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THE CHANGING FACE OF CORPORATE LIABILITY – NEW HARD LAW AND THE INCREASING INFLUENCE OF SOFT LAW

ABSTRACT. The first frameworks defining standards of human rights protection specifically for business enterprises were non-binding "soft law" like the UN Guiding Principles on Business and Human Rights. In recent times, a "hardening" of corporate human rights law has taken place. Several acts of "hard law" have been implemented at a national and EU level. This article provides an overview of the most important ones. The "hard law" provisions differ in their scope: some obligate companies to report on human rights, others stipulate concrete obligations to conduct human rights due diligence. Another way of tackling the issue of human rights compliance has been demonstrated by the prosecution of companies in the United States. While procedural guidelines abstractly stipulate an effective compliance system to be a mitigating factor, the US Department of Justice regularly defines concrete compliance obligations in deferred or non-prosecution agreements. This development could lead to comprehensive liability for negligence due to organisational and monitoring deficiencies. But who defines the standards? This article examines how the changing practice of human rights compliance may have "feedback effects" on hard law, particularly by changing the scale of negligence. Regarding the lack of effectiveness of some due diligence measures, especially in the "certification industry", it is then asked how legislation may proactively exert influence by defining effective CSR instruments necessary to prevent civil and criminal liability. Using the example of German law, a proposal is made to implement an obligation of human rights due diligence in "hard law" and, simultaneously, set up an independent expert commission that drafts guidelines specifying the necessary measures for different kinds of companies.

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I INTRODUCTION

People's lives and freedoms are highly influenced by transnational business enterprises – in some areas this influence may be greater than that which states have on their own citizens.[1] Business enterprises are able to change people's lives for the better, providing jobs and developing products that satisfy their needs.[2] However, they can also violate their human rights, especially in the production processes in the global south, and not only of the workers involved. Because human rights violations are rarely committed by business enterprises from the global north directly,[3] a central aspect of effective human rights protection is whether they can be held accountable for harms committed by suppliers and subcontractors.

For the purpose of protecting employees and civilians against business-related human rights abuses, several multinational treaties have been adopted that can be qualified as "soft law",[4] particularly the United Nations Guiding Principles on Business and Human Rights (UNGP). Although "soft law" is non-binding by definition, such treaties paved the way for several acts of "hard law" that have been introduced in the past years.[5]

The following parts trace this development of legislation pertaining to business and human rights from "soft" to "hard law" by firstly presenting the relevant legal frameworks (II.) and subsequently looking at how they are implemented into the practice of business enterprises (III.). Lastly, it will be examined how a changing practice of corporate human rights protection is able to influence the corresponding law and administration of justice, and how the legislator can shape due diligence standards on its own.

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[1] Kirchhof, "GG Art. 3 Abs. 1", in Maunz, Dürig and Kirchhoff, *Grundgesetz Kommentar* (2016), mn. 291.

[2] Osieka, *Zivilrechtliche Haftung deutscher Unternehmen für menschenrechtsbeeinträchtigende Handlungen ihrer Zulieferer* (2013), p. 61.

[3] Paschke, "Extraterritoriale Sorgfaltspflichten von Außenwirtschaftsunternehmen zur Achtung von Menschenrechten ante portas?", *Recht der Transportwirtschaft* 6 (2016), p. 121.

[4] There is debate about what this term includes; whereas sometimes only intergovernmental treaties are meant, other authors also include non-governmental organisational standards, see Buntenbroich, *Menschenrechte und Unternehmen. Transnationale Rechtswirkungen "freiwilliger" Verhaltenskodizes* (2007), p. 23.

[5] See II.

II LEGAL FRAMEWORKS PERTAINING TO HUMAN RIGHTS

2.1 *"Soft Law"*

2.1.1 *Preliminary Considerations: Are Private Corporations Bound by Human Rights?*

Since transnational business enterprises tend to have tremendous power[6] and therefore de facto act as a subject of international law,[7] there is debate about whether such corporations are directly bound by international treaties on human rights or whether it is solely the states' obligation to prevent human rights violations by private actors. The acceptance of a direct horizontal effect of human rights provisions is often referred to as a "privatisation of human rights".[8]

Pursuant to the prevailing view, the inherent character of human rights as rights of defence against the state indicates that they are generally binding for the contracting states, but not for private actors.[9] It has been tried, however, to derive a direct horizontal effect of certain human rights provisions by interpreting the respective international treaty. It is argued that the wording of some human rights provisions (for example, Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR): "every human has the inherent right to life") shows that the main focus is on the concerned individuals, not the perpetrators.[10] Moreover, it is pointed out that

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[6] The economic power of transnational companies exceeds that of some countries, cf Weilert, "Transnationale Unternehmen im rechtsfreien Raum? Geltung und Reichweite völkerrechtlicher Standards", *Zeitschrift für ausl. öffentl. Recht und Völkerrecht (ZaöRV)* 69 (2009), 883 n. 1; Emmerich-Fritsche, "Zur Verbindlichkeit der Menschenrechte für transnationale Unternehmen", *Archiv des Völkerrechts* 45 (2007), 541.

[7] Osieka, *supra* note 2, p. 71.

[8] Spießhofer, "Wirtschaft und Menschenrechte – rechtliche Aspekte der Corporate Social Responsibility", *Neue Juristische Wochenschrift (NJW)* 61 (2014), 2473, 2475; Emmerich-Fritsche, *supra* note 6, 544.

[9] This is, for instance, the position of the German *Bundesregierung*, see BT-Drs. 16/2896, 8; see also Krajewski, "Die Menschenrechtsbindung transnationaler Unternehmen", *MenschenRechtsMagazin (MRM)* 17 (2012), 66, 70; Weiß, "Transnationale Unternehmen – weltweite Standards?", *MRM* 7 (2002), 82, 85.

[10] Paust, "Human Rights Responsibilities of Private Corporations", *Vanderbilt Journal of Transnational Law* 35 (2002), 801, 810; cf Hillemanns, *Transnationale Unternehmen und Menschenrechte. Eine Studie zu den ersten beiden Prinzipien des Global Compact* (Doctoral dissertation, University of Zürich 2004), p. 36; cf Osieka, *supra* note 2.

the preamble of the Universal Declaration of Human Rights states that the human rights proclaimed therein are "a common standard of achievement for all peoples … [including] every individual and every organ of society".[11] Others say that, even though the main addressees of human rights conventions are states, this does not preclude corporations from having a duty to secure human rights.[12]

However, according to the German Constitutional Court a direct horizontal effect of human rights provisions can only be assumed if the text expresses this unequivocally.[13] It is also required that the provision is not subject to any restrictions.[14] This is discussed, for instance, for Article 5 of the Charter of Fundamental Rights of the European Union prohibiting slavery and forced labour.[15] By contrast, most international treaties explicitly address only the contracting states.[16] This is due to the history of human rights treaties that were originally adopted having in mind states as the primary violators of human rights.[17]

It can therefore be noted that a direct horizontal effect of human rights provisions is the exception rather than the rule. Given the changing role of private corporations and their deep impact on living conditions in a globalised world, this may seem to be a conflict of values.[18] Nonetheless, this does not mean that human rights conventions are useless for preventing business-related violations. The core internationally recognised human rights as contained in the International Bill of Human Rights and the principles concerning fundamental rights in the eight ILO core conventions are "the benchmarks against which other social actors assess the human rights impacts of business enterprises".[19] Although non-binding in nature, they form the public perception of corporate behaviour. In addition, they are supposed to be transferred into hard law, which is in fact what happens as shown in 2.2.

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[11] Paust, *supra* note 10, 811; Emmerich-Fritsche, *supra* note 6, 558–559.

[12] Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility", *The Yale Law Journal* 111 (2001), 443, 493.

[13] BVerfGE 43, 203, 209.

[14] Jarass, "EU-GRCharta Art. 51 Anwendungsbereich", in *Charta der Grundrechte der Europäischen Union* (1st edn, 2010), mn. 25; Spießhofer, *supra* note 8.

[15] Jarass, *supra* note 14, n. 88; Spießhofer, *supra* note 8.

[16] Weilert, *supra* note 6, 907.

[17] Emmerich-Fritsche, *supra* note 6, 560. More comprehensively: Kai Ambos's contribution in this issue.

[18] Osieka, *supra* note 2, p. 75.

[19] UNGP Principle 12, Commentary.

2.1.2 *UN Guiding Principles on Business and Human Rights*

In its Resolution 17/4, the UN Human Rights Council endorsed the UNGP, making them an "authorative point of reference" for states, enterprises and civil society regarding the prevention of business-related human rights violations.[20] The tripartite framework "Protect, Respect, Remedy" was developed by the former UN Secretary-General's Special Representative for Business and Human Rights, Professor John Ruggie. The first pillar of the UNGP, "Protect", specifies that states are obliged to protect human rights by taking appropriate measures. The second, "Respect", states that business enterprises have a responsibility to respect human rights while conducting their business. Lastly, "Remedy" stipulates that states must have appropriate procedures in place to give access to effective remedy to those who have had their human rights harmed.

According to Principle 12 of the UNGP, the corporate responsibility to "respect" human rights refers to all internationally recognised human rights. This includes regional provisions like the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union.[21] The responsibility to respect internationally recognised human rights can be understood as the introduction of a direct horizontal effect of human rights in a "soft version";[22] the responsibility to respect human rights is not one in the legal sense which is clarified in the general principles of the UNGP, stating that "[n]othing in these Guiding Principles should be read as creating new international law obligations".[23] John Ruggie states that the failure to meet their responsibility to respect human rights can, however, subject companies to the "courts of public opinion".[24]

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[20] Davis, "The UN Guiding Principles on Business and Human Rights and conflict-affected areas: state obligations and business responsibilities", *International Review of the Red Cross* 94 (2012), 961, 962.

[21] Spießhofer, "§ 11. Compliance und Corporate Social Responsibility", in Hauschka, Moosmayer and Lösler (eds), *Corporate Compliance* (2016), mn. 16.

[22] Spießhofer, "Compliance und Corporate Social Responsibility", *Neue Zeitschrift für Gesellschaftsrecht* 24 (2018), 441, 444.

[23] United Nations, "United Nations Guiding Principles on Business and Human Rights" (2011), p. 1, available at: <www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>, last visited 05 September 2018.

[24] Ruggie, "Protect, Respect and Remedy: a Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie" (2008), A/HRC/8/5, available at: <www2.ohchr.org/english/bodies/hrcouncil/docs/8session/A-HRC-8-5.doc>, last visited 05 September 2018.

Adhering to the UNGP may also have legal consequences: companies meeting the expectation to draft a publicly available statement of policy as provided for in Principle 16 of the UNGP may be liable under competition law if such statement turns out to be incorrect.[25]

Moreover, the standard described in the UNGP and especially the requirements of human rights due diligence provided for in Principles 17–21 are supposed to be taken into account for criminal and civil liability for negligence. While John Ruggie's mandate was "not to create or set new norms or standards", the UNGP can be seen as a clarification of widely accepted existing standards determined by "consultations, surveys and submissions with and from states, corporations, business associations, and civil society organizations".[26] Public expressions of commitment to meet the responsibility to respect human rights may also have direct consequences for a company's liability for negligence, as is shown in the Canadian case *Choc v. Hudbay Minerals*. The Ontario Superior Court of Justice found that a Canadian parent company, Hudbay Minerals, may have owed a duty of care to villagers in Guatemala that were affected by the actions of the security personnel of its subsidiary companies.[27] The Court referred to Hudbay's public statements of having adopted the Voluntary Principles on Security and Human Rights, "a detailed set of standards applicable to the use of private security forces at resource extractive projects".[28] It recognised these statements to be one factor establishing the "proximity" between the defendants and the plaintiffs as part of the *Anns Test*[29] used for determining the existence of a duty of care in the tort of negligence.

Although only "soft law", a commitment to the UNGP may therefore have concrete legal consequences.

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[25] Spießhofer, *supra* note 8, 2476.

[26] Submissions of Amnesty International Canada to the Ontario Superior Court of Justice in the case *Angelica Choc v. Hudbay Minerals*, p. 8, available at: <www.amnesty.ca/sites/amnesty/files/imce/images/HudBay%20factum.20feb2013.pdf>, last visited 05 September 2018.

[27] CSR in Canada in general: Roach, Archibald and Jull, *Regulatory and Corporate Liability: From Due Diligence to Risk Management* (2005); Roach, Todd and Jull "Corporate Criminal Liability: Myriad Complexity in the Scope of Senior Officer", *Criminal Law Quarterly* 60 (2013), 386; Roach, Archibald and Jull, "Critical Developments in Corporate Criminal Liability: Senior Officers, Wilful Blindness, and Agents in Foreign Jurisdictions", *Criminal Law Quarterly* 60 (2013), 92.

[28] *Choc v. Hudbay Minerals Inc. et al.*, 2013 ONSC 998 (CanLII), <www.canlii.ca/t/fw5bt>, last visited 05 September 2018.

[29] *Anns v. Merton London Borough Council* [1977] UKHL 4.

Lastly, the UN working group on the issue of human rights and transnational corporations and other business enterprises has encouraged all states to develop "national action plans" to implement the UNGP into national law. Today, 21 states have produced national action plans, among them Germany, the UK and the US.[30]

2.1.3 *OECD Guidelines for Multinational Enterprises*

The OECD Guidelines for Multinational Enterprises, first adopted in 1976, were revised in 2011 and now contain a chapter on human rights (chapter IV.) based on the UNGP. They form a specification of the "Respect" pillar of the UNGP and detail a specific procedure in the case of violations. It is demanded of every adhering country to set up a "National Contact Point" (NCP) to further the effectiveness of the Guidelines.[31] One responsibility of the NCPs is to contribute to the resolution of issues in connection with the implementation of the Guidelines "in specific instances". A complaint against a business enterprise can be filed by natural persons, unions and NGOs, but also by other enterprises.[32] The NCP makes an initial assessment as to whether the issues raised merit further examination. If the complaint is accepted, the NCP offers intermediary services to help the parties resolve the issue. The NCP publishes a report at the end of the procedure if the parties reached an agreement. If an agreement was not reached or if a party was unwilling to participate, then the NCP publishes a unilateral statement.

Therefore, although the Guidelines are "soft law", and as such not legally binding for business enterprises, the NCP mechanism for "specific instances" is able to subject companies effectively to the "court of public opinion".

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[30] Office of the High Commissioner for Human Rights, "State national action plans on Business and Human Rights", available at: <www.ohchr.org/en/issues/business/pages/nationalactionplans.aspx>, last visited 05 September 2018.

[31] OECD, "OECD Guidelines for Multinational Enterprises" (2011), p. 68, available at: <www.oecd.org/daf/inv/mne/48004323.pdf>, last visited 05 September 2018.

[32] Krajewski, Bozorgzad and Heß, "Menschenrechtliche Pflichten von multinationalen Unternehmen in den OECD-Leitsätzen: Taking Human Rights More Seriously?", *ZaöRV* 87 (2016), 244, 319.

2.2 *Hard Law*

A hardening of CSR law has been observed over the past few years.[33] There have been several legislative initiatives at EU and national level. These are presented in the following subsections.

2.2.1 *Directive 2014/95/EU on Non-financial Reporting; German CSR Directive Implementation Act*

As part of the "CSR strategy" of the European Union, the Directive 2014/95/EU of the European Parliament and of the Council was adopted in 2014. The Directive stipulates the obligation of certain enterprises to publish reports on issues typically referred to as "CSR" (Corporate Social Responsibility). According to Recital 1 of the Directive, its aim is "to raise to a similarly high level across all Member States the transparency of the social and environmental information provided by undertakings in all sectors".

According to Article 6, the Directive had to be transposed into national law by 6 December 2016. Within its CSR Directive Implementation Act, the German *Bundestag* adopted new provisions in the German Code of Commerce (Handelsgesetzbuch – HGB) in April 2017. According to § 289b(1) HGB, the new regulations apply to business enterprises that a) have a balance sum of more than 20 Mio Euros or revenues of more than 40 Mio Euros in the 12 months preceding the reporting date, b) are capital markets orientated and c) have more than 500 employees. These enterprises are obligated to draft non-financial statements containing information about the business model (§ 289c(1) HGB), as well as on a) environmental issues, b) employee matters, c) social concerns, d) respect for human rights and e) prevention and combating of corruption (§ 289c(2) HGB). Missing or incomplete statements can lead to heavy fines. According to § 334(3a) of the HGB, violations against the provisions on CSR reporting can result in fines of up to 10 Mio Euros, 5 percent of the total turnover in the year preceding the administrative decision, or at least twice the economic benefit derived from the offence. Although this law primarily serves the purpose of providing information on corporate CSR activity, it can indirectly contribute to human rights protection by forcing companies to be transparent. For the first time, there is an explicit criminal liability for representatives of companies in connection with human rights protection. However,

[33] Kroker, "Menschenrechte in der Compliance", *Corporate Compliance Zeitschrift (CCZ)* 8 (2015), 120, 126.

this is merely mediated by the principle of balance sheet truth. Furthermore, there are significant exceptions to the reporting obligation, the impact on the protection of human rights therefore remains questionable.

2.2.2 *Modern Slavery Act, United Kingdom*

In 2015, the UK introduced the Modern Slavery Act. This obligates companies with global revenues of more than 36 Million GBP carrying on a business or part of a business in the UK to annually publish a "slavery and human trafficking statement" (s. 54 of the Act). The statement has to be approved by the board of directors, signed by the directors and published on the website of the enterprise.[34] The government deliberately did not make binding specifications on the content of the statement. However, s. 54(5) of the Act lists aspects a slavery and human trafficking statement may include, such as the "due diligence processes in relation to slavery and human trafficking in its business and supply chains".[35] Therefore, although publishing a statement in itself is enforceable by the Secretary of State bringing civil proceedings in the High Court for an injunction (s. 54(11) of the Act), companies are allowed to publish a report stating only that they do not take any measure to prevent slavery and human trafficking.[36]

The Modern Slavery Act can thus be qualified as "hard law" only in terms of the duty to draft and publish a statement. Apart from that, the purpose and effect of the Act can be understood as a way of raising public awareness as to whether or not a company does take measures against slavery and human trafficking. While the mere duty to report will exert some pressure on enterprises to take due diligence measures, the law only has little influence on their effectiveness. The primary goal in publishing the report may be to appear socially responsible to customers, which could be achieved by slick-sounding marketing text rather than by actually implementing effective mechanisms.

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[34] Weaver Gernand, "Fragen und Antworten zum UK Modern Slavery Act 2015 – Mit welchen Maßnahmen können Unternehmen Menschenhandel und Zwangsarbeit in ihren Lieferketten effektiv verhindern?", *CCZ* 9 (2016), 102, 106.

[35] Modern Slavery Act 2015, s. 54(5)(c).

[36] Weaver Gernand, *supra* note 34.

2.2.3 *Duty of Vigilance Law, France*

The French Duty of Vigilance Law,[37] adopted in March 2017, stands out from the aforementioned initiatives. It imposes an obligation of vigilance on the biggest[38] business enterprises established and carrying on business in France. The Law is perceived as a "historic step"[39] towards holding businesses accountable for human rights violations as it moves "beyond merely reporting to actually requiring a proactive due diligence obligation".[40] The affected companies have to establish, disclose and implement an effective vigilance plan.[41] According to the Law, the plan shall contain a mapping that identifies, analyses and ranks risks, procedures to regularly assess the situation of subsidiaries, subcontractors or suppliers, appropriate action to mitigate risks or prevent serious violations, an alert mechanism, and a monitoring scheme to follow up on the measures implemented and assess their efficiency.[42] It thus stipulates concrete due diligence measures. However, there is still considerable discretion on how to fulfil the requirements. Companies that do not establish vigilance plans or do not implement them accordingly can be liable for negligence according to Articles 1240 and 1241 of the French Civil Code (Code Civil – CC) if it can be proven by the plaintiff that the harm suffered is linked to the failure to comply with the Duty of Vigilance Law.[43]

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[37] LOI no. 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (1).

[38] Companies that either employ at least 5,000 people themselves and through their French subsidiaries, or employ at least 10,000 people themselves and through their subsidiaries located in France and abroad, see Cossart, Chaplier and Beau de Lomenie, "Developments in the Field. The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All", *Business and Human Rights Journal* 2 (2017), 317, 320.

[39] ibid.

[40] Martin, "Hiding in the Light: The Misuse of Disclosure to Advance the Business and Human Rights Agenda", 24, available at: <ssrn.com/abstract=3028826>, last visited 05 September 2018.

[41] Article 1 of the Law, English translation available at: <www.corporatejustice.org/documents/publications/ngo-translation-french-corporate-duty-of-vigilance-law.pdf>, last visited 05 September 2018.

[42] ibid.

[43] Cossart, Chaplier and Beau de Lomenie, *supra* note 38, 321.

2.2.4 *Child Labour Due Diligence Law, The Netherlands*

In January 2017, the Child Labour Due Diligence Law (''Wet Zorgplicht Kinderarbeid'') was adopted by the Dutch Parliament. It is yet to be approved by the Senate. The law stipulates that certain Dutch companies or companies carrying on business in the Netherlands must make a declaration to the Dutch Consumer and Market Authority (DCMA) stating that they have exercised due diligence to prevent child labour across the whole supply chain. The law stipulates fines in case of non-compliance with the duty to file due diligence reports or to actually conduct due diligence.[44] Complaints can be made by natural and legal persons to the DCMA about the production of a company's products or services with child labour.

2.2.5 *EU Regulation on Supply Chain Due Diligence Regarding ''Conflict Minerals''*

From 2021, there will also be an obligation to perform supply chain due diligence for EU business enterprises importing ''conflict minerals'', ie gold, tin, tungsten and tantalum. This is set out by Regulation (EU) 2017/821 that was adopted in 2017. EU importers will have to follow a 5-step framework laid out in the OECD ''Due Diligence Guidance for Responsible Supply Chains from Conflict-Affected and High-Risk Areas'', including the assessment of risks in the supply chain, implementation of a strategy to respond to identified risks and annual reporting on supply chain due diligence.[45] Pursuant to Article 16 of the Regulation, each Member State is obligated to lay down rules applicable to infringements of the Regulation.

2.2.6 *USSG and DOJ Principles of Federal Prosecution of Business Organizations*

Another way to stipulate the importance of organisational due diligence is shown by the US Sentencing Guidelines (USSG) and the Department of Justice (DOJ) Principles of Federal Prosecution of Business Organizations.

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[44] v. Dam, ''Statutory human rights due diligence duties in the Netherlands'' (2016), p. 5, available at: <www.rsm.nl/fileadmin/Images_NEW/Sites/Chair_IBHR/Publications/Van_Dam_-_Statutory_HRDD_duties_in_NL.pdf>, last visited 05 September 2018.

[45] OECD, ''OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Third Edition'' (2016), available at: <www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf>, last visited 05 September 2018.

The USSG are published by the independent US Sentencing Commission and were originally intended to be mandatory in federal sentencing. In the decision *US v Booker*,[46] the Supreme Court ruled that the USSG were too inflexible and would therefore now be just advisory. This has led to an increased influence of procedural decisions of the public prosecution.[47] USSG chapter 8 contains instructions on the sentencing of an organisation; in its part C it offers factors for calculating the "culpability score" of an organisation. One factor that may allow the subtraction of points from this score is having an effective compliance and ethics programme in place. According to USSG § 8B2.1, this requires exercising "due diligence to prevent and detect criminal conduct", and otherwise promoting "an organizational culture that encourages ethical conduct and a commitment to compliance with the law". This is further specified in USSG § 8B2.1.(b).

However, "good corporate citizenship" of business enterprises goes beyond preventing criminal conduct and encouraging compliance with the law. This applies especially to activities in less regulated countries in the global south.[48] Thus, the USSG are not fully aligned to CSR and need to be updated in that regard.

The DOJ, on the other hand, issues the "United States Attorneys' Manual" (USAM). In its title 9, chapter 9-28.300, it instructs US Attorneys on which factors to consider when investigating, when determining whether to bring charges, and when negotiating pleas or other agreements. One factor is the existence and effectiveness of a corporation's pre-existing compliance programme. The requirements on effectiveness are further detailed in chapter 9-28.800. In contrast to the USSG, the USAM states that "the Department has no formulaic requirements regarding corporate compliance programs" and instead formulates "fundamental questions any prosecutor should ask".

Both instruments demonstrate alternative ways of stipulating CSR requirements outside of formal federal law.

2.3 *Conclusion and Outlook*

The previous subsections show that there are various approaches to implement CSR into law. These initiatives differ in terms of the scope

[46] 125 S.Ct. 738 (2005).

[47] Momsen and Tween, "Criminal Compliance in den USA", in Rotsch (ed), *Criminal Compliance* (2015), p. 1034.

[48] cf Spießhofer, *supra* note 22.

of the affected CSR sectors; for example, the Dutch Law focuses on child labour prevention whereas the EU Regulation targets the prevention of importing conflict materials. They differ in their legal nature – the above contain an EU Directive and a Regulation, several national Acts and with the USSG and USAM procedural instruments not directly issued by the legislator. In addition, the Acts requiring the implementation of due diligence measures differ in their level of detail. Lastly, there are differences regarding the depth to which supply chain due diligence is necessary. The French Vigilance Law explicitly states that the due diligence measures must cover the whole supply chain.

As it is desirable to have standardised CSR legislation considering that big corporations are not bound to single countries, the outlook for the future is the implementation of additional EU Regulations stipulating due diligence obligations for other industry sectors.

In the following, we try to clarify how human rights violations by companies can be prevented most effectively. The question is also whether this should be done through ''soft'' or ''hard law'', through national legislation or through international criminal law. We must also bear in mind that criminal law, which can effectively combat human rights violations by companies, can potentially have fatal consequences for accused persons in completely different proceedings. Effective law enforcement instruments can often be used in completely different contexts. Laws that allow access to a company may equally allow access to a political party or union. Under certain circumstances, the accused may be cut off from a multitude of defensive options. If, for example, the elements of conspiracy were applied to human rights violations by companies, this would presumably be effective, but almost every employee would be exposed to the risk of criminal liability.[49] Effective protection through criminal law always also means an extension of criminal law. If this effect is to be achieved, it must be considered whether an informal regulation (''soft law'' or CMS based voluntary commitments) or formal (''hard'') law is preferrable. In case of doubt, the latter ensures better protection for the accused and equality of justice.

[49] Momsen and Grützner, ''Gesetzliche Regelung unternehmensinterner Untersuchungen – Gewinn an Rechtsstaatlichkeit oder unnötige Komplikation?'', *CCZ* 10 (2017), 242; Grützner, Boerger and Momsen, ''Die „Dieselaffäre'' und ihre Folgen für Compliance-Management-Systeme – Evolution durch Einbeziehung des Bereichs Produkt-Compliance in ein CMS'', *CCZ* 11 (2018), 50; Momsen and Washington, ''Unternehmensstrafrecht vs. Conspiracy? Alternative Strafverfolgungsmodelle im Wirtschaftsstrafrecht'' in Böse et al. (eds), *Festschrift für Urs Kindhäuser* (2019).

III IMPLEMENTATION INTO THE PRACTICE OF BUSINESS ENTERPRISES

As "hard" CSR law in Germany, among other countries, is still limited to the CSR Directive Implementation Act that stipulates merely an obligation of non-financial reporting, the only applicable legal frameworks providing guidance on how to conduct business in a socially responsible manner are non-binding "soft law", in particular the above described UNGP and the OECD Guidelines. Both frameworks need to undergo a "translation process" from their abstract principles into the organisational practice of business corporations. This also becomes apparent in Principle 14 of the UNGP that lists the factors of size, sector, operational context, ownership and structure of enterprises, subsequently stating that "the scale and complexity of the means through which enterprises meet [the] responsibility [to respect human rights] may vary according to these factors and with the severity of the enterprise's adverse human rights impacts". Principle 15 additionally specifies that business enterprises should have "policies and processes appropriate to their size and circumstances" in place.

Over the past few years, both a consulting industry and a branch of the legal and related sciences has evolved under the heading of "corporate compliance" to provide solutions for companies as to which measures are appropriate. While the focus of compliance has been mainly on the prevention of corruption, on antitrust law, data protection and the protection of company assets,[50] the issue of corporate social responsibility has taken on increasing importance in recent times. This can be attributed to a series of media-effective incidents in supplier companies in the global south caused by infractions of international labour standards.[51] Additionally, the spread of communication technology has contributed to the "rapid distribution of brand image-damaging information".[52]

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[50] Kroker, *supra* note 33; Moosmayer, "Modethema oder Pflichtprogramm guter Unternehmensführung? – Zehn Thesen zu Compliance", *NJW* 59 (2012), 3013.

[51] A recent example being the fire in the Pakistani factory of Ali Enterprises, a supplier of the German textile discount chain KiK, killing hundreds of workers due to lacking fire safety measures, see ur-Rehman, Walsh and Masood, "More Than 300 Killed in Pakistani Factory Fires", *The New York Times* (New York, 12 September 2012), available at: <www.nytimes.com/2012/09/13/world/asia/hundreds-die-in-factory-fires-in-pakistan.html>, last visited 05 September 2018; cf Mamic, *Implementing Codes of Conduct: How Businesses Manage Social Performance in Global Supply Chains* (2004) p. 25.

[52] Mamic, *supra* note 51.

Regarding the possible translation instruments, a distinction must be drawn between unilateral corporate codes of conduct (3.1), business association standards (3.2) and multi-stakeholder standards (3.3).[53]

3.1 *Corporate Compliance*

The central and most widespread instrument that performs the translation from abstract principles of social responsibility into the practice of corporations is the unilateral introduction of a ''business code'', ''code of conduct'', or ''code of ethics''.[54] A business code can be defined as ''a distinct and formal document containing a set of prescriptions developed by and for a company to guide present and future behaviour on multiple issues of at least managers and employees toward one another, the company, external stakeholders, and/or society in general''.[55] Research into the Fortune 200 companies showed that in 2014, 76% had adopted a business code (86% in 2008[56]); more specifically, all North American Fortune 200 companies had a code, 88% of the European companies, and 42% of the Asian companies.[57]

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[53] OECD, ''Les codes de conduite des enterprises- Etude approfondie de leur contenu'', OECD Working Party of the Trade Committee, TD/TC/WP(99)56/FINAL (2000), p. 8; Jenkins, ''The political economy ofcodes of conduct'' in Jenkins, Pearson and Seyfang (eds), *Corporate responsibility and labour rights codes of conduct in the global economy* (2002), p. 7; Mamic, *supra* note 51, pp. 43 ff.

[54] These different descriptions all refer to the same document, cf Rottluff, ''Code of Conduct'', in Kleinfeld and Martens (eds), *CSR und Compliance* (2018), p. 181; Delbufalo*, Agency Theory and Sustainability in the Global Supply Chain* (2018) p. 20; KPMG, ''The Business Codes of the Fortune Global 200: What the largest companies in the world say and do'' (2014), p. 8; but see Collins, *Essentials of Business Ethics* (2012), pp. 60 ff., defining a code of ethics as a description of ''broad ethical aspirations'' and a code of conduct as a description of ''acceptable behaviours for specific situations''.

[55] This definition was developed based on an analysis of existing definitions by Kaptein and Schwartz, ''The Effectiveness of Business Codes: A Critical Examination of Existing Studies and the Development of an Integrated Research Model'', *Journal of Business Ethics (JBE)* 77 (2008), 111, 113.

[56] KPMG, *Business Codes of the Global 200: Their Prevalence, Content and Embedding* (2008), p. 7; the decreased prevalence in 2014 is due to the larger number of Asian companies in the Fortune 200, see KPMG, *supra* note 54, p. 6.

[57] KMPG, *supra* note 54, p. 9; for further figures on the prevalence of business codes see Kaptein, ''Business Codes of Multinational Firms: What Do They Say?'', *JBE* 50 (2004), 13.

A business code normally contains a definition of the corporation's mission and core values, on the one hand, and concrete conduct guidelines for managers and employees, on the other.[58]

A business code allows the human rights a company commits itself to protect to be defined, stressing ones that are particularly relevant for the respective sector – these are often taken from different human rights conventions[59] and put together as a product tailored to the company's specifications. The key to a meaningful translation of abstract human rights principles into corporate practice is to comprehensively address matters with which the company is expected to deal with in the business code. Due to specific risks, a chemical company, for example, must address environmental problems while a textile company has to deal with labour rights.[60] A good business code is not one that includes every possible ethical aspect, but one that tackles matters that are actually relevant to the business.[61]

Effective codes of conduct must contain procedures for cases of violations: "[w]ords are meaningless unless they correspond with actions".[62] Companies should carry out human rights due diligence. Measures to prevent human rights violations – especially regarding subsidiaries or suppliers in the global south – can include careful selection of business associates in the first place, imposing its own code of conduct on business partners, and regularly performing CSR audits to make sure that the company itself and all business partners (still) comply with the set standards. The respective company can conduct these audits either personally by sending employees or they can be conducted by corporations that specialise in such auditing (see 3.4).

Unfortunately, business codes are not always constructed and implemented in an equally diligent and effective manner. This is due to the strategic objective of self-imposed codes of conduct. The fundamental reasons for setting up codes of conduct are that companies want to decrease their liability for human rights violations and appear socially responsible to the public. As the effective implemen-

[58] Rottluff, *supra* note 54, p. 181.

[59] The Universal Declaration of Human Rights and the ILO Declaration of Fundamental Principles and Rights at Work in particular, see Spießhofer, *supra* note 8, 2476.

[60] Kaptein, "Effektive Business Codes: Inhalt und Bedingungen", in Wieland, Steinmeyer and Grüninger (eds), *Handbuch Compliance-Management* (2014), p. 601.

[61] ibid.

[62] Collins, *supra* note 54, p. 67.

tation of business codes can be costly and time-consuming, there is a danger of "decoupling between policy and practice" especially further down the supply chain.[63] Suppliers may be more interested in obtaining legitimacy by committing themselves to the buyer's business code, than to actually implement the required standards which may increase production costs and lower their competitiveness.[64] It is the task of companies from the global north to ensure that business codes imposed on suppliers are actually complied with. The problems of doing this by means of external certification companies are discussed in 3.4.

3.2 *Standards of Business Association Standards*

Standards endorsed by business associations without participation of multiple stakeholders, like the Worldwide Responsible Accredited Production (WRAP) that was created by a working group of the American Apparel & Footwear Association in 1997,[65] tend to be the weakest. This is due to the fact that they need to be acceptable to all companies in the concerned association and that the stakeholders' concerns are not heard during the creation of the code.[66] Research shows that business association codes contain the least provisions on core labour standards, for example.[67]

3.3 *Multi-stakeholder and NGO Standards; Global Framework Agreements*

The weakness of business association standards has increased the importance of multi-stakeholder and NGO standards. Adopting a multi-stakeholder approach allows standards to be drafted in a way that covers the interests of all concerned parties. Furthermore, widespread standards are desirable because they can guarantee a similarly high level of protection for the businesses of all joining

[63] Egels-Zandén, "Revisiting Supplier Compliance with MNC Codes of Conduct: Recoupling Policy and Practice at Chinese Toy Suppliers", *JBE* 119 (2014), 59, 60; Delbufalo, *supra* note 54, p. 22.

[64] Delbufalo, *supra* note 54, p. 22.

[65] Today, WRAP's charter requires that the majority of the Board is comprised of individuals not affiliated with the apparel industry, see Worldwide Responsible Accredited Production, "History", available at: <www.wrapcompliance.org/history>, last visited 05 September 2018.

[66] cf Jenkins, *supra* note 53, p. 18.

[67] ibid, p. 19.

parties. The most important actors drafting standards concerning human rights in businesses are non-governmental international organisations, particularly Social Accountability International (SAI) and the International Organization for Standardization (ISO), and global union federations like IndustriALL and UNI Global Union. The following subsections briefly present standards SA8000 and ISO 26000.

3.3.1 *Social Accountability 8000 (SA8000) of Social Accountability International*

SA8000[68] of the NGO SAI is an auditable, voluntary standard concerning itself with worker rights and ethical workplace conditions. It was drafted in 1997 as a multi-stakeholder initiative.[69] The content of SA8000 is oriented to the ILO core conventions, the Universal Declaration of Human Rights and the UN Convention on the Rights of the Child.[70] The standard is intended for the certification of production sites. Auditing is performed by organisations that were awarded accreditation for performing audits consistent with the SA8000 audit requirements by the Social Accountability Accreditation Service (SAAS).[71] The textile supplier "Ali Enterprises" in Pakistan was awarded the SA8000 certification only a few weeks before a fire killed 260 of its workers due to non-compliance with fundamental workplace safety regulations.[72] Although SAI conducted investigations into the performance of the auditors subcontracted by the Italian auditing company RINA and criminal investigations were opened in Italy, this incident gives pause for thought on how to make sure that CSR auditing is actually effective and not merely cosmetic. The corresponding problems will be further examined under 3.4.

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[68] The 4th issue 2014 can be retrieved from <sa-intl.org/_data/n_0001/resources/live/SA8000%20Standard%202014.pdf>, last visited 05 September 2018.

[69] SAI, "SA8000 Standard", available at: <www.sa-intl.org/index.cfm?fuseaction=Page.ViewPage&PageID=1689>, last visited 05 September 2018.

[70] Hahn, "Zur Normierung gesellschaftlicher Verantwortung. ISO 26000 im analytischen Vergleich mit ISO 14000 und SA8000", *Zeitschrift für Unternehmensethik* 14 (2013), 378, 386.

[71] Social Accountability Accreditation Services, "SA8000 Certification", available at: <www.saasaccreditation.org/certification>, last visited 05 September 2018.

[72] European Center for Constitutional and Human Rights, "Case Report", available at: <www.ecchr.eu/fileadmin/Fallbeschreibungen/CaseReport_Rina_Pakistan.pdf>, last visited 05 September 2018.

3.3.2 *ISO 26000 of the International Organization for Standardization*
With the ISO 26000, the ISO adopted a global standard for the social responsibility of organisations. It was also drafted by a multi-stakeholder initiative.[73] As the ISO consists of 148 national standardisation organisations[74] that are partly governmental, partly non-governmental, and have been founded by industry associations, it is in a perfect position to carry out a ''mediating role'' between the needs of businesses and society.[75]

The innovative approach of ISO 26000 is that it is not limited to single aspects of social responsibility like the SA8000 (workplace ethics) or the earlier ISO 14000 standards regarding environmental management. At the same time, it does not take the approach of stipulating a management system (in contrast to, for instance, the ISO 14001 standard on environmental management systems), as explicitly stated in ISO 26000, chapter 1: ''It is not intended or appropriate for certification purposes or regulatory or contractual use.''[76] In fact, the goal is to ''provide guidance'' to companies on social responsibility. During the initial discussions, there was a consensus that ''the current status of the verification industry is unsatisfactory'', although some stated that ''some form of verification will be necessary in the future''. [77] From our point of view, the question is not whether CSR standards should be implemented into management systems but how to do this effectively.

3.4 *The ''Certifying'' Industry*

As mentioned above, in some cases the performance of CSR audits shows serious shortcomings in their effectiveness.

There are three main problems identified in this context, which are detailed in the following subsections.

3.4.1 *Economic Areas of Tension*
The first problematic issue derives from possible tensions between economic dependencies and the accuracy of an audit. As a result of

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[73] Hahn, *supra* note 70, 380.

[74] Including the German ''Deutsches Institut für Normung e.V.'' (DIN).

[75] Buntenbroich, *supra* note 4, p. 64.

[76] ISO, ''ISO 26000:2010'' (2010), chapter one.

[77] Castka and Balzarova, ''A critical look on quality through CSR lenses. Key challenges stemming from the development of ISO 26000'', *International Journal of Quality & Reliability Management* 24 (2007), 738, 744.

the increase in competition between auditing firms and the low market price for audits in some industry areas,[78] auditing firms tend to rely on repetitive hirings. Follow-up audits, therefore, are common in CSR auditing and generally a useful measure for tracing positive changes. When considering the goal of social audits, the definition of a "good" audit can differ: If the goal is to effectively prevent human rights violations, a good audit is one that identifies risks in order to minimise them for the future. If the primary goal is positive publicity, a good audit is one that does not find any risks or violations of the company's code of conduct.[79] In the latter case, therefore, if an audit company wants to be considered for follow-up audits, it may be likely to provide favourable audit reports.

Another problematic aspect is the practice of supplier companies paying for the audits conducted in their own factories. However, the balance of interests is more neutral in cases when audits conducted at supplier companies in the global south are paid for by the business partner from the global north.

3.4.2 *Corruption and Falsification of Documents*

These circumstances also result in a higher risk of criminal activity in the context of auditing. In particular, this takes the form of bribery. Additionally, submitting forged documents to the auditors is a widespread practice. The Fair Labour Association (FLA) stated in their annual report of 2010 that fake records of wages were found at 40 percent of the audited companies.[80] Moreover, written documents to prove that trainings on, for instance, fire protection were conducted, have often been known to be falsified. The investigation of SAI in the case of "Ali Enterprises", for example, showed that the document provided to the auditing firm declared that a non-existent firm had conducted a fire safety training.[81]

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[78] 200 – 300 Euros for farm audits in agribusiness for example, see Albersmeier et al., "The reliability of third-party certification in the food chain: From checklists to risk-oriented auditing", *Food Control* 20 (2009), 927, 933.

[79] See the expert opinion of Burckhardt in the context of the action filed by surviving dependants of those killed in the fire at "Ali Enterprises" against the German corporation KiK Textitilien und NonFood GmbH before the *Landgericht Dortmund*, available at: <www.ecchr.eu/fileadmin/Gutachten/Gutachten_Dr._Gisela_Burckhardt_KiK_Pakistan_Audits_2015.pdf>, last visited 05 September 2018.

[80] FLA, "2010 Annual Report", p. 5, available at: <www.fairlabor.org/sites/default/files/documents/reports/2010_annual_public_report.pdf>, last visited 05 September 2018.

[81] Burckhardt, *supra* note 79, p. 6.

3.4.3 *Lack of Transparency of Auditing Reports*

Another aspect that negatively influences the effectiveness of audits is the fact that reports on identified risks and issues are not published. An empirical study has shown that the difference in compliance between a first and a second audit was not statistically significant, and an actual improvement of factory conditions could be detected only at factories that had undergone more than 10 audits.[82] This indicates that the results identified in an auditing report are insufficiently transmitted into practice. A duty to publish every auditing report would exert considerable pressure on the involved companies as this would have a significant effect on public perception. The stipulation of such a duty could fit in well in the general legislative strategy to control the social behaviour of corporations by making their efforts public, for example, with duties to report on non-financial aspects stipulated in the EU CSR Directive or to make a slavery and human trafficking statement according to the UK Modern Slavery Act.

3.4.4 *Conclusion*

The identified problems could be tackled by implementing a legal framework that standardises and specifies the requirements for orderly CSR audits by specifically stipulating requirements that result in a high accuracy of the audit. Companies must recognise that indifference to human rights violations is not just a reputational risk. It is not just about CSR compliance. In fact, the manufacturing of a product without human rights abuses is a value-creating factor of the product. Therefore, the strict parameters of product compliance must be applied in this area.[83]

IV FEEDBACK EFFECTS OF CSR PRACTICE INTO BINDING LAW

Not only is it possible to shape the behaviour of corporations using legislative instruments, the established practice of corporations, particularly in the field of CSR compliance, can also have the power

[82] Lindholm, Egels-Zandén and Rudén, "Do code of conduct audits improve chemical safety in garment factories? Lessons on corporate social responsibility in the supply chain from Fair Wear Foundation", *International Journal of Occupational and Environmental Health* 22 (2016), 283, 288.

[83] "VW-Dieselgate" was an instructive case to examine the consequences of underestimating seemingly little reputational risks: Grützner, Boerger and Momsen, *supra* note 49, 50 ff.; Momsen and Washington, *supra* note 49.

to influence legislation or the administration of justice. The relationship between the practice of CSR compliance and "hard" binding legal mechanisms can therefore be described as circular. The feedback effects from non-governmental CSR standards – as defined in codes of conduct of business enterprises or NGOs, in their non-binding nature as "soft law" – on binding law will be demonstrated using the examples of liability for negligence, and the USSG and DOJ Principles.

4.1 *Influence of the (Changing) CSR Practice on the Scope of Negligence*

As CSR is a relatively new field in business management, there are many different strategies and instruments that have not yet been standardised. It also means that it is possible for completely new compliance instruments to emerge and for ones recognised up to the present no longer to be considered adequate. It can be assumed that some certifying instruments fall into the latter.

A changing CSR practice can be especially important for civil and criminal liability for negligence. The determining factor of liability for negligence is non-compliance with due diligence whereby the necessary degree of diligence is oriented either to specific laws stipulating a certain standard or to the actual practices of the relevant public. Bearing this in mind, the introduction of a new compliance instrument that is broadly accepted in a particular industry sector, for example, could increase the scale of negligence in the sense that non-implementation of this particular instrument could result in liability for negligence (if a harm is done that could have been demonstrably prevented by this measure). It would then be the task of the administration of justice to form settled case law that made this changed scale of negligence binding for the future.

4.2 *Influence of a Changing CSR Practice on the Prosecution of Companies in the US*

In the US, the abovementioned (2.3) provisions in the USAM on prosecuting and in the USSG on sentencing of organisations contain abstract requirements for an effective compliance and ethics programme. Concrete measures, however, are specified in the administration of justice, particularly in the context of deferred prosecution agreements (DPAs) that the DOJ and the Securities and Exchange Commission (SEC) concludes with corporations. DPAs, similar to

non-prosecution agreements (NPAs), are a voluntary alternative to adjudication whereby the prosecutor grants an amnesty in exchange for the full cooperation of the defendant and the fulfilment of certain requirements. These requirements can include the implementation of very concrete compliance instruments. The agreement between Johnson&Johnson and the DOJ[84] is an instructive example. It includes specific instructions such as: "J&J will appoint heads of compliance within each business sector and corporate function. These compliance heads will have reporting obligations to the Chief Compliance Officer and the Audit Committee."[85]

Due to the disclosure of DPAs, it is possible for comparable corporations to orient themselves to these "catalogues" to make sure that their compliance and ethics system is considered "effective", and therefore able to lower the culpability score in case of criminal activity. This system enables the DOJ to determine specific compliance instruments that it deems effective. It can also respond to new developments in compliance by making new instruments part of the requirements imposed in DPAs.

4.3 *Possible Instruments for Regulating Due Diligence Measures in the Future*

None of the approaches that take changing compliance practices into account in hard law and in the administration of justice are wholly satisfactory. The following subsections detail the shortcomings.

4.3.1 *Limitations of Influences on the Scale of Negligence*

Even though not all CSR compliance measures are equally widespread in the practice of business enterprises, and therefore not necessarily part of the required degree of diligence, this does not mean that it would not be desirable for certain effective measures to be implemented in practice. Thus, if the scale of negligence is not increased due to slow developments in compliance practice, the question has to be raised as to how the legislator can influence it on its own in order to shape business behaviour and accelerate the speed at which corporations improve their efforts to prevent human rights violations.

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[84] U.S. Department of Justice, Criminal Division, Case 1:11-cr-00099-JDB, available at: <www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/04/27/04-08-11depuy-dpa.pdf>, last visited 05 September 2018.

[85] ibid, p. 34.

Additionally, it would not be desirable for countless individual standards of negligence to emerge in this way. Because criminal law as hard law must satisfy the rule of law, mechanisms must be developed that formulate predictable and generally binding standards.

4.3.2 *Limitations to Taking Changing Compliance Practices into Account in DPAs*

Regarding the power of the DOJ to react to a changing compliance practice and to shape the practice of compliance, it should be kept in mind that DPAs are only concluded if a corporation may be criminally liable. It has, however, no or at most an indirect impact on the standard of liability itself. In other words, by using DPAs, the DOJ can shape the legal consequences but not the definitions of crimes.

4.3.3 *Alternative: A Two-Pillar System*

Generally, the stipulation of due diligence measures in hard law as shown by the French Duty of Vigilance Law is a desirable solution as it can be an effective instrument for holding corporations accountable for human rights and for standardising compliance systems. However, formal legislation is too inflexible to be able to react to developments in CSR practice. Furthermore, as suitable compliance measures greatly differ for corporations of different sizes and in different sectors, an extensive catalogue of compliance instruments and their applicability would be necessary. This might be an unmanageable factor for formal law.

Therefore, we propose a two-pillar system following the example of German law.

(1) General due diligence obligations comparable to the French Duty of Vigilance Law and an obligation to report on the due diligence efforts already made should be stipulated in hard law. In Germany, for example, a suitable position would be the Code of Commercial Law that already contains provisions on non-financial reporting. Non-compliance with the implementation of and reporting on due diligence should be punishable. The stipulated due diligence requirements in the French law, such as risk assessment, procedures to assess subsidiaries, subcontractors or suppliers, measures to mitigate risks, an alert mechanism, and a monitoring scheme, would be incorporated in the negligence scale of criminal and civil liability. If violations are found that

could have demonstrably been prevented by these measures, corporations that did not fulfil the requirements would be liable.

(2) Additionally, a catalogue of concrete due diligence measures should be gathered from case law. The catalogue should contain different measures applicable to corporations of all sizes and from every sector.

In Germany, there is as yet no possibility to grant an amnesty in exchange for the fulfilment of certain conditions comparable to the DPAs in the US, as set out under § 47(3) of the Administrative Offences Act (Ordnungswidrigkeitengesetz – OWiG) where the sanctioning of corporations is stipulated. The discontinuing of prosecution subject to conditions is forbidden as this case law could only be formed by the courts. However, the introduction of a tool for the prosecution to conclude agreements with corporations would contribute to the efficiency of prosecuting corporations. Currently, the German prosecution can make discretionary decisions on which corporations to prosecute – a result of overworked courts often choosing only ''symbolic'' cases. These agreements could then also be subject to the new ''due diligence catalogue'', thereby making the prosecuting practice transparent.

Using the example of the German corporate governance code (Deutscher Coporate Governance Kodex – DCGK) that stipulates recommendations and suggestions for good and responsible corporate governance in German listed corporations and is created by a governmental commission (Regierungskommission Deutscher Corporate Governance Kodex),[86] the due diligence catalogue should be implemented in a guideline published by a similar commission introduced by the German Federal Ministry of Justice and Consumer Protection. Just like the DCGK commission that comprises of ''managing and supervisory board representatives of German listed companies and their stakeholders, institutional and retail investors, academics (economics, jurisprudence), auditors and a trade union federation'',[87] the new due diligence commission should include experts in the fields of due diligence and supply chains, experts in various industry branches and experts in areas relevant to CSR, for example, environmental or workplace aspects. Similar to the

[86] Regierungskommission Deutscher Corporate Governance Kodex, ''Code'', available at: <www.dcgk.de/en/code.html>, last visited 05 September 2018.

[87] Regierungskommission Deutscher Corporate Governance Kodex, ''Commission'', available at: <www.dcgk.de/en/commission.html>, last visited 05 September 2018.

DCGK,[88] the due diligence catalogue should be reviewed at least annually. It would provide an advisory tool for the prosecution and the courts.

This two-pillar system would encourage greater efforts by corporations in the effective implementation of due diligence measures whilst at the same time making it easier for them to assess which concrete measures are deemed necessary in the prosecuting practice and the practice of the courts.

4.3.4 *Consequences – Increasing Importance of Negligence and a General Offence of Negligence for Companies*

As a consequence of human rights protection through the two-pillar system outlined above, criminal liability for negligence is increasing in importance. To date, board members of international corporations cannot be held liable, primarily because they have no precise knowledge of the processes that lead to the violation of human rights. There is no intent. Where there is a premeditated penalty, such as assault and manslaughter, knowledge of the concrete situation and the concrete victims is missing. However, if it is part of compliance to take precautions to prevent such crimes, negligent joint responsibility almost automatically arises for those who have to ensure functioning compliance systems, i.e. the management. Any violation of human rights is therefore an indication of a failure of the compliance system. If this could have been avoided by more careful organisation or monitoring, most jurisdictions provide a linchpin for punishment for negligence.

In this way, responsibility can arise for offences that can only be committed intentionally, although in some cases there is no intent on the side of the management (eg fraud, embezzlement and bribery). Conversely, it is crucial for management to consider the indications: If a certification company offers its services too cheaply (see above), this can be an indication for corruption and for the fact that no real examination takes place. This creates a responsibility of the management for the consequences of this poor performance, which may be due to non-compliance with safety or environmental standards, which in turn can lead to injury or loss of life.

In this way, the management's general duty of selection, monitoring and diligence can lead to comprehensive liability for negligence

[88] Regierungskommission Deutscher Corporate Governance Kodex, "German Corporate Governance Code' (2017), p. 2, available at: <www.dcgk.de//files/dcgk/usercontent/en/download/code/170214_Code.pdf>, last visited 05 September 2018.

for all consequences that could have been avoided in a chain of causes if careful monitoring had been carried out at all levels. This would create a today unprecedented level of criminal liability.

V CONCLUSION

We hope to have demonstrated that there are several different legislative and non-legislative ways to tackle the issue of human rights in business. There have been promising approaches but there are still big protection gaps in the legislature of most countries. Thus, further efforts are needed to make due diligence and the prevention of human rights violations more effective. A possibility is shown above (4.3.3).

As standardisation is an important goal in CSR law, it would be desirable for such regulations to be introduced at EU level. As the final analysis has shown that the consequence of effective human rights protection will be a significant extension of criminal liability for negligence, this is another reason why the standardisation of the scale of negligence is of decisive importance. It is just as important to avoid excessive intervention by law enforcement agencies against employees, even at the lower levels, as is the case where a company is investigated for conspiracy within the meaning of US criminal law. Effective protection of human rights must not lead to the rights of defence being undermined. Defence in criminal proceedings is itself a human right.