duty of the state to enforce human rights, they can oblige entities to refrain from infringements.[112] When contracting with companies from other countries they have to consider the specific human rights risks.

In Namibia, a duty to act is established when "legal convictions of the community in the light of constitutional norms require that the omission to act be regarded as wrongful"[113]. According to the Acheson case, the constitution reflects the national soul.[114] The promotion and protection of human rights is a basic aspiration of every nation. As

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[107] ECCHR (2015) p. 2 (European).
[108] As laid down in the General Principles of the UN Guiding Principles (International).
[109] ECCHR (2015) p. 2 (European).
[110] Grünewald (2001) p. 136 (International).
[111] Nomos Commentary StGB 2017 / *Karsten / Gaede* / s 13 recital 42 (German).
[112] ECtHR judgement of 23rd February 2016 Mozer v. The Republic of Moldova and Russia, Application number 11138/10 (European); *Filártiga v Peña-Irala* judgement of 30th June 1980 – 630 F.2 d 876 – US 2nd Circuit Court; *Yaiguaje v Chevron Corporation* judgement of 23rd May 2018 ONCA 472 - Court of Appeal for Ontario - Docket C63309 and C63310 (Foreign).
[113] *Van Straten N.O a.a. v Namibia Financial Institutions a.a.* judgement of 8th June 2016 (SA 19/2014) [2016] NASC 10 at 84 (Namibian).
[114] *S v Acheson* judgement of 23rd April 1990 [1991] (2) SA 805 (NM) at 813 (Namibian).

Namibia is very open to international law, it can be seen, that the Namibian community wants the common good of all people world-wide. This is also required by human dignity as explained above under 3.1.1.3 Constitutional Interpretation of Corporate Liability. The entities neglect fundamental democratic principles in abusing the situation in a country which does not have an effective judicial system. They use their power and prioritize economical gain over human rights. Although in the supply chain the human rights violation is committed by other enterprises, they have an effect on the production conditions though. This behavior is condemned by society according to Art. 5, Art. 8, Art. 9, Art. 10 of the Constitution. Hence, the UN Principles are only a tool to help companies to comply with their human rights duties.

In Namibia, the notions of reasonableness, fairness and justice limit the guarantor duties[115]. It should not overburden the companies and infringe too much into a free competition. The UN Principles are within those limits, as they only establish an obligation when it is possible for the entity. Furthermore, as every enterprise world-wide is affected, they do not hinder access to the market in a discriminatory manner. As they were negotiated with a lot of different stakeholders, they provide for a fair standard, which can be accepted by all businesses.

In Germany, the creation of the danger has to be legally condemned. This is complied with, if the danger is created intentional. It is irrelevant, that the prior conduct was not in breach of a law.[116] That leads to the conclusion, that the company cannot defend itself with reference to the fact, that business conduct is generally not prohibited. The enterprise intentionally contracts with factories in low wage countries, to make use of the exploitative labour system. It directly benefits from the crime, as it decreases the purchase price. Therefore, the conduct of the company is legally condemned.

The German scientist Jakobs makes the guarantor duty dependent on the sphere of influence of the person ("Organisationskreis").[117] The supply chain is to a certain extent in the field of influence of the company. The enterprise influences the market. The factory which produces the cheapest will get the tender. As crimes are the most economical alternative short-term, e.g. missing security standards save money, the factory committing crimes will be preferred. It is based on a mind-set, that a human life is not worth anything anymore. Furthermore, the supplied unit can use its influence in a positive way. If they only accept goods produced in line with a human rights standard and controls

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[115] *Van Straten N.O a.a. v Namibia Financial Institutions a.a.* judgement of 8th June 2016 (SA 19/2014) [2016] NASC 10 at 109 (Namibian).
[116] Münchener Commentary 2017 / *Freund* / S 13 recital 130 (German).
[117] Jakobs (2012) p. 36 (German).

it, the risk of crimes can be decreased. They can support the factory in preventing crimes during the production, in pointing out fields of high risks, e.g. building safety.

In both countries, it is a requirement that the conduct of the supplier has to further the danger. However, this behaviour does not free the supplied enterprise from liability, it only decreases the degree of its liability. Both in Namibia and Germany, it was decided that multiple persons can be held liable for a result.[118]

The gravity of the created danger depends on the region of the production. This has its effect on the degree of liability. Obviously, the danger is very high in conflict areas. Also, low-wage countries are risk areas, as the law enforcement system is very weak and does not effectively prevent companies from committing crimes. In contracting with such factories, the risk of crimes has to be considered and prevented.

That leads to the conclusion, that the companies created a legally condemned danger of human rights violations. The standard of the UN Principles provides for a tool to comply with the guarantor duty to prevent human rights violations in so far as possible.

3.2.1.3 Determining Reasonable Conduct

Beyond a guarantor duty, the UN Principles can be used to establish standards for a reasonable business conduct. They determine the conduct, that is necessary to raise the defence of socially adequate business behaviour. The defence is destroyed, that contracting with a company without caring about the human rights impact, would be normal business behaviour. Additional, the principles can be used to determine the conduct required from a prudent business man. If a managerial head does not comply with it, he can be held liable for negligence.

3.2.1.4 Due Diligence Standard

Having dealt with the problems of application, it will be turned to the content. The UN Guiding Principles establish a due diligence standard on companies aiming at enforcement of human rights. The duties are extended towards the supply chain, even if the company has not directly contributed to the violation. The link is established via the business relationship.[119] Every company shall have a policy statement, expecting the suppliers to be in line with human rights obligations.[120] The due diligence standard

[118] *S v Daniëls* judgement of 1983 (3) SA 32 (A) (South African applicable in Namibia); BGH judgement of 31th Jan 2002 – 4 StR 289/01 – BGHSt 47, 224 – duty to jointly prevent a danger; BGH judgement of 6th July of 1990 -2 StR 549/89 – NJW 1990, 2560 at 2565 – leather spray (German).
[119] Principle 13 (International).
[120] Principle 15 (International).

involves assessment and analyse of actual and potential human rights violations.[121] If a breach has been spotted, a duty to mitigate the negative impacts and to prevent further violations arises.[122] In addition, the companies have to evaluate the effectiveness of the chosen measures.[123] Communication with the stakeholders is encouraged.[124] The concrete duties also involve consulting an expert in complex situations.[125] Another obligation is to provide for effective remedy measures.[126] The UN Principle 19 goes even so far, to establish a duty to end a business relationship, if human rights violations cannot be mitigated. However, this is only expected, if another business partner is available.

The required measures have to be, on the one hand, reasonable towards the size, nature and context of the company. On the other hand, the gravity of the human rights risk is a grading scale. The higher the risk and the graver the affected human rights, the greater the concrete duties to take measures.[127] This principle can already be found in national law, e.g. in the interpretation of the German duty of supervision according to s 130 OWiG.

On the application on crimes in the supply chain, it has to be considered, that crimes and human rights violations are not the same. They overlap, e.g. murder infringes to the right to life. The due diligence standard of the UN Principles will only apply to crimes, which aim to protect a fundamental right. Examples are murder and culpable homicide (Art. 6 (1) ICCPR), aggravated assault and torture (Art. 7 ICCPR), human trafficking (Art. 8 ICCPR), corruption (Art. 2 ICESCR) and breach of fundamental workers' rights (Art. 7 ICESCR).

The supply chain management which is practiced by the majority of the transnational companies does not comply with this standard. There are many ways how the human rights violations by subsidiaries and suppliers can be prevented or at least mitigated.

One duty comprises of creating a compliance department. It has been encouraged to try to deal with the misconduct internally first.[128] This department can be very effective, as it works problem orientated. The German courts decided to already put such a duty on enterprises of a certain size.[129]

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[121] Principles 17, 18 (International).
[122] Principle 19 (International).
[123] Principle 20 (International).
[124] Principle 21 (International).
[125] Principle 19 (International).
[126] Principle 15 (International).
[127] Principle 17 (International).
[128] See further Jentsch (2005) p. 244 she claims for a legal promotion of this approach (German).
[129] LG Munich judgement of 10th December 2013 – 5 HK O 1387/10 – NZG 2014, 345 – compliance duties (German).

An interview conducted with a former Chief Officer on a medium size containership[130] revealed that also in the transport sector human rights violations are committed. In the harbours crimes are committed, which are furthered by the logistic company, e.g. exploitation of dock workers. The charterer regularly sends a representative to West African harbours to mitigate escalating corruption. This shows that communication and negotiation about working conditions is possible.

The company can rely on external controls for the assessment of human rights violations. Examples are certification systems, like the fair-trade label[131]. Such organisations set human rights standards and monitor and report compliance. They can either be public or private. In the latter instance, there has to be established a public regulation control, whether the applied standard complies with the UN Guidelines and is executed effectively and non-discriminatory.

As the UN Principles are formulated very broadly, the companies can choose which particular measure they take. If the entity did not address human rights violations adequately and effectively prevent them, criminal liability is established. The concrete judgement on the adequateness and effectiveness has to be done by the courts. The measures have to be possible for the company in the certain circumstance. To prevent a too extensive liability, the conduct must have prevented the crime according to Namibian law[132] or only mitigated the risk of the crime according to German law[133]. The threat of the customer to search another supplier, would lead in many instances to a change in the behaviour of the producer.

3.2.2 OECD Guidelines for Multinational Enterprises

Another international document providing for a due diligence standard is the OECD Guidelines for Multinational Enterprises[134]. It is based on broad consultations with companies, worker associations and NGOs.[135] It was approved by the Ministers of the OECD in 1976, the last amendment was made in 2011.

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[130] See in the appendix (Foreign).

[131] For further information see http://www.fairtrade.eu (last accessed 21st May 2018) (International).

[132] *Kasingo v Minister of Health And Social Services N.O a.a.* judgement of 3rd June 214 (I 925/2012) [2014] NAHCMD 176 at 26-29 (Namibian).

[133] e. g. Commentary StGB 2017 / *Heinrich* / Vor s 13 recitals 124 ff.; Puppe (2000) p. 95 (German).

[134] Of 25th May 2011, OECD Publishing, available at http://dx.doi.org/10.1787/9789264115415-en (last accessed 17th May 2018) (International).

[135] OECD, *OECD Guidelines for MNE – Responsible Business Conduct Matters*, 2014, available at http://mneguidelines.oecd.org/MNEguidelines_RBCmatters.pdf (last accessed 17th May 2018) p. 2 (International).

3.2.2.1 Legal Force in Namibia and Germany?

The OECD Guidelines suffer also difficulty concerning application, as they are declared as soft laws.[136] The wording says that they are only recommendations and not legally enforceable. If they have been converted into national law, they can be applied. An example is an EU regulation[137] dealing with the supply of conflict minerals. This document being binding in Germany, expressly refers to the due diligence standard of the OECD Guidelines, like the risk assessment and management.

In addition, the Guidelines bear the potential to create customary law. One option are courts using the OECD Guidelines as a tool to interpret national law. Additional, the National Contact Points can create customary law. Those centres give non-enforceable recommendations on complaints of breaches of the Guidelines. If over a period of time, those national contact points make coherent decision, it can establish international customary law. [138]

3.2.2.2 Establishment of a Guarantor Duty + Determining Reasonable Conduct

In the same way as the UN Principles the OECD Guidelines can be used as establishing a guarantor duty, determining the socially adequate behaviour and negligence. They are also a standard aiding at interpretation of human rights obligations.

3.2.2.3 Due Diligence Standard

The OECD Guidelines provide for a similar due diligence standard as the UN Principles. The duties also cover the whole supply chain.[139] In contrast to the UN Principles, the OECD implemented more specific duties for different field of trades.[140] The due diligence guidance for the garment industry[141] comprising of 190 pages proposes a concrete conduct that leads to compliance with human rights. This paper, written as a reaction of the collapse of Rana Plaza provides for the duty to control the supply chain. The business relationship has to be made as close as possible in order to avoid anonymity.[142]

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[136] Caroni / Pedretti (2012) p. 45; Schwamm JWTL 1978, 348 (International).

[137] Regulation (EU) 2017/821 of the European Parliament and of the Council, of 17th May 2017, laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas (European).

[138] This was forecasted by Saage-Maß NK 2014, 232 (International).

[139] Guideline No. II.10, III.4., III.7, IX (International).

[140] Available at http://www.oecd.org/corporate/mne/ (last accessed 18th May 2018) (International).

[141] OECD Due Diligence Guidance for Responsible Guidance for Responsible Supply Chains in the Garment and Footwear Sector, 2018, http://dx.doi.org/10.1787/9789264290587-en (last accessed 17th May 2018) (International).

[142] pp. 47-67 (International).

Companies should investigate in the most significant risk areas in their supply chain. This information is the basis for the taken measures to prevent human rights violations.[143] The general risks in the certain fields are mentioned and claimed to be addressed.[144] Additional, companies shall establish a monitoring system.[145] Recommendation dealing with the specific circumstances of small and medium-size enterprises are given.[146]

The scope of the duty depends on the particular circumstance. In the following, two recommendations by the German National Contact Point are enlightened. One recommendation dealt with the liability of a clothing store for a fire in his supplying factory. It was negated as the contract with the garment factory had terminated and KiK had no production in the factory when the fire occurred. That shows, that the influence on the supplier has to be given at the time the crime is committed.[147] Another example is the neglecting of the right to form a trade union by an Indonesian and a German cement company.[148] The National Contact Point ruled that the cooperation between the companies and the trade unions have to be improved. Furthermore, it was said that the fear of trade union activities within the company have to be decreased.

3.2.3 Interim Findings

All in all, the UN Principles and the OECD Guidelines provide for an internationally recognised due diligence standard for supply chain management. Due to broad consultations in their creation, they bear the potential to be widely applied. The UN Principles find legal force in interpretation of international human rights law according to my opinion. The OECD Guidelines will become enforceable as they will turn into customary law in future. Both standards can be used by the courts to interpret human rights.

Those two standards establish a guarantor duty. Furthermore, they can serve as a basis for required business conduct. They can be used to interpret the defence of socially adequate behaviour and negligence.

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[143] pp. 68-82 (International).
[144] pp. 105-152 (International).
[145] pp. 83-88 (International).
[146] pp. 144 ff (International).
[147] 4th November 2014, available at https://www.bmwi.de/Redaktion/EN/Downloads/oecd-ac-final-statement-kik.pdf?__blob=publicationFile&v=1 (last accessed 16th May 2018) p. 4 (German).
[148] 21th May 2014, available at https://www.bmwi.de/Redaktion/DE/Downloads/G/gemeinsame-abschlusserklaerung-nks-indonesien-deutschland-englisch.pdf?__blob=publicationFile&v=2 (last accessed 18th May 2018) p. 1 (German).

The OECD documents are more likely to comply with the principle of certainty of for criminal law[149]. Firstly, they provide special provisions for certain field of trades clarifies the duties. Secondly, the recommendations of the National Contact Points describe the required behaviour in more and more instances.

3.3 Namibia + Germany: Money Laundering

In the following, it is turned back to national law. It is scrutinized for which criminal offences the retailer can be held liable if no corporate liability is established. The crimes of money laundering and handling of stolen property have been chosen, as they are applicable to many instances of crimes in the supply chain. Those are crimes that have been adapted to realities to globalisation, especially the crime of money laundering. The applied principles can be extended towards corporate liability.

If the director acted in his official capacity and the requirements of s 332 (1) CPA (Namibia) or s 30 OWiG (Germany) are given, the company can be held liable, too.[150] Even if the corporate link has not been established, the director can be accused in his personal capacity.

It will be scrutinized whether the retailer can be held liable for money laundering if the crime in the supply chain was for example received through human trafficking or fraud.

As money laundering is influenced by international law, the Namibian and German provisions are alike. Relevant international documents are provided by the UN (Palermo Convention) and the Financial Action Task Force (FATF Recommendations[151]). In Namibia, the liability for money laundering is established in s 4 POCA. In the Germany, it finds it place in s 261 StGB. The German Money Laundering Act GWG provides for more detailed provisions.

3.3.1 Unlawful Activity

First of all, an unlawful activity by a third person has to be established. Art. 1 POCA defines it as any offence or conduct breaching a law. However, in the light of the field of the POCA, namely organised crime, and international agreements, like the FATF

[149] Art. 12 (3) Constitution (Namibian); Art. 103 (2) Basic Law (German).
[150] *S v Nkeuene* judgement of 12th March 2010, [2010] (1) NR 301 (HC) – 2010 (1) NR 301; BGH decision of 9th May 2017 – 1 StR 265/16 – NJW 2017, 3798 at 3799ff. – tax evasion via omission (German).
[151] Of 2012, last updated February 2018, available at http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf (last accessed 22nd May 2018) (International).

Recommendations[152], last updated in 2018, it is necessary to restrict the scope towards serious crimes. The German legislator has set up a list of considered crimes.[153] It includes human trafficking, corruption, tax evasion, murder, serious assault, fraud and theft.

Human trafficking is an example for such a crime, as defined by the UN Palermo Protocol[154]. The courts make an evaluation of all exploitative factors and then assess with reference to human dignity whether the conduct amounts to human trafficking. Some say, that the conditions in the garment factories only amount to human trafficking in their worst shape.[155] However, based on their research, the ILO states, a high risk for forced labour exists in the garment sector.[156] In Indian brick factories, many instances of debt bondage have been reported.[157]

Another delict can be fraud[158] in not paying adequate wages. Fraud is part of the unlawful activities.[159] Many instances where the factory did not pay the promised[160] or minimum salary[161] are reported. Due to reasons of practicability it will be difficult to prosecute all those instances. This interpretation would open a flood of cases. Nevertheless, justice should not give way to practicability. First step is the liability, and in only a second the practicality has to be scrutinised.

3.3.2 Proceeds of Unlawful Activities

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[152] Although Namibia is not party to that convention, the content has become customary law.
[153] S 261 (1) Criminal Code StGB (German).
[154] UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime of 15th November 2000 (International).
[155] That is also stated by the slavery activist Kevin Bales quoted by the Guardian 16th May 2013 available at https://www.theguardian.com/global-development/poverty-matters/2013/may/16/bangladesh-garment-workers-exploitation-slavery (last accessed 4th May 2018) (International).
[156] ILO *Forced Labour and Human Trafficking – A handbook for Labour Inspectors*, Geneva 2008, available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_097835.pdf (lasst accessed 4th May 2018) p. 9 (International).
[157] Anti-Slavery International, *Slavery in India's Brick Kilns & Payment System*, September 2017, available at http://www.antislavery.org/wp-content/uploads/2017/09/Slavery-In-Indias-Brick-Kilns-The-Payment-System.pdf (last accessed 16th May 2018) pp. 37-38 (Foreign).
[158] *Nakandjembo v S* judgement of 29th November 2016 (SA 12/2007) [2016] NASC 10 (Namibian); s 263 German Criminal Code StGB; BGH judgement of 12th October 2016 – 5 StR 134/15 – HRRS 2017 Nr. 34 – fraud through unreasonable investment; BGH judgement of 13th September 2010 - 1 StR 220/09 – BGHSt 55, 288 – fraud Siemens (German).
[159] *Pinto v First National Bank a.o.* judgement of 31st October 2012, (A 98/2011) [2012] NAHCMD 43 (Namibian); s 261 German Criminal Code StGB (German).
[160] Smith-Spark, *Trapped in Bangladesh's brick factories*, 6th July 2015, available at https://edition.cnn.com/2015/07/05/world/cnnphotos-bangladesh-brick-factories/index.html (last accessed 16th May 2018) (Foreign).
[161] This is published from WageIndicator available at https://wageindicator.org/main/salary/minimum-wage/bangladesh (last accessed 22nd May 2018).

Furthermore, there has to be established, that the goods are proceeds of unlawful activities. This include any benefit or advantage that is gained due to the unlawful conduct, it is also an increase of assets.[162]

Although the good was never owned by the workers, the work force of the worker can be seen as such an increase of assets. They improved the value of the good in working on the material. The German courts emphasized, that any increase of value which is not petit will be taken into consideration.[163] Furthermore, the legislator said that the saving of money due to e.g. corruption can also be seen as "good" in the sense of this rule.[164] And this is also the improvement of the raw material by the worker.

Now this good or increase of assets has to be linked to the crime. Both jurisdictions require causation. Namibian law requires a sole connection. An example, money paid due to the commitment of fraud is proceeds of unlawful activities.[165] The connection with the initial tax evasion is still there, when the illegally received money is used to purchase a car. [166] As connection is listed next to result in s 1 POCA, it has to have a different meaning than causation. The German legislator requires strict causality between the receiving of the good or benefit and the crime.[167] One could argue, that this include the production conditions. This would then also include the crimes committed against the workers, including fraud. It would also cover missing security standards, which later caused the death of people.

For human trafficking, it is easily established: due to the work force of the trafficked persons, the value of the goods was increased. Concerning fraud causality is also given: Had the factory owner not lied to the worker, the employees had not worked for such a low salary.

Every crime that in fact saved money leads to the establishment of a link with the good.

3.3.3 Handling of the Good

[162] S 1 POCA (Namibian); Parliamentary documents Bt-Drs. 14/7471, p. 9 (German).
[163] OLG Karlsruhe, judgement of 20th January 2005 – 3 Ws 108/04 – NJW 2005, 767 at 769 – goods applicable to money laundering (German).
[164] Parliamentary documents Bt-Drs. 14/7471, p. 9 (German).
[165] *PG v Taapopi* judgement of 19th June 2017, Case No. 25/2015 (Namibian).
[166] *New Africa Dimension CC v Prosecutor-General* judgement of 8th March 2018 Case No. 22/2016 - at 43 (Namibian).
[167] BGH judgement of 18th February 2009 – 1 StR 4/09 – NStZ 2009, 328 at 329 – corruption and money laundering (German).

The retailer has to receive the good for himself or for a third person. Mostly, this is done in favour of the consumer. In Namibian law, an agreement between the factory and the retailer is enough to proof the link with the illegally received good. This can be the business contract agreeing on the purchase of the goods.

3.3.4 Unlawfulness

One possible defence is the reporting of money laundering to the instructed authorities.[168]

3.3.5 Culpability

The director of the supplied company must have acted intentional or negligent when he handled the goods.

Concerning intention, he must at least foreseen that the goods, he receives are proceeds of unlawful activities.[169]

The test for negligence deals with the question, what he ought to know. The Namibian law takes the expected and the actual knowledge of the director into consideration.[170] The German jurisprudence sets a higher standard of negligence. Due to the protection of the free economical transactions gross negligence, namely “Leichtfertigkeit”, is required.[171] It has to be established, that the director did not care whether the received goods are received illegally or not.

As in both countries there is no duty to investigate in the supply chain, yet, there is no liability for negligent ignorance. That leads to the conclusion, that the managerial head has to be aware of facts, that give raise to a reasonable suspicion of crimes happening.

3.3.6 Interim Findings

That leads to the conclusion, that the CEO can be held liable for money laundering if the crime in his supply chain is serious enough and he has the suspicion that the gained products are proceeds of unlawful assets. It can also be committed negligently, although

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[168] S 9, 10 POCA (Namibian); s 48 Money Laundering Act GWG (German).

[169] KG Berlin judgement of 13th June 2012 – (4) 121 Ss 79/12 (138/12) – money laundering intention (German).

[170] S 1 (3) POCA (Namibian).

[171] BGH judgement of 24th June 2008 – 5 StR 89/08 – NJW 2008, 2516 at 2517 – Negligence money laundering; KG Berlin, judgement of 13th June 2012 – (4) 121 Ss 79/12 (138/12) – Negligence money laundering 2; Hetzer, NJW 1993, 3299 (German).

the German requirement is a bid stricter than the normal test for negligence. This criminal offence provides for a good basis for supply chain liability.

The notion to hold a consumer of goods liable shaped with grave crimes like human trafficking can be supported by the EU. This institution claims to hold every person liable if he knowingly uses the service of a slave.[172] It expressly only refers to services and not to goods. However, as in the end the service of the slave is "included" in the good, it can be interpreted, that the EU supports the general notion of criminal liability for buying goods which are knowingly stained by human trafficking.

3.4 Handling of Stolen Property

If the courts decide, that a crime is not serious enough to fall under unlawful activities to establish liability for money laundering, the crime of handling of stolen property can be applied. The senior executive of the supplied corporation could be held liable for handling of stolen property, if theft is committed by the factory.

3.4.1 Namibia

The Namibian law punishes the receiving of stolen property in s 7 (1) Ordinance[173].

3.4.1.1 Receiving

It is required that the director physically receives the stolen property. He does not need to acquire property rights. He can also hold the property for someone else.[174]

3.4.1.2 Stolen Property

The good must have been stolen during the production process. It must comply with the elements of theft. Hence, the property must be capable of being stolen and must in fact have been appropriated. The managerial head must have besides the normal intent the intention to deprive the owner permanently from his property.[175]

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[172] Art. 18 (4) Human Trafficking Directive 36/2011/EU (European).
[173] 12 of 1956, cited in Afrikaner v S judgement of 2nd July 2010 (CA 88/2008) [2010] NAHC 48 at 1 (Namibian).
[174] *R v Tsotitsie a.a.* judgement of 1953 (1) SA 239 (T) (South African applicable in Namibia).
[175] *S v Kapia* judgement of 11th May 2018 (CC 09/2008) [2018] NAHCMD 124 at 141-143; *S v Kido* judgement of 22nd March 2011 (CR 26/2011) [2011] NAHC 87 (Namibian).

An example is mining in areas which are owned by natives. The ownership rights of the land mostly include the resources on it. However, there are a lot of disputes on ownership rights to land and soil resources. Examples are the bushmen in Southern Africa.[176]

3.4.1.3 Culpability

According to s 7 (1) Ordinance[177] negligence is sufficient as the reasonable belief is the same as a reasonable person's test. This has to be proven by the state, as the presumption of the intention has been declared unconstitutional.[178] The liability for negligence was highly criticised by Snyman as it would contravene to general legal principles concerning intention and mistake.[179] Nevertheless, I would choose the test of negligence as there should be a duty to infringe into the origin of the received goods. However, the standard of a reasonable person will be very low. There has to be indicators giving raise to suspicion of theft. However, the managerial head does not subjectively foresee the theft. It is enough, if a reasonable person in his position would have done it. The director should not be excused if he failed to draw the conclusion from the indicators towards the theft. On the long run, it would be great to establish a world-wide obligation to reveal the supply chain, to prevent the hiding of infringements of property rights.

3.4.1.4 Interim Findings

An entity can be held liable if it receives stolen goods. The culpability requirement is negligence.

3.4.2 Germany

The equivalent German crime is the handling of goods received in breach of a property right in s 259 Criminal Code StGB.

3.4.2.1 Handling

The product has to be either purchased or sold by the retailer. This is nearly always given.

3.4.2.2 Breach of Property Rights

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[176] As reported e.g. by Survival, 13th December 2006, *Bushmen win landmark legal case*, available at https://www.survivalinternational.org/news/2128 (last accessed 29th May 2018) (Foreign).
[177] 12 of 1956 (South African applicable in Namibia).
[178] *Gomes v Prosecutor-General of Namibia* judgement of 9th August 2013 (A 61/2012) [2013] NAHCMD 240 (Namibian).
[179] Snyman (2015) p. 251 (South African).

Germany does not cover only theft but any delict that amounts to an infringement of assets. Every conduct that changes the assets of another person without authorisation is a breach of property rights. Also, the contractual claims are included.[180] That leads to the conclusion, that the withholding of promised pay or the minimum wage in the production amounts to such an infringement.

3.4.2.3 Property Received through the Breach

The essential question is whether there is a link between the illegally received work force and the property of the goods.

According to the literal interpretation property only means the materiality of an object, e.g. clothing in itself. The workers normally do not own the material, as it is made available by the factory. Hence, when the owner took the goods, he did not infringe on a right of ownership as the goods were always his property.

However, the theological interpretation leads to the conclusion, that the definition of property has to include the work force which has been acquired in a breach of property rights. S 259 Criminal Code StGB aims at protecting the assets of the victim[181]. It does not make a difference for the assets of the worker whether the material had been provided by him or by the factory owner despite the fact that his loss would be higher, as he had to have paid for the material. The workforce of the employee is his tool to earn money and should therefore be protected. A further aim of s 259 is the prevention of infringements of property rights, which are committed due to the promise of purchase afterwards.[182] This work force has increased the value of the good. Therefore, the good is shaped by the crime. As the entity promised the supplier to buy the goods, it encouraged him to further exploit workers. Hence, he is also included in the delict.

3.4.2.4 Cooperation with the Perpetrator

Another element of s 259 StGB is the cooperation with the perpetrator. A precondition of this is that the head of the supplied unit knows about the unlawful act and agrees with it.[183] The approval can be given impliedly and also after the delict was committed.[184]

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[180] Gabler Wirtschaftslexikon, *Vermögen*, available at https://wirtschaftslexikon.gabler.de/definition/vermoegen-48233 (last accessed 18th May 2018) (German).
[181] Münchener Commentary StGB 2017 / *Maier* / s 259 recital 1 (German).
[182] Ibid recital 3 (German).
[183] BGH judgement of 15th November 1982 – 2 StR 274/82 – JurionRS 1982, 14652 at 5 – commercial theft (German).
[184] Münchener Commmentary StGB 2017 / *Maier* / s 259 recital 68 (German).

The cooperation can be established by a business relationship. The two actors agreed on the goods being delivered. As the retailer raises the expectation that goods should be produced as cheap as possible, he impliedly agrees on the non-payment of adequate wages. Moreover, it can be referred to what has been written under 3.1.1.3. permission of the Namibian imputation of crimes to the company.

Beyond that, it has to be proven, that he had actual knowledge about the breach of property rights. Remuneration for example is a piece of information that normally stays within a company. Nevertheless, NGOs or trade unions that have an insight can forward the information to it.

3.4.2.5 Culpability

The retailer must have a double intention, namely to handle a good that was received in breach of a property right and to make profit. The first intent has to be direct or indirect intent, dolus eventualis is not sufficient. The director must have had actual knowledge about the breach of the property right. The intent to receive the usual profit of a business is enough for the second requirement.[185] The majority opinion is, that this is not given if the price is the market value,[186] even if only an illegal market existed for that product.[187] I argue that if the market value is defined by products that are received in breach of property rights, this argument cannot stand. It is no justification that the whole market is shaped by the illegal behaviour. I would propose to make a comparison with the hypothetical price the product had if the workers had been paid adequately. If there is a difference, the aim to receive benefit is given. Accordingly, as the usual aim of the business is to make profit, it will not be difficult to establish that element.

Negligence is sufficient only in exceptional circumstances. An example is the trading with precious metals and precious stones[188]. This accommodates evidentiary difficulties as this material can easily be changed.[189]

3.4.2.6 Interim Findings

The supplied establishment can be held liable if it knowingly purchases or sells wares that are received in a breach of property rights according to s 259 StGB.

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[185] Beck Commentary StGB 2018 / *Fischer* / s 259 recital 23 (German).
[186] OLG Hamm judgement of 27th March 2003 – 1 Ss 213/03 – NStZ-RR 2003, 237 at 238 – intend to make profit (German).
[187] Beck Commentary StGB 2018 / *Fischer* / s 259 recital 23 (German).
[188] S 148b Trade Act GewO (German).
[189] Commentary GewO 2014 / *Kahl* / s 148b recital 1 (German).

3.4.3 Comparison

In comparing both jurisdictions, it becomes obvious, that the core of the crime of handling of stolen property is the same but the detailed elements differ. It becomes clear, that Namibian law aims solely at the prevention of theft. On the contrary, the German law focuses on the combatting of commercial activities. The additional intention requirement of making profit is an indicator for that. Furthermore, a cooperation with the perpetrator has to be given, which is not necessary in Namibian law. The addressed incidence is more restricted in Germany compared to Namibia.

The scope in Germany is much broader, as it covers any property that is received through an infringement of property rights. As a conclusion, also the non-payment of salaries can amount to such an infringement though a bit argumentative effort is necessary to convince a judge from the link with the property.

In Namibian law, the culpability requirement can be fulfilled by intention or negligence of the supplied business. The scope of the law in Germany is more restricted as actual knowledge of the crime is necessary.

The Namibian requirement of culpability is better adapted to the reality of supply chains. Actual knowledge about the crime cannot be easily proven, except if it has been communicated by an external person or investigations have been conducted in the factory. To avoid the legislation run void due to impossibility to prove, already the suspicion should establish liability. It is not a too high burden to require companies inquire in cases when it becomes aware of facts, that reasonable would lead to a suspicion of theft. Furthermore, negligence should establish liability, to deal with the fact, that companies intentionally do not care about the production. They neglect to receive information about the working conditions, to not be held liable. That is why, a duty to investigate has to be established, to keep companies from increasing the distance with the supplier. The OECD Guidelines could also be applied here, as they provide for an obligation to investigate into the payment of the workers in the supply chain.[190] It always depends on the realities of the supply chain, whether such an investigation is necessary and possible.

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[190] OECD Due Diligence Guidance for Responsible Guidance for Responsible Supply Chains in the Garment and Footwear Sector, 2018, http://dx.doi.org/10.1787/9789264290587-en (last accessed 17th May 2018) p. 153 (International).

The crime of handling of stolen property holds the retailer accountable if in his supply chain theft (Namibia) or any delict against property rights (Germany) has been committed.

4 Extra-Territorial Jurisdiction

Questions concerning liability have been answered in the previous chapters. A further challenge is that the crime was committed in a foreign country. This chapter deals with the question in which instances Namibian or German courts have jurisdiction.

4.1 Principle of Territoriality

4.1.1 Theory

Generally, the territoriality principle prevails. It determines that the crime has to be prosecuted in the country in which it has been committed.

In Namibia, jurisdiction is established if a significant portion of the crimes is committed in the particular country. In the Mwinga case[191], one of the few cases dealing with extra-territoriality, some Namibian policemen standing at the border of Namibia shot a Zambian on the other side of the border in Zambia. The reason for accepting jurisdiction was that the majority of the conduct took place in Namibia, namely the firing of the shot. The Supreme Court rejected the notion to make jurisdiction dependent on the country in which the result appeared.[192]

In Germany, the territoriality principle is established in s 3 Criminal Code StGB. The courts interpret it in so far as that the conduct or the result has to appear in the country to establish jurisdiction. For example, the publication by a foreigner which was uploaded on the Internet in Australia led to German jurisdiction. The court argued that for prohibited conduct which endangers a legally protected interest, the place of the endangering is relevant.[193] The territoriality principle also applies when the main crime was committed abroad, but the conduct of the participant took place in Germany, according to s 9 (2) (2) StGB. In this instance, the participant is liable under German law irrespective of the liability of the main perpetrator. In many instances, the conduct of the supplied company amounts to participation to the crimes committed by the producing factory. Often the representatives of the supplied business act or omit in their offices in Germany. The

[191] *S v Mwinga a.o.* judgement of 11th October 1995 (SA 1/95) [1995] NASC 2 (Namibian).
[192] Ibid at 11 (Namibian).
[193] BGH judgement of 12th December 2000 – 1 AtR 184/00, at 61 – holocaust denial by foreigner (German).

scope of s 9 StGB can be limited via s 153c Criminal Procedure Act StPO, which empowers the Public Prosecutor to stop prosecution if a foreign judgement dealing with the same conduct has been executed. The German scholar Knaup argues that s 9 (2) (2) StGB mitigates the behaviour of companies to search the countries with the lowest legal standards concerning worker rights and legal enforcement.[194]

4.1.2 Application on Money Laundering, Handling of Stolen Property

Concerning the crime of money laundering, the territoriality principle can be applied as the relevant conduct is not the initial crime but the handling of the goods. Jurisdiction is established in the country in which the goods are received, irrespective whether the initial crime was committed abroad.[195] That leads to the conclusion that as soon as the wares cross the border to Namibia or Germany, the respective courts have jurisdiction.

The jurisdiction for the crime handling of stolen property can be applied in a similar manner. In Germany, the property has to be purchased or disposed of within the borders. It makes no difference that the breach of property rights was committed abroad.[196] The Namibian courts have not dealt with a case of goods stolen abroad, yet. The relevant conduct establishing liability is the receiving rather than the stealing. Accordingly, jurisdiction should be determined according to the place where the wares were received.

4.2 Personality Principle

4.2.1 Theory

According to the personality principle, jurisdiction for extraterritorial crimes can be based on the nationality of the perpetrator or the victim.

The German courts establish jurisdiction only if the conduct also amounts to a crime in the country where it has been committed. The core of the crime has to be penalized.[197] The particular elements[198] and aims[199] of the provision do not need to be proven. If democratic principles are not prevailing concerning the abroad crime or defence, the German courts neglect the abroad criminal offence or defence.[200] After it has been

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[194] Knaup (2011) pp. 160-162 (German).
[195] S 1 POCA (Namibian); s 261 (8) Criminal Code StGB (German).
[196] Münchener Commentary StGB 2017 / *Maier* / s 259 recital 24 (German).
[197] Ibid recital 6 (German).
[198] Ibid recital 6 (German).
[199] Commentary Corporate Law 2017 / *Esser* / s 7 StGB recitals 2,3 (German).
[200] Proposal for the now applicable Criminal Code E 1962, Parliamentary documents BT-Drs. 4/650, p. 113 (German).

scrutinized whether the crime is punishable in the other country, the German criminal law is applied.[201]

4.2.2 Application on Director

The directors of German companies are very often Germans, hence, this section applies for many crimes in the supply chain.

As in the Mwinga case[202] no reference was made to the nationality of the perpetrator or victim, it becomes clear that Namibia does not take into consideration the personality principle for natural persons.

4.2.3 Application on Company

The personality principle can also be applied on companies. The "nationality" can be established via the place of their headquarters. It is the country, which determines their legal identity.

In Germany, although businesses cannot be held criminally liable and are not included in s 7 (2) (1) Criminal Code StGB,[203] administrative law provides for extra-territorial jurisdiction of German courts if the regulatory offence was committed for the benefit of the company. The "nationality" is determined via the country of either the headquarter, the branch or the property.[204]

Namibian courts have not dealt with the question of extraterritorial crimes of companies yet. Applying the strict territoriality principle would lead to the conclusion that Namibia has no jurisdiction for crimes committed in the supply chain abroad. However, in light of international law, an exception should be made for the liability of companies for crimes in their supply chain. The ICJ decided that the country of the headquarters of the enterprise in which the misconduct occurred has jurisdiction.[205] This is supported by many other international instruments. The International Commission of Jurists claims in the Maastricht Principles that the country of the headquarters of a company should extend jurisdiction over its human rights violations committed abroad. The mother

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[201] Münchener Commentary StGB 2017 / *Ambos* / s 7 recital 8 (German).
[202] S v Mwinga a.o. judgement of 11th October 1995 (SA 1/95) [1995] NASC 2 (Namibian).
[203] AG Bremen judgement of 30th September 2004 – 74 Cs 230 Js 48049/03, NStZ-RR 2005, 87 – extra-territorial jurisdiction of crimes against companies (German).
[204] Beck Commentary OWiG / *Gürtler* / s 30 recital 1; Münchener Commentary StGB 2017/*Ambos*/ vor s 30 recital 33 (German); example: Art. 9 (1) (d) Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism (European).
[205] *Barcelona Traction, Light and Power Company, Ltd,* judgement of 5th February 1970, I.C.J. Reports 1970 p. 33 (International).

country has to oblige parent companies to prevent human right violations by their subsidiaries abroad.[206] Reasons mentioned in the preamble are universality of human rights and lacks in human rights legislation and enforcement. Also, the commission argued that it has to be counterbalanced, that the corporation is not prosecuted in low-wage countries because of missing political will. Additionally, the UN Guiding Principles include a recommendation towards states to establish extraterritorial jurisdiction over the conduct of their companies. Hereby, the drafters referred to policy reasons.[207] The OECD Guidelines base their jurisdiction on the place of business operation or its headquarters.[208] In light of the Namibian Constitution, which is very friendly towards international law e.g. with reference to Art. 144 and the Mwinga case[209], those principles claimed by the international community cannot be neglected. It provides for a convincing argumentative basis which can be adapted by Namibia's courts.

If the nationality of the director differs from the one of the company, there could be contradictions concerning jurisdiction and breaches of the ne bis in idem principle. [210] One possibility is to say that the court which opens a case at first, gains jurisdiction. Another option is to argue that the nationality of the company should prevail. In my opinion, it makes more sense to refer to the nationality of the legal person, as the crucial factor is the company. Foreigners are still bound by the country in which they are settled. Hence, no confusion should be established in the field of business.

If an establishment has a branch in another country, it is questionable which country should take jurisdiction. I argue in favour of obliging first the country of the branch to prosecute. If it fails, the mother country of the business should take jurisdiction. Then the principle of representative prosecution applies as discussed in the following chapter.

4.3 Principle of Representative Prosecution

4.3.1 Theory

Representative prosecution is a further exception of the territoriality rule. It finds its application when the state in which the misconduct occurred does not prosecute.

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[206]Art. 24 and Art. 25 (c) Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights of 28th September 2011 (International).
[207] Commentary UN Principle 2 (International).
[208] OECD Recommendation I.2; National Contact Point, Final declaration of 30th March 2011 (International).
[209] S v Mwinga a.o. judgement of 11th October 1995 (SA 1/95) [1995] NASC 2 at 171-172 (Namibian).
[210] This is supported by expert opinion: Münchener Commentary StGB 2017/ *Ambos* / vor 3 recital 73 (German); Council of Europe et al. (1992) p.472 (European).

The German legislators applied this principle to anyone who is discovered in Germany and cannot be extradited, according to s 7 (2) (2) Criminal Code StGB.[211] It comes into place where the strict application of the principle of territoriality would lead to a non-punishment.[212] Furthermore, it is practiced, if the right to a fair procedure is hampered. Especially, the right to a speedy trial is infringed by many judicial systems in low-wage countries.

The behaviour has to be a criminal offence in the country in which it took place. Concerning this offence, the same rules apply as for the personality principle as shown under 4.2.1..

It is also possible that Germany executes a foreign judgement. It has to be in line with the requirements set out in s 84 ff. International Cooperation in Criminal Matters Act IRG.

Generally, Namibian law does not provide for representative prosecution. I argue in favour of this approach because otherwise the rules on liability would run void. Firstly, it often allows for a quicker procedure.[213] Secondly, the low-wage country often has not the means and the interest to prosecute the transnational company. One reason lies in the ineffective legal system. The trial against Rana is an example as even five years after the collapse, there had not been set a date for the murder proceedings yet.[214] On the other hand, the economy of the low-wage country is highly dependent on the foreign corporations. Furthermore, the behaviour of transnational companies to outsource the production to low-wage countries undermines general principles of law. The power of grand enterprises over governments infringes into state sovereignty, which is the basis for jurisdiction. Accordingly, an exception should be granted. In dealing with representative prosecution, it has to be considered that Namibia has neither the financial means nor the staff to prosecute all abroad crimes of managerial heads to be found in Namibia. Hence, it should start with the prosecution of the most serious ones.

4.3.2 Application on Director

If the director is caught in Germany, he can be prosecuted as long as there has been no criminal judgement regarding the same conduct in another country (ne bis in idem

[211] Examples for reasons to not extradite: OLG Stuttgart judgement of 28th January 2005 – 3 Aus. 116/04 – NStZ-RR 2005, 181 – extradition Poland; BVerfG judgement of 24th June 2003 – BvR 685/03 – extradition India (German).

[212] Proposal for the now applicable Criminal Code E 1962, Parliamentary documents BT-Drs. 4/650, p. 113 (German).

[213] Council of Europe et al. (1992) p. 469 (European).

[214] Tipu, *No progress in trial proceedings of Rana Plaza cases,* 24th April 2018, available at https://www.dhakatribune.com/bangladesh/court/2018/04/24/no-progress-rana-plaza-cases-trial-proceedings/ (last accessed 21st of May 2018) (Foreign).

principle).[215] If the abroad judgement is not criminal but private or administrative, the judges consider the decision of their foreign colleagues when determining the sentence. If the case allows it, the punishment is mitigated.[216]

4.3.3 Application on Enterprises

As the company cannot change places, it will be difficult to establish it to be caught in the country. It would be unfair if the country prosecutes against a business if the leader is found within its borders. I would argue that this infringes too much into states sovereignty to take jurisdiction over a whole company of another country. Especially as corporations do not have a high flight risk.

4.4 Universal Jurisdiction

4.4.1 Theory

The principle of universal jurisdiction could solve issues connected with the missing enforcement in the low-wage country. It is disputed whether universal jurisdiction is established by the Rome Statute[217]. The scholar Ryngaert neglects it with reference to Art. 12 (2) Rome Statute which refers to the principle of territoriality and nationality.[218] Nevertheless, there are indicators to argue in favour of its application. ICC itself makes exceptions to the strict rules set in Art. 12 and the UNSC has the possibility to refer any case to the ICC according to Art. 13 (b).[219] The AU Model Law[220] provides for an expressed representative jurisdiction in Art. 4. There are arguments that the prosecution by the ICC or national courts is not an infringement into state sovereignty as it is the duty of each state to punish international crimes as they are so grave that they affect all human beings.[221] Furthermore, one can argue that the international crimes have become part of international customary law. The scholar Wenqi showed that it has been already established concerning the duty to co-operate.[222]

There are no court decisions and legislation on universal jurisdiction in Namibia yet. The AU Model Law is of high convincing value to support the notion that international crimes

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[215] s 87m Act on International Cooperation in Criminal Matters IRG (German).
[216] LG Darmstadt, judgement of 14th May 2007, 712 Js 5213/04-KLs – corruption Italy (German).
[217] of 17th July 1998, A/CONF.183/9 (International).
[218] Ryngaert, NCLR 2009, 510 - 511 (International).
[219] This is supported by Dube PER 2015, 452 – 453 (International).
[220] African Union Model National Law on Universal Jurisdiction over International Crimes, adopted in July 2012, EX.CL /Dec. 708 (XXI) (AU Model Law) (International).
[221] Köster (2010) p. 254 (International).
[222] Wenqi, IRRC, 2006, 108 (International).

trigger Namibian jurisdiction if the perpetrator is found in Namibia and the country in which the crime took place does not prosecute.

The principle of universality is implemented very broadly in Germany. The courts have jurisdiction over all international crimes although no connection to the own country is established via territory of the crime, nationality of the perpetrator or territory of discovery.[223] Mostly, it is practiced as a representative prosecution.[224]

4.4.2 Application on Human Trafficking

Some scholars argue to subsume human trafficking under the international crime against humanity.[225] Then it would trigger universal jurisdiction. The non-military cases of crimes against humanity[226] reveal that it has to be committed in a cruel and systematic manner to comply with the requirement of attack against a civil population. Examples could be conflict minerals which are mined by slaves to finance a cruel governmental system or rebel groups. A systematic attack can also be established when the factory relies on slave workers in such a systematic and cruel way that it can be called organised crime. Accordingly, in Namibia in case of grave forms of human trafficking which amount to a crime against humanity, the principle of representative jurisdiction is applied. This is due to Art. 144 Constitution.

The German legislator went beyond that in granting all forms of human trafficking universal jurisdiction.[227]

4.5 Interim Findings

The Namibian and German approach to extra-territorial jurisdiction are directly opposed. Namibian courts seem to decline to assert jurisdiction in as many as possible cases, whilst the German courts allow trials as soon as the slightest link with their own nation is seen. The latter state does not scrutinize whether there is a country with a closer link which should take jurisdiction.

[223] S 6 Criminal Code StGB, S 1 (1) International Criminal Code VStGB (German).
[224] OLG Frankfurt a. M. judgement of 18th February 2014 – 3 StE 4/10 – BeckRS 2015, 04846 – assistance to Rwandan genocide (German).
[225] Obokata, ICLQ 2005, pp. 448 ff; Wing / Amann (2007) p. 277 (International).
[226] e.g. the judgement of the Women's International War Crimes Tribunal: *The Prosecutors and the People of the Asia-Pacific Region v. Hirohito Emperor Showa et al*, judgement of 4th December 2001, PT-2000-1-T – Comfort women case; *Hereros v Deutsche Afrika-Linine GMBLT & Co.* judgement of 10th April 2007, C 06/1684, US Courts of Appeals of the Third Circuit (International).
[227] S 6 (4) Criminal Code StGB (German).

The Namibian jurisdiction is focused on the territoriality principle, the only exception are international crimes that establish representative jurisdiction. In contrast thereto, the German courts broadly apply the principle of personality, representative prosecution and universality.

I argue in favour of a broad application of extra-territoriality concerning transnational crimes. Every state which has a link to the crime must be allowed to prosecute and try transnational crimes to avoid perpetrators to escape jurisdiction. The connection could be established via the territory where (part of) the crime took place, via the nationality of the CEO or the headquarter or place of operation of the company or the place, where the perpetrator was caught. There are a lot of convincing international arguments for holding businesses liable by their mother countries. This can be supported by many scholars who claim that the state of the headquarter of the entity should establish jurisdiction over the extra-territorial crimes.[228] Still it has to be determined that the state in which the major conduct of the crime took place is obliged to take jurisdiction. However, if it does not comply with this duty, other states can take the place. If any court has decided about the case, the ne bis in idem principle should be applied.

As many economic relationships are transnational, so should the police, prosecutors and courts. Only then individual states can face the big and small human rights violations of their companies. An international police, prosecutors and courts are dreams of the future, although Europol and Interpol are a starting point. They do a great job in the field of combatting organised crime. Until an overall judicial system is established, states should take all measures to prevent that internationality frees from responsibility.

5 Conclusion

5.1 Summary

This thesis showed that there are manifold provisions for holding companies liable for crimes in their supply chain. Liability varies with the gravity of the crime, the relationship with the supplier, the control exercised and the director's knowledge or suspicion of the crime. An example for an enormous infringement into workers' lives was the collapse of Rana Plaza, where more than 1000 people died. The graver the infringement into legally protected goods, the bigger the duty to prevent it. Particular attention has to be given

[228] Abi-Saab (1984) at 50 (International); De Schutter (2003) pp. 85-87 (European); Joseph (2000) p. 79 (International).

towards crimes that endanger human lives and internationally condemned crimes like human trafficking.

Namibia provides for the liability of companies for crimes committed by suppliers. It holds the company liable for any crime that was impliedly permitted and furthered the interests of the corporation. Unfortunately, s 332 POCA is ineffective with regards to supply chains due to missing extraterritorial jurisdiction except in instances of serious and high-scale human trafficking. Still there is potential that Namibia adopts a broad approach concerning extraterritorial jurisdiction. Then a sound judicial framework would be established to hold companies liable for many crimes in their supply chain.

In Germany, it is very difficult to hold a director liable for crimes committed by a supplier. Although the laws on extraterritorial jurisdiction provides for many exceptions that can be adapted to supply chains, the scope of liability is very restricted. The director has a duty to supervise his company and the subsidiaries which are totally controlled by him. Unfortunately, the linkage to establish a liability under criminal law exists only if the director was the initiator of the danger that was realised in the commitment of the crime. It is very disappointing, that in Germany liability depends on the chosen control over the supplied company and is thus easily be evaded. Furthermore, there is no criminal liability of legal person, only the possibility to impose a regulatory fine.

These failures in the Namibian and German law can be compensated by the UN Principles on Business and Human Rights and the OECD Guidelines on Multinational Companies. Those standards provide for a fair business framework as the duty to act depends on the gravity of the crime, the conduct of the supplied enterprise, the possibility to prevent the crime and the size and means of the supplied company. The UN Principles can be used as an interpretation of human rights documents. Both guidelines can be referred to by courts of law. In future, undoubtedly, they will receive binding force. Both guidelines establish a guarantor duty. In cases of non-compliance, the supplied company can be held liable for infringements of legally protected interests in the supply chain. Furthermore, the UN Principles and the OECD Guidelines can be used by the courts to interpret notions like the defence of socially adequate business conduct or the required conduct to disregard negligence. The OECD is very clear in establishing extra-territorial jurisdiction. It states that the country where the business operates or has its headquarters has jurisdiction.

The best provision in both countries to hold managerial heads liable for serious crimes in their supply chain is money laundering. Examples of initial offences are fraud and

human trafficking. The offence of money laundering does not require a close relationship or control. It is clearly defined that in cases of suspicion of unlawful activities in the supply chain, the company is held liable. Since it is irrelevant where the initial crime has been committed, it does not fail due to extraterritoriality.

Furthermore, the crime handling of stolen property provides for a basis to hold companies liable. Especially in Germany it has a broad scope as it includes all delicts committed in the supply chain which are directed against property rights.

The current legislation focusses too much on control and on knowledge. Both elements can easily be evaded by companies by increasing the distance to and anonymity of the supplier. This behaviour does not only lead to the evasion of liability but also increases the risks of crimes. Therefore, it is crucial to establish a duty to inspect suppliers. Otherwise, every national provision will run void, as companies can decide to relax any control and to remain ignorant about any information about exploitation during the production.

5.2 Recommendations

After the examination of Namibian and German law dealing with supply chain liability, I give the following recommendations:

1. Most importantly, governments should provide for a due diligence standard of businesses concerning their supply chain. It should include the duty to exercise control. The UN Principles and OECD guidelines can serve as an example with world-wide acceptance.[229] The best would be if it is an international harmonized tool. This is supported by many scholars.[230]

2. Courts should apply the UN Principles and the OECD Guidelines when defining required conduct of corporations. They should use every chance to clearly define duties and responsibilities concerning their supply chain management.[231]

3. Legal scholars should write more on supply chain liability. They should scrutinize how existing international standards for business and human rights like the UN Principles and the OECD Guidelines can be enforced via national law.

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[229] This recommendation can be supported by the claim of the ECCHR for a clear national due diligence standard, ECCHR (2015) p. 3 (European).
[230] Eichhorn / Merk (2016) p. 243 (International); Pegg (2003) p. 20 (German).
[231] This approach is also claimed from the ECCHR (2015) p. 2 (European).

4. There should be an internationally unified legislation on extra-territorial jurisdiction, e.g. Namibia should extend its jurisdiction on extraterritorial crimes that can be imputed to companies having their headquarters in its territory.

5. The German legislator should establish a criminal liability of corporations.

6. The international community should oblige transnational enterprises to disclose their supply chain.

7. Entities should establish a due diligence standard in line with the UN Principles on Business and Human Rights and the OECD Guidelines. They should control their suppliers and take all reasonable measures to prevent human rights violations.[232]

8. NGOs and other actors are encouraged to conduct research in the field of trades, e.g. in the garment industry. If they find evidence of criminal behaviour in the production, they should confront the supplied enterprises with those pieces of information. Only then they cannot raise the defence of mistake of fact in a judicial trial.

5.3 Outlook

This thesis does not intend to cover all criminal offences to hold enterprises liable for the misconduct in the supply chain. There can be done further research which crimes can be applied to establish a supply chain liability. An example is direct liability for murder or assault, if a factory collapses. The extent of liability is a further point of discussion. Here, control could be the determining factor to decide whether the retailer is liable as a perpetrator or participant.

Other jurisdictions have established a liability for human rights violations in the supply chain. The French law punishing companies for the crimes in their supply chain can serve as an example.[233] The Belgian legislator is starting to establish legation which pushes businesses to produce socially responsible.[234] In the country, a law has been proposed to make businesses liable for the supply chain.[235] Namibia and Germany can look at this

[232] This is supported for example by Fasciglione (2016) pp. 9-16 (International).
[233] Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (Foreign).
[234] Loi visant à promouvoir la production socialement responsable, loi de 27 fevrier 2002 (Foreign).
[235] Plan d’action national Entreprises et Droits de l’Homme, de 23 juin 2017 (Foreign).

legislation when implementing a new law or deciding to directly apply the international standards for businesses concerning human rights.

The words of the preamble of the Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector will serve as a concluding remark: “Governments, international organisations, enterprises and civil society organisations can draw on their respective competences and roles to build responsible garment and footwear supply chains that benefit society at large”[236]

[236] OECD Due Diligence Guidance for Responsible Guidance for Responsible Supply Chains in the Garment and Footwear Sector, 17th May 2017 (International).

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IV. Appendix: Interview with a former Chief Officer

Das Interview fand am 14.05.18 von 16:00-18:00 Uhr statt. Der Interviewpartner ist ein ehemaliger Erster Offizier, der afrikanischen Westküste fuhr und dabei in den Kontakt mit Korruption kam. Die Reederei hat 1500 Mitarbeiter, und fährt mit mittelgroßen Frachtschiffen.

1. *Kannst du die Kette der Auftraggeber eines Frachtschiffes beschreiben?*

Das Endunternehmen, wie Mondelez, gibt an den Charterer einen Auftrag auf Verschiffung. Der Charterer ist der Befrachter. Er beauftragt dann eine Reederei, die für das Schiff, Besatzung, Verpflegung und Sicherheit an Bord sorgt. Das Frachtschiff ist entweder im Eigentum der Reederei oder durch einen Fond finanziert. Es ist möglich, dass auf einem Schiff mehrere Charterer einen Auftrag geben. Dann wird die Aufgaben- und Verantwortungsverteilung etwas schwieriger, da beide verantwortlich für die Fracht sind.

2. *Welchen Einfluss hat der Erste, Zweite und Dritte Offizier eines Frachtschiffes auf das System der Korruption beim Hafenpersonal und bei den zusammenhängenden Behörden?*

Der Erste Offizier ist für die Ladung und Besatzung verantwortlich. Er verteilt die Aufgaben unter der Mannschaft, die aus 20 Menschen besteht. Er koordiniert die Arbeit an Deck. Er macht die Einkaufslisten. Der Zweite Offizier ist für die Sicherheit verantwortlich und der Dritte Offizier für die Routen.
Vor dem Einlaufen in den Hafen ordnet der Erste Offizier an, klar Schiff zu machen und lässt alles aufräumen, um keinen Anlass für ein Fehlverhalten zu bieten. Die nötigen Dokumente werden gesucht. Dabei muss man wissen, dass die Besatzung alle vier Monate wechselt und es 100 Zertifikate für alles Mögliche gibt. Deshalb ist es unmöglich, alles zu kontrollieren und perfekt zu haben. Die afrikanischen Hafenbehörden kommen auf das Schiff, um es zu durchsuchen. Dabei suchen sie Scheinprobleme, um Geld verlangen zu können. Dieses geht offensichtlich nicht in die Staatskasse, sondern in die Tasche des Beamten. Auch gibt es keine Rechtsgrundlage für die Beanstandung der Beamten, bpsw. muss Geld bezahlt werden, wenn ein Zertifikat nicht im Original vorliegt, sondern nur in der Kopie. Hier ist es nicht möglich, Rechtsstaatlichkeit zu fordern. Meine Aufgabe bestand dann darin, zu beschwichtigen und den Preis herunter zu handeln. Es gab keine Möglichkeit, nicht zu bezahlen.
Unterstützt werden Kapitän und Offiziere in jedem Hafen von einem Agenten, der von einer Firma vor Ort angeheuert wird. Dieser ist mit den Gepflogenheiten und der Kultur des Landes vertraut. Er ist eine Mittelsperson zwischen Hafenbehörden und Kapitän, er spricht die Landessprache, um zu übersetzen. Manchmal ist es fraglich, auf welcher Seite der Agent steht, bzw. von wem er noch bezahlt wird. Dies merkte man an der Art der Beratung im Umgang mit dem Preis, den die Hafenbehörden verlangten. Sagte er sofort, dass es ein guter Preis ist, wurde man misstrauisch.

3. *Welchen Einfluss hat der Kapitän?*

Der Kapitän teilt sich seine Aufgaben mit dem Ersten Offizier. Letztendlich hat der Kapitän das letzte Wort. Er verwaltet den Alkohol, die Zigaretten und das Geld.
Einmal habe ich den Kapitän gefragt, ob er sich nicht Sorgen darüber macht, wegen Korruption belangt zu werden. Der meinte ja schon, aber es ist noch nie passiert. Und es ist auch sehr unwahrscheinlich, dass es jemand aufdeckt, weil alle Beteiligten davon profitieren. Recht und Praxis divergieren in Afrika. Wenn die Beamten mit Waffen an Bord kommen, kann man ihnen nicht den Zutritt verweigern. Aber das müsste man doch eigentlich dürfen, wo es doch ein deutsches Schiff ist.

Die Bezahlungen beliefen sich auf einen Betrag von circa 35 € pro Person, meistens in Sachgütern, wie Alkohol und Zigaretten. Pro Hafen schicken die unterschiedlichen Behörden Leute, sodass so circa 20 Menschen pro Hafen kamen.

4. *Welchen Einfluss hat der Geschäftsführer der Reederei? Was weiß er? Was kann ihm zugemutet werden?*

Der Reeder weiß von der Korruption. Aber er hat keinen Einfluss auf die betroffenen Geldquellen. Er ist zuständig für die Besatzung und die Sicherheit an Bord. Er trägt jedoch rechtlich keine Verantwortung für die Korruption, sein Wort ist zu unbedeutend. Er lebt mit dem Risiko.

5. *Welchen Einfluss hat der Charterer für den Transport der Waren? Was kann ihm zugemutet werden? Wie viel Kontrolle hat er über das Verhalten des Personals auf dem Frachtschiff?*

Sie sind letztendlich die Entscheidungsträger, die über Geschwindigkeit und die Route entscheiden. Der Kapitän hat einen Entscheidungsspielraum, muss jedoch sein Handeln vor den Charterern rechtfertigen.
Der Charterer schickt von Zeit zu Zeit einen Vertreter zu den Häfen. Sein Ziel ist es zu beschwichtigen und zu verhindern, dass das verlangte Geld den Rahmen sprengt.
Der oder die Charterer stellen die Finanzen bereit für die Korruption, sie kalkulieren diese Kosten schon mit ein. Er stellt auch das Geld für Benzin bereit und entscheidet somit, wie schnell gefahren werden darf.
Es ist billiger, Korruption zu bezahlen, als lange zu verhandeln, abzuwarten oder in Kauf zu nehmen, dass die Hafenangestellten dann langsamer arbeiten. Im Vergleich zu den wirtschaftlichen Verlusten ist die Korruption peanuts.

6. *Welchen Einfluss hat das auftraggebende Unternehmen?*

Das auftraggebende Unternehmen hat keinen Einfluss. Sie haben nur mit dem Charterer Kontakt. Oft sind es sehr viele unterschiedliche Unternehmen, die Fracht auf einem Schiff haben. Sie haben auch keinen Einblick auf welches Schiff bei welchem Chartere die Ware verschifft wird.

7. *Ist es möglich, die Verantwortungsbereiche gesetzlich vorzugeben, oder ist es effektiver, der Firma es selbst zu überlassen, wie sie Verantwortung strukturiert?*

Firmen sind im Einzelnen wegen dem Marktdruck nicht handlungsfähig. Wegen der Wettbewerbsfähigkeit ist dies ein zu hoher Aufwand. Alle machen es und keiner hat etwas dagegen.

8. *Ist es möglich, dass die CEOs von den Firmen, die in einer Lieferkette sind, zusammen über Arbeitsbedingungen diskutieren? Ist es anders im Fall von krassen Menschenrechtsverletzungen?*

Dies ist nicht möglich, weil die nicht nur die Lieferkette betroffen ist, sondern auch andere Bereiche mit einbezogen werden müssen, vor allem Politik, Wirtschaft und sogar Kultur.
Der Auftraggeber hat nichts mit dem Frachtschiff zu tun. Dem Charterer ist egal, welches Frachtschiff und welche Reederei beauftragt wird. Sie haben das Druckmittel, dass sie jederzeit die Reederei wechseln können.
Die Zusammenhänge sind zu komplex, um einfach nachverfolgen zu können, wer in der Lieferkette ist. Die Ware wird während der Fahrt mehrfach weiterverkauft. Der Nutzen ist minimal, während die Folgen unbekannt und gar gefährlich sein können.
Wenn jedoch Ware verdorben ist, dann funktioniert plötzlich die Kommunikation zwischen uns und dem auftraggebenden Unternehmen. Und dann möchte man genau wissen, wer dafür verantwortlich ist.

9. *Was hat euch davon abgehalten, bei der Polizei vor Ort Anzeige zu erstatten?*

Zum einen bietet dies das Risiko von weiteren Komplikationen. Zum Beispiel haben wir Angst, dass das Militär eingeschaltet wird. Außerdem besteht das Risiko, dass die Hafenarbeiter die Arbeit einstellen.
Des Weiteren besteht die Gefahr von Verspätung, die zu enormen Mehrkosten führt. Man muss mit der richtigen Tide den Hafen verlassen, und beim nächsten Hafen ankommen. Wir bleiben ca. 48 Stunden in einem Hafen. Außerdem macht der Charterer Druck, dass die Waren rechtzeitig geliefert werden. Für jede Verzögerung müssen wir uns rechtfertigen.
Ein weiterer Punkt, der uns davon abhält, ist das fehlende Vertrauen in die Rechtsstaatlichkeit des Systems. Es könnte ja sein, dass die Polizei auch erstmal Geld verlangt, bevor sie überhaupt anfangen zu arbeiten. Dadurch sind die Erfolgsaussichten nicht sehr hoch.
Außerdem haben wir keine Kenntnis über die Strukturen vor Ort. Ja da muss ich einräumen, dass man dies wahrscheinlich über den Agenten herausfinden könnte.
Ein Argument gegen den Gang zur Polizei ist, dass wir uns selber angreifbar machen. Auf dem eigenen Schiff ist nicht immer alles in Ordnung, es gibt immer irgendetwas das nicht den Auflagen entspricht.

10. *Wäre es möglich, dass alle deutschen Reedereien gemeinsam durch Marktdruck die korrupten Strukturen in den afrikanischen Häfen verändern könnten? Oder braucht es dafür ein internationales Vorgehen?*

Deutsche Reedereien haben keinen Einfluss, eher die niederländischen, arabischen und US-amerikanischen. Der Markt ist hart umkämpft, der Wettbewerb ist hart, vor allem aus Russland und China.
Außerdem ist der Eigennutz zu gering. Die Reedereien haben es nicht als Aufgabenschwerpunkt, Korruption zu bekämpfen. Die Korruptionszahlungen sind peanuts für die Reederei. Da lohnt es sich einfach nicht, den Aufwand zu starten, sie zu verhindern, was deutlich mehr kosten würde.
Die chinesischen Schiffe müssen nicht bestechen, weil sie Rückendeckung von ihrem Staat haben. Da haben die Afrikaner Angst. Die Chinesen demonstrieren mehr Macht. Da sollte sich Europa mal eine Scheibe abschneiden.
Es ist nicht möglich, dass ein Land alleine vorreiten. Das ist zum Scheitern verurteilt. Es müssen alle Nationen gemeinsam über internationales Recht Strukturen schaffen, um Korruption zu beenden.

11. *Was muss sich an nationalen Kontaktstellen („national contact points“) ändern, damit sie genutzt würden?*

Von den nationalen Kontaktstellen habe ich aus deinem Mund zum ersten Mal gehört.
Die Vertreter müssten eine höhere Uniform tragen als die Behörden, also mehr Autorität haben. Es müsste jemand sein, der dem Schiff ein Hebel in die Hand gibt, um seine Rechte durchzusetzen. Der Vertreter müsste für Rechtsstaatlichkeit sorgen. Sehr wichtig ist, dass er bei den Kontrollen präsent ist. Er muss da mitwirken, wo offensichtlich Rechtsverstöße vorkommen.
Es würde schon helfen, wenn die Vertreter einfach beobachten und die Verstöße aufschreiben. Sie müssen vertrauenswürdig und unabhängig von den Hafenbehörden sein.

12. Welches System schlägst du vor, um Korruption in Afrika zu bekämpfen?

Es braucht Überwachung der Hotspots vor Ort, durch bspw. die nationalen Kontaktpunkte. Sie sollen eine sofortige Handlungsbefugnis haben, quasi wie „Man in black". Daneben sind kurzzeitige Handelsembargos auf einen Hafen bei eskalierender Korruption ein geeignetes Druckmittel der Wahl. Jedoch sollte es nur für kurze Zeit andauern, um das Land nicht ausbluten zu lassen. Das Motto soll sein: Ihr wollt handeln, wir wollen Fairness. Es müssen alle Länder mitmachen, damit nicht schon der Chinese vor der Tür steht.
Außerdem muss eine Umerziehung des Gedankengutes in den afrikanischen Ländern stattfinden. Die gängige Praxis muss sich ändern. Darüber hinaus ist es einfach essentiell, dass Rechtsstaatlichkeit und Wirtschaftlichkeit in den afrikanischen Ländern verbreitet wird.
Ein Beispiel aus der Praxis ist folgendes: Wir wollten Schweröl in einem Hafen abgeben. Dies war jedoch nicht möglich, weil alle Unternehmen, die Schweröl abholten, von der Regierung wegen Korruption verboten wurden. So war keiner da, der das Schweröl abnahm. Als wir später wieder in diesen Hafen kamen, gab es wieder Unternehmen, die genauso korrupt wie vorher waren. Man konnte nicht erkennen, ob es die alten Unternehmen waren oder nicht, da einfach eine Gruppe von Menschen mit einem LKW dort stand. Wir haben auf jeden Fall keine Veränderung hinsichtlich der Korruption bemerkt.

13. Gab es Menschenrechtsverletzungen auf dem Frachtschiff im Hafen?

Weibliche Mitglieder der Besatzung, die auf der Brücke Wache hielten, wurden oft belästigt von Afrikanern. Bei den Hafenarbeitern wurden die Sicherheitsbestimmungen nicht eingehalten. Oft hatten sie nicht einmal Handschuhe.

14. Möchtest du sonst noch etwas anmerken?

Es gibt verschiedene internationale Verträge, wie bspw. die International Maritime Organisation, die Maritime Labour Organisation, International Transport Federation. Die ITF ist eine Konvention von 147 Ländern, die ein Beschwerdemechanismus haben bei größeren Rechtsverstößen. Selbst habe ich mit ihnen noch keine Erfahrung gemacht, jedoch in einer Verhandlung wurde mit ihnen gedroht, als die Beamten zu viel Geld wollten. Dies hat Wirkung gezeigt, die Beamten haben sich etwas zurückgezogen, jedoch nicht einschüchtern lassen. Die ITF würde im Fall der Fälle eine Vertretungsperson schicken, die dann Recht und Gesetz durchsetzt. Der ITF gibt dem Ersten Offizier die Möglichkeit, das Schiff vom Hafen bestreiken zu lassen, da er selbst nicht streiken darf. So kann der Erste Offizier Dinge gegen die Reederei durchsetzen. Der ITF hat Mechanismen, um seine Regularien durchzusetzen. Beispielsweise können sie ein Schiff in einem Hafen an die Kette legen und verlangen, dass es erst ablegen kann, wenn es mit den Vorgaben übereinstimmt.
Außerdem hat der Hafen das Recht, Schiffe festzuhalten, die die Sicherheitsbestimmungen nicht einhalten. Dieses Recht üben sie bspw. aus, wenn eine Crew ein Sicherheitsmanöver nicht kann.
Deutsche Flagge heißt nur, dass deutsche Sicherheitsstandards auf dem Schiff gelten. Die Arbeitsverträge werden jedoch nach dem Maßstab des Heimatlandes bewertet und bezahlt. Die Kiribatis werden deutlich schlechter bezahlt. Prinzipiell muss ich jedoch auch sagen, dass die Bedingungen an Bord sehr gut waren. Trotz unterschiedlicher Bezahlung wurden die Leute gut behandelt. Und die schlechtere Bezahlung hat immer noch gereicht, um die Familie und das ganze Dorf zu versorgen.
Beim Suez-Kanal gab es früher sehr viel Korruption unter den Lotsen. Dann hat der Staat Regelungen eingeführt, die dazu führten, dass das Problem deutlich verringert wurde. Deshalb braucht es nationale und internationale Gesetze die eine Veränderung bringen. Die Reedereien an sich können nichts tun es ist die Rolle des Gesetzgebers dort einzugreifen.

V. Affirmation

I hereby declare, that I wrote this thesis by myself and only used the sources and auxiliary means cited. Additional, I assert that I complied with the general academic principles as laid down in the "Leitlinien guter wissenschaftlicher Praxis" of the Carl von Ossietzky Universität.

Hiermit versichere ich, dass ich diese Arbeit selbstständig verfasst und keine anderen als die angegebenen Quellen und Hilfsmittel benutzt habe. Außerdem versichere ich, dass ich die allgemeinen Prinzipien wissenschaftlicher Arbeit und Veröffentlichung, wie sie in den Leitlinien guter wissenschaftlicher Praxis der Carl von Ossietzky Universität festgelegt sind, befolgt habe.

Oldenburg, 15th July 2018

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