

A stylized world map composed of a grid of dots. Most dots are light gray, but several are colored red, including one in North America, one in Europe, one in Africa, and one in Asia.

Labour Conditions in the Global Supply Chain

What Is the Extent and Implications
of German Corporate Responsibility?

MIRIAM SAAGE-MAAB
December 2011

- Workers from outside the EU can proceed in German courts against German parent companies for human rights violations. There is, however, no precedent yet of compensation being awarded by a German court for overseas human rights violations. Therefore many issues remain unclear.
- While many human rights violations give rise to actionable claims under tort law (for example, violations of the rights to life, health, freedom of movement, and protection from discrimination) it remains unclear whether the freedom of association and protection from excessive overtime are also covered as legally protected interests under the law of tort.
- Principles of a corporate duty of care are already enshrined in German law. These could be further developed to correspond with the UN Framework and UN Guiding Principles on business and human rights. By doing this, Germany could develop clear standards of responsibilities of the parent company for human rights abuses in supplier and subsidiary firms. This would increase the effectiveness of legal remedies in German tort law and would enable victims to hold companies accountable for human rights violations in their overseas subsidiaries and suppliers as described in the UN Guiding Principles.



Table of Contents

| | |
|--|-----------|
| 1. Corporate Responsibility vs Corporate Accountability | 2 |
| 2. The Necessity of Effective Legal Remedies in a Corporation's Home State..... | 4 |
| 2.1 The International Level | 4 |
| 2.2 The National Level..... | 5 |
| 2.3 Importance of Legal Remedies in a Corporation's Home State. | 5 |
| 3. The Reality of Legal Remedies: German Civil Law | 5 |
| 3.1 Labour Law in the German Context: An Overview | 5 |
| 3.2 Tort Law Compensation Claims: Jurisdiction of German Courts and Applicable Law | 6 |
| 3.3 Protected Rights in German Tort Law..... | 8 |
| 4. Liability of Parent Companies..... | 10 |
| 4.1 Parent and Subsidiary Companies: The Problem of Separate Legal Personalities | 10 |
| 5. Liability for Parent Companies' Own Actions and Omissions | |
| with Regard to Its Subsidiaries and Suppliers | 11 |
| 5.1 Typical Human Rights Risks and Influence of German Companies | 12 |
| 5.2 Duty of Care in German Law | 12 |
| 5.3 Importance of Corporate Due Diligence in Overseas Human Rights Violations | 13 |
| 5.4 Preliminary Conclusion: Existing Duties of Care Suitable for Transnational Claims | |
| for Human and Labour Rights Violations | 16 |
| 6. Conclusion..... | 17 |
| 7. Policy Recommendations..... | 17 |
| References..... | 19 |

1. Corporate Responsibility vs Corporate Accountability

Over the last 30 years, corporations have increasingly relocated production from Europe to the global South. In some cases, production has been outsourced – in part or entirely – to external supplier firms. By relocating or outsourcing, corporations reduce the costs and risks of production, particularly in labour-intensive sectors like textiles and electronics (Plank/Staritz/Lukas 2010).

As stressed in the most recent report from the United Nations Conference on Trade and Development (UNCTAD), this relocation process is intensively subsidised by states through foreign investment schemes. Such investment has been mainly directed towards emerging and developing economies in recent years (UNCTAD 2011: 5). The largest of the supplier firms are now transnational corporations in their own right. Such large suppliers working in the textile or electronics industries are set up in developing or emerging countries, where they are able to use both their own factories and partner supplier firms. Many of these operate their business on an international level with an impact that reaches societies in several developing countries.¹

While textile retailers no longer produce their products themselves, other industrial sectors, such as for automobiles, continue to manufacture products in their own factories, but they are increasingly relocating production to developing countries. Furthermore, corporation-owned factories often work with materials or components that have first been prepared by external suppliers.

This global dissemination of corporate production sites has created a complex worldwide supplier structure involving 18–20 million employees. In some countries, the money generated by this supplier chain makes up 15 per cent of the total GDP. It has not, however, resulted in a corresponding spread of European labour and social standards beyond territorial borders (UNCTAD 2011: 127 et seq., 140). On the contrary, globalised economic structures are typified by massive violations of employment rights in subsidiary and supplier factories. Again and again, scandals break out over exploitative working conditions. Modern economic and human rights

discourse now recognises labour exploitation within the global supply chain as a fundamental problem of our time. The reality of systematic labour exploitation in far-flung parts of the world stands in stark contrast to both international law and norms of the International Labour Organisation (ILO).

Labour exploitation takes many forms. Studies on working conditions in countries such as El Salvador, Bangladesh, China, or Romania describe the following scenarios (Zimmer 2008; *Kampagne für saubere Kleidung* 2008; Wick 2009): workers receive inadequate wages and have no formal working contracts. They work long hours and overtime is demanded without prior notice or adequate payment. Those who dare to complain risk losing their job. Health and safety provisions are inadequate, maternity leave is not provided, and pregnant women are threatened with dismissal. The systematic discrimination of women on the grounds of their gender is closely connected with other forms of labour exploitation. Globalisation has altered the reality of gender roles: alongside their domestic work, an increasing number of women in the global South have entered the commercial job market. Nonetheless, the traditional role allocation remains: as women are traditionally allocated to the private sphere, they continue to be excluded from public debate on the development of employment rights. Additionally, companies take advantage of the vulnerable situation of female workers to improve their competitiveness. For example, corporations may decide to make employment agreements less formal, and thus more insecure. When doing so, they assume that women will be less likely to organise in groups than men, who often are members of organised trade unions. »By facilitating flexible employment agreements, gender discrimination is key to increasing corporate competitiveness« (Musiolek 2010).²

Several of the problems faced by workers are in violation of the ILO core labour standards (prohibition of workplace discrimination, prohibition of forced and child labour, freedom of association and collective bargaining) (Alstom/Heenan 2004). The right to adequate payment is also contravened, as is the prohibition on excessive overtime and the right to healthy and safe working conditions. Despite the fact that international labour stand-

1. Examples among the 10 biggest electronic producers include: Foxcon, Quanta, Compal, Winstrom (all Taiwan Province of China) and Flextronics (Singapore) (Falk 2011: 3).

2. Women are frequently underrepresented in trade unions: cf. Bangladesh Institute of Labour Studies (2009).

ards are for various reasons not absolutely synonymous with human rights,³ the labour rights safeguarded in the ILO's core labour standards and in other fundamental conventions⁴ nevertheless correspond closely with human rights detailed in the international human rights conventions.⁵ The two terms, therefore, will be used below as synonyms.

The human rights challenges in global production networks as outlined here provoke different reactions. While trade unions, civil society actors, and human rights activists are pushing for strong trade unions and increased legal regulation of corporations (corporate accountability, corporate liability), the corporations themselves are in favour of self-regulation and voluntary initiatives through which they accept their »corporate social responsibility« (CSR). Corporations define their own behavioural codes of conduct, which include basic labour standards, and seek to improve working conditions in their supplier firms by enforcing these codes via training and auditing.

Leaving aside for a moment the questionable efficacy of CSR measures (Musiolek 2010; Kocher 2010: 29-37), the concept of corporate social responsibility itself remains problematic. CSR allows corporations to define on their own what reasonable social engagement is, independently from other social actors: ultimately, it is the corporation that decides what is – or is not – a reasonable expectation. By opting for CSR, state institutions tend to relinquish their responsibility to orientate the various actors and norms towards the public good, delegating this role instead to corporations, which are bound above all to a capitalist logic. The inherent democratic deficit results in CSR instruments that are not designed to uphold the interests of victims of corporate abuse when they collide with the interests of the corporation itself.

Seeking to mitigate the obvious weaknesses of the CSR concept, trade unions and other civil society actors opt

for the concept of corporate accountability. They demand improved rules that specify legally binding obligations incumbent upon corporations whose overseas activities give rise to, or are involved in, labour and human rights abuses.⁶ The corporate accountability model seeks to improve the chances of victims to use judicial remedies against corporations for labour and human rights violations (Misereor/*Brot für die Welt*/ECCHR 2011). The political debate about corporate accountability is accompanied by the efforts of victims, groups representing affected communities, and human rights organisations to file law suits against corporations for abuses of human and labour rights. Such cases are currently being brought to court in the home states of the respective companies, such as the United States and the United Kingdom, as well as in host states such as Ecuador or the Philippines. Mechanisms used to enforce corporate accountability extend beyond legal instruments for reparation and compensation. A range of judicial tools are currently being used to uphold victims' interests so that these lawsuits do not only result in just individual reparation awards, but that they also create a public space in which wider social, economic, and human rights issues are debated (Kaleck/Saage-Maaß 2010: 436-448).

In the summer of 2011, the UN Human Rights Council accepted the proposed Guiding Principles on Business and Human Rights. The UN Guiding Principles cite effective legal instruments as one of the three chief pillars. Legal remedies, in this context, refer to judicial and non-judicial complaint procedures and legal action for victims of corporate human rights abuse (UNHRC 2011⁷). The UN Guiding Principles – the result of many years of work by the UN Special Representative on Business and Human Rights, John Ruggie – operationalise Ruggie's UN Framework »Protect, Respect, Remedy« (UNHRC 2008⁸). Within the Framework, Ruggie differentiates between the state duty to protect human rights and the corporate responsibility to respect human rights. Noting states as the only actors directly obliged by human rights treaties and conventions, Ruggie's Framework defines states as primarily responsible for protecting against corporate human rights abuse. According to this

3. For an overview of the discussion see Kolben (2010: 450-484).

4. ILO Convention Nr. 1, 30 (working hours per week), Nr. 14 (weekly day of rest), Nr. 131 (minimum wage), Nr. 184, 187 (health and safety at work).

5. Prohibition of forced labour: Art. 8 III International Covenant on Civil and Political Rights (ICCPR), Art. 6 International Covenant on Economic, Social and Cultural Rights (ICESCR); Prohibition of child labour: Convention on the Rights of the Child: Art. 22 I ICCPR, Art. 8 ICESCR; Prohibition of discrimination: Art. 3 I ICCPR, Art. 3 ICESCR; the right to just and favourable conditions of work (working hours, day of rest, safety): Art. 7 ICESCR.

6. Corporate Accountability (CorA) *Netzwerk für Unternehmensverantwortung*, <http://www.cora-netz.de> (visited 19.10.2011); European Coalition for Corporate Justice (ECCJ), <http://www.corporatejustice.org> (visited 19.10.2011).

7. From here onward referred to as the UN Guiding Principles.

8. From here onward referred to as the UN Framework.

concept, corporations are therefore merely responsible for respecting human rights. As such, they must exercise due diligence in all operations to ensure that human rights are not being, and will not be, negatively impacted. In cases where due diligence reveals that human rights are being damaged through operations, be it directly or indirectly, the corporation is required to remedy the situation. The third pillar of the UN Framework and Guiding Principles outlines the state's duty to provide effective judicial and non-judicial legal remedies. Complaint mechanisms are recognised as a necessary and crucial component of the UN Framework. Unfortunately, the UN Guiding Principles do not offer clear guidance for cases in which corporations do not fulfil their responsibility to exercise human rights due diligence. There is no clear indication as to whether states – on the basis of their obligation to provide complaint mechanisms – are further obliged to sanction companies that do not fully exercise their human rights due diligence. In this respect, the existing principles of duty of care might offer an opportunity for victims to hold corporations to account for a failure to exercise what the UN Framework calls due diligence.

2. The Necessity of Effective Legal Remedies in a Corporation's Home State

Effective legal remedies are important for preventing corporate abuse of human rights and helping victims seek reparation or compensation for injuries suffered. Procedural rights – just like the material manifestation of law – provide a forum in which workers and other victims can negotiate and enforce their interests against corporations. Legal remedies can also limit corporate activities for the benefit of the common welfare. When legal remedies are used in a strategic way, they can improve the power balance between workers, their union representatives and companies and therefore enhance fair interaction between the two parties in the global South. Such instruments are also pivotal in the creation of a »level playing field« in which corporations that have developed high labour and human rights standards do not find themselves at a competitive disadvantage to other companies with weak human rights performance.

Despite the fundamental importance of legal remedies that is stressed in both the UN Guiding Principles and

the UN Framework, in reality those remedies remain inadequately developed.

2.1 The International Level

On the international level, there are hardly any legal procedures through which corporations could be held to account for labour exploitation. Theoretically, it is possible to file criminal complaints at the International Criminal Court against individual employees who have conducted or participated in systematic torture or forced labour.⁹ But there is no international court for civil law matters, nor do the regional human rights courts and UN complaint mechanisms have jurisdiction over corporations, since they are denied the status of subjects under international law.

As a non-judicial remedy on the international level, OECD Guidelines for Multinational Enterprises and their complaint procedure are of particular relevance. The OECD complaint mechanism offers a mediation process between complainants and corporations without any sanctions. The efficacy of this mechanism has been strongly criticised by civil society organisations as ineffective to provide redress and compensation for victims. The procedures on the national level (conducted via so-called national contact points) are often handled in a non-transparent, insufficiently standardised way and have often failed to come to concrete resolutions.¹⁰ An updated version of the guidelines was released in the spring of 2011 – it is not yet clear if this will result in a fundamental improvement in practice.¹¹

The ILO is the main institution for setting international labour standards. However, its system for monitoring norm compliance is not constructed in a way that can be used by individual victims. They are primarily directed at states – the only actors compelled to comply with international law. As such, they cannot be counted as legal nor quasi-legal remedies as defined by the UN Guiding Principles.

9. The current investigation and prosecution practices of the Prosecutor of the International Criminal Court do not recognise the central responsibility of economic actors. Furthermore, the ICC will act only in selected cases of international crimes and cannot therefore be considered to be an accessible remedy for individual victims.

10. To take one example: OECD Watch (2010): 43–54.

11. For an overview and evaluation: Utz (2011); Huarte Melgar/Nowrot/Wang (2011).

2.2 The National Level

Victims of corporate abuse have a range of options for holding corporations legally accountable at the national level. So far, victims and their representatives pursuing European companies have tended in particular to use compensation law suits or criminal complaints initiating criminal investigations as a means for redress. However, it is also possible to sanction unlawful corporate actions using legal procedure under administrative or labour law (SALIGAN 2009: 19 et seq).¹²

These different legal venues are available both in the state in which the labour and human rights violations were committed (host state of the parent company), and in the state in which the parent company has its headquarters (home state). The crucial questions that arise in the context of national legal remedies are: Should victims of corporate abuse only have access to legal remedies in the (often non-EU) host state? Or should they also be able to pursue their claims in the state in which the corporation has its headquarters? The UN Guiding Principles are quite weak on this point. They do not clearly state that home states have an obligation to provide legal remedies for those whose human rights have been injured by the overseas activities of the home state's corporations. This unconvincing stance on the question of extraterritorial state obligations has been rightfully criticised, as will be shown here in detail.

2.3 Importance of Legal Remedies in a Corporation's Home State

Victims of human rights abuse must be able to initiate proceedings within the state in which the responsible corporation has its headquarters, since such legal proceedings in the company's home state are significant for victims to gain redress and to improve corporate human rights performance for the future. The state in which the headquarters is located is home to a number of important actors who are all able to influence corporate behaviour, both directly and indirectly: The decision-makers working in the parent company should explain their problematic business practices to peers and the

public in their own social and political environment. The corporation's shareholders, who should be interested in the way their corporation deals with human rights, also need to be confronted with the wrongs committed by the company. And the consumers, who profit from the cheap products manufactured under inhumane conditions, should also know about the hardships that the production of certain products causes.

Since there are different actors in the home states who are involved in decision-making that influences labour and human rights in host states' production sites, it is appropriate to discuss before a European court the question of the scope of legal responsibility of a corporations for human rights abuses of its subsidiaries and suppliers. The political discussion about corporate responsibility for human rights abuses within the global business structure that accompanies judicial proceedings can have a significant repercussion on trade union activities and can be used actively by labour representatives.

3. The Reality of Legal Remedies: German Civil Law

As outlined above, there are several substantiated human rights arguments in favour of allowing employees to pursue complaints in a corporation's home state for the company's involvement in exploitation in subsidiary and supplier firms. The following section will show, however, that the current legal situation in German civil law is not fully adequate to provide victims effective legal recourse.

3.1 Labour Law in the German Context: An Overview

Before evaluating the adequacy of German civil law for victims of overseas corporate human rights abuse, it should be noted that workers within the German context normally enjoy an extensive range of legal options when dealing with human rights violations in the workplace.

Within Germany, the freedom of association is a constitutionally guaranteed right. Workers who experience disadvantages as a result of their trade union activities are entitled to sue their employer.¹³ Workers are protected

12. The organisation SALIGAN represents for example a rural community in the Philippines in a lawsuit brought by a corporation against the local authorities that took measures against the companies' excessive use of pesticides.

13. Federal Labour Court (BAG) Judgement of 23.4.1986, 5 AZR 340/85.

against discrimination, in particular gender-based discrimination, according to the *Allgemeine Gleichbehandlungsgesetz* (AGG), the German equality law. According to this law, German employers are not only prohibited from discriminating against their employees, they also have a duty of care towards their employees, and are compelled to prevent any disadvantages being caused by other employees or by a third party. If these duties are contravened, employers face the risk of law suits demanding compensation, and employees may refuse to work.¹⁴

According to the *Arbeitszeitengesetz* (ArbZeitG) – the law of working hours – workers are protected from working excessive overtime. It is an administrative offence for employers to exceed the maximum (average) daily or weekly working hours, or to fail to provide the minimum number of breaks. This offence, which becomes a crime under German law if it is committed intentionally, can be prosecuted by the competent authorities.¹⁵ Workers who have been assigned overtime illegally can refuse to work without sanctions.

Employees working, for example, in a subsidiary or a supplier firm of a German parent company in India who wish to proceed against the German parent do not enjoy the same degree of protection.¹⁶ As a matter of principle, workers can only exercise their rights under labour law with respect to the contracted partner, which is in this case the Indian subsidiary or supplier. There is no contractual relationship between the German parent company and the affected Indian employee that could give rise to the aforementioned entitlements and obligations. At the same time, German courts do not have jurisdiction over charges filed against an Indian employer arising from the Indian working relationship: German courts are only competent to hear legal disputes that arise from an employment relationship established under German law. German labour law, therefore, offers few points of entry for employees whose rights have been abused in overseas German subsidiary or supplier firms and who wish to file claims against German parent corporations. There are, however, other ways of seeking compensation from German parent corporations.

14. §§ 13–15 AGG.

15. §§ 22, 23 AGG.

16. Subsequent example cases take the form of German parent companies and Indian subsidiaries or subcontractors. This is not meant to offer any assessment, but is rather used solely for illustrative purposes.

3.2 Tort Law Compensation Claims: Jurisdiction of German Courts and Applicable Law

The following section will examine claims for compensation under German tort law, which can be utilised by workers injured overseas by German corporations. In this context two questions are relevant. First: which of the human rights violations connected with global production chains can be addressed through civil law compensation claims? The second is related to the first: Which domestic law is applicable on these transnational disputes?

According to the Brussels I Regulation of the European Union, almost all German civil courts are competent to hear tort law claims filed against German-based corporations. The Brussels I Regulation has also been applied repeatedly in cases of human rights abuses committed by European corporations. A Dutch court, for example, used the Brussels I Regulation as the basis to establish jurisdiction over charges of pollution in Nigeria that were filed by a Nigerian citizen against the oil company Shell.¹⁷ The same was done by a London court ruling on charges filed against a British corporation for its involvement in the dumping of toxic waste on the Ivory Coast.¹⁸ The Brussels I Regulation has nevertheless been criticised as being too restrictive, since it discards more progressive jurisdictional provisions in European national jurisdictions.

The cases of corporate abuse discussed here typically involve two legal systems. First, the jurisdiction of the state in which the violation was committed, for example India. Second, the jurisdiction of the state in which the (co-) responsible corporation has its headquarters, for example Germany. In transnational litigation, the question arises as to which law will be chosen by the German court as the basis for its assessment of the charges. For compensation claims under tort law, such as those under discussion here, the answer to this question is found in the 2009 Rome II Regulation.¹⁹

17. District Court of The Hague, Interim decision on jurisdiction from 30.12.2009 – *Nigerians v Shell*.

18. High Court of London, Interim judgement on jurisdiction in *Yao Essaie Motto & Ors v Trafigura*.

19. Regulation (EC) Nr. 864/2007 of the European Parliament and Council of 11.7.2007 on law applicable for non-contractual obligations (Rome II Regulation). This regulation is directly valid in all EU member states and is also applicable if the disputed legal relationship has a non-European reference point and does not involve any other EU member state.

According to the regulation, courts must apply the law of the state in which the injury occurred, that is, in which the infringement of rights took place (Article 4 I Rome II Regulation). In a case of labour exploitation in an Indian subsidiary of a German corporation, the German courts hearing the lawsuit against the German corporation would apply Indian law when deciding on the merits of the case.

The Rome II Regulation does, however, provide for several exceptions to this rule – those two of relevance to this discussion will be examined in the following section.²⁰

Mandatory Rules

According to Art. 16 Rome II Regulation, certain provisions in German law can be applied as mandatory rules, when these rules are of fundamental importance, even if the case is being generally decided according to foreign law. Although there is not yet a consensus on how the term “overriding mandatory provision” in Art. 16 Rome II Regulation should be interpreted (Junker 2007: 3675 et seq.), according to existing case law, a rule is mandatory in this sense when the meaning and purpose of the provision in question has been internationally recognised.²¹ This is particularly true when the provision pursues a matter of public interest that is fundamentally significant at the international level. A provision can be considered of such fundamental significance once numerous states have judged its content to be so important that they agreed on respecting it in an international treaty, such as the human rights conventions, or the conventions of the ILO (particularly the core labour standards).

Several provisions in German law, which also protect human rights interests, have already been classified as mandatory rules. German courts recognise the right to

maternity pay, for example, just as they accept the mandatory nature of the right to sick pay.²² The prohibition on discrimination has also been ascribed the character of mandatory rule (Thüsing 2007).

If German law gives rights and claims to those who suffered a loss through what can be described as a violation of internationally recognised human rights standards, these provisions might be classified as mandatory rules by the respective court and therefore taken into consideration when deciding on a case. This way, foreign plaintiffs could take advantage of protection standards that are enshrined in German law, even if the dispute was generally being assessed under non-German tort law.

Rules of Safety and Conduct

The second exception to the general rule of the Rome II Regulation relevant in cases of transnational litigation relates to rules of safety and conduct.²³ According to Art. 17, rules of safety and conduct pertaining to the defendant will follow German law if this appears appropriate.²⁴ Rules of safety and conduct in this sense incorporate both special requirements and general principles relating to the safety and conduct of the person who caused the damage in question.²⁵ In cases of transnational lawsuits, the question determining the application of Art. 17 Rome II Regulation is whether these conduct rules were foreseeable for the tortfeasor.

This reasoning can be well applied to claims against German companies for human rights violations in subsidiaries or subcontracting firms. For example, a case in which the German-based headquarters of a corporation initiated a practice that led to exploitation in an India

20. The Rome II Regulation also facilitates the application of the law of another state if this has an «obviously closer relationship» than the law of the state in which the acts were carried out (Art. 4 III). In the cases under discussion here, which deal with the global corporate structure and supply chains, the exception clause will scarcely lead to any application of German law. Art. 7 states that for cases in which environmental damage was caused by actions at home but manifested in damage abroad, the law of the state in which the cause occurred can be applied. It is recommended that this regulation should be extended to apply to human rights cases; Cf. Augstein (2010: 224, 237).

21. Federal Court (BGH), judgement from 13.12.2005 - XI ZR 82/05; European Court of Justice (ECJ), judgement from 23.11.1999 - verb. Rs. C-369/96 and C-376/96 (Arblade); see also Junker (2010: line 11).

22. BAG 12.12.2001 – 5 AZR 255/00 – Decision of the German Federal Court (*Bundesarbeitsgerichtsentscheidungen*, BAGE) 100, 130 to § 14 I MuSchG and § 3 EFZG.

23. Art. 17 Rome II Regulation: »In assessing the conduct of the Person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability.«

24. It follows exactly from ordinary principles of international tort law that the liable person has to align his behaviour to the safety and conduct rules of his location.

25. The basic principles of road safety also establish this in case of an accident. In this sense, the directive would for example be the blanket clause of §1 *Straßenverkehrsordnung* (German traffic by-law) (imperative of consideration). It does not matter if this directive has been established by the legislator or by case law, nor if it is part of public or private law. Cf. Recital 34 Rome II Regulation; see also Junker (2010: para. 11, 16).

subsidiary. A German court deciding on the compensation claims of Indian workers would consider German law when determining the extent to which the German company had a duty of care. This way, fundamental principles of German law would be decisive in the evaluation of whether certain decisions in the headquarters were made with due care although the overall lawsuit is being decided on the grounds of Indian law. Such an application of German law would be thoroughly reasonable when corporations based in Germany are compelled to observe German rules of duty of care when making decisions that will have overseas repercussions. The application and interpretation of Art. 17 Rome II Regulation that is recommended here is also supported by the UN Framework on business and human rights, and concretely stipulated in Nr. 2 of the UN Guiding Principles. According to this, states must clearly communicate to transnational corporations that they are obliged to observe human rights when conducting global business. Corporations are not allowed to excuse their behaviour by pointing out that human rights standards are not equally implemented around the world.

Preliminary Conclusions: The Consequences of the Rome II Regulation

As a result of the Rome II Regulation, German courts are applying non-German law to judge the claims put forward in the cases discussed. This needs to be considered when legislative changes are made in Germany in order to improve conditions for lawsuits concerning transnational human rights abuses. As a result of the Rome II Regulation, many changes to substantive German law would not make a difference, since the German law could not actually be applied. As it has already been suggested, it is conceivable that changes would be made to the Rome II Regulation itself (Augstein 2010: para. 224, 237; ECCJ 2010: 16).

Within the current legal structure, certain rules of German law can nevertheless be applied in transnational human rights cases, provided they are considered as mandatory rules or rules of conduct in the sense of the Rome II Regulation. As yet, however, there has been no clarification – be it through the courts, or via expert opinions from federal committees, the government, or other state officers – on when exactly an existing German civil law norm that protects human rights interests is considered

to be a mandatory rule. Similarly, there has been no explanation of precisely which corporate rules of conduct have to be applied.

3.3 Protected Rights in German Tort Law

Under both German law and the law of the state in which the injury occurred, certain cases of severe labour and human rights abuses are covered by tort law and therefore offer the basis for a compensation law suit.

Health Damage Caused by Excessive Overtime or Hazardous Working Conditions

If labour or human rights violations have affected the life, physical integrity, or health of the plaintiffs, almost all legal codes provide for compensation claims under the law of torts (Wagner 2008: 1003, 1013). If, for example, the use of pesticides or devices on agricultural plantations leads to illness or injury among the workforce, it can be assumed that all domestic tort law provisions will in principle protect the health of workers. If excessive overtime leads to health damages of workers, it is also conceivable that this would fall within compensation norms and would typically result in compensation payments for material and immaterial damages. There is also no reason to assume that legal codes in the global South will be any less equipped for these matters than the German legal system (Schmidt 2009: 527, 533).²⁶

Modern Forms of Forced Labour and Involuntary Overtime

While it is not possible to speak in uniform terms about the extent to which massive or subtle forms of forced labour would trigger tort law protection within different legal systems, this study will concentrate on German law.

26. Brazilian Compensation Law, for example, contains in part very far-reaching liability. Liability for damages, for example, can arise if »a socio-economic structure is in place that due to its nature damages the rights and interests of third parties.« If the operation of an industrial plant exposes the general public to special risks, and these risks are realised in actual damages, the person who benefits economically from the facility is liable, even if no intention or other wrongful act is proven against him. Comp.: Brazilian Código Civil: Art. 927 § ún. CC/2002: »Alongside cases regulated by law, an obligation to pay damages exists independently of fault if the nature of the activities habitually pursued by the person responsible for the damages endangers legally protected rights. «

German law accords to the freedom of movement the same tort law protection as to physical integrity (OLG 1985: 466, 467; Wagner 2009: line 99). A civil damages claim of § 823 BGB (*Bürgerliches Gesetzbuch* – Civil Law Code) potentially protects both freedom of movement in the sense of Art. 9 of the International Covenant on Civil and Political Rights, and the prohibition on forced labour in the sense of the ILO core labour norms. Following the ILO's interpretation of the term »forced labour« (ILO 2007: 20; ILO 2005: 6), it can be argued that the freedom of movement is infringed when workers are made to remain at work through methods that equate in their effect to physical force. If in a specific case the applicable law does not provide the same standard of protection as German, the court would have to decide whether § 823 I BGB is an mandatory rule in the sense of 16 Rome II Regulation, since it implements both the freedom of movement as protected by the German constitution and the International Covenant on Civil and Political Rights, as well as the prohibition of forced labour as stipulated in the ILO core labour norms.

Compensation Claims for Workplace Discrimination

In German law, compensation claims for discrimination on the basis of gender or other characteristics are regulated by the AGG, the anti-discrimination act. AGG claims arise from directly or indirectly discriminatory measures on the part of the employer, or if the employer fails to protect the employee from the discriminatory actions of third parties, such as colleagues or independent contractors. Since the AGG, only directly obliges the employer it is not applicable in the cases discussed here, as they concern claims against third parties (the parent company), and not the employer directly.

However, if the German parent company has contributed significantly to the discrimination of the direct employer in India, the Indian employee can claim an injury to his/her personality rights (*Allgemeines Persönlichkeitsrecht*). German tort law classifies the comprehensive right to personal development, freedom and dignity as »other legally protected rights«. ²⁷ In two landmark decisions, the German Federal Labour Court ruled

that gender-specific discrimination was an infringement of personal dignity, and that it constituted grounds for compensation under the law of torts.²⁸ It has been required that the discrimination in question qualifies as a severe attack on the dignity of the injured person (Voigt 2008: para 23). As this criterion would be fulfilled in most cases under consideration here, German tort law provides for compensation claims on the grounds of discrimination.

Labour Violations That May be Covered

In cases of excessive overtime work that does not directly lead to health damages, German law does not clearly provide for a compensation claim, since those cases do not fall under the catalogue of legally protected rights: health, freedom, and property. There is a similar lack of protection in cases of trade union repression that does not result in physical harm. In both cases of grave violation of internationally accepted labour rights, it can be argued that a compensation claim might arise from the general right to personality (*Allgemeines Persönlichkeitsrecht*). The right to work only within agreed hours can be seen as part of human dignity. The same could be said for the right to conduct trade union activities without fear of sanction. It is also feasible that a claim would arise from the violation of free unionisation as defined in § 823 II BGB. The freedom of association and collective bargaining is enshrined in constitutional law, the International Convention of the ILO, and in human rights conventions. It is also protected through the case law of the Federal Labour Court and may well be considered significantly concrete.²⁹

However, these considerations remain merely speculations. They have at present neither been decided by courts nor have they been subject of a wider scholarly debate. It is therefore not yet clear whether workers who have suffered excessive overtime or circumscriptions to trade union activity would be entitled to compensation from German corporations under tort law.

28. *Bundesarbeitsgerichtsentscheidungen* (BAGE) 61, 2198, 8 AZR 351/86; BAGE 61, 209, AZR 447, 87; the BAGE also acknowledged that the compensation claim was not precluded by § 611a II BGB old version; see also Baeter (2005: para. 18, 211).

29. Basic law and human rights conventions such as the ILO Conventions may be subsidiary to the case work of the Federal Labour Court, but they would be considered in the interpretation of individual cases.

27. BGH, *Bundesgerichtshofentscheidungen in Zivilsachen*, 13, 334.

Preliminary Conclusion: Fundamental Labour Rights Partially Protected Under Civil Law

As outlined, German tort law offers compensation claims in cases of violations of fundamental labour rights, when they fall within the categories of damages of personal goods, such as life, health, freedom of movement, or the general right to personality (*Allgemeines Persönlichkeitsrecht*).

If the right to form trade unions is infringed, and there is no corresponding damage to a concretely protected right such as health, it is not yet clear whether German law would recognise a compensation claim in tort law. Since the injustice of such fundamental human rights violations should be adequately addressed by domestic law, it is necessary to clarify whether tort law protects against the violation of trade union rights and excessive working hours. Although it is not possible in this analysis to conduct an extensive comparative study, it should be noted that the legally protected rights found in German civil law are also expressed in a similar manner in many jurisdictions in the global South (Wagner 2008).

4. Liability of Parent Companies

Even if certain human rights violations are covered by the applicable tort law standards and therefore can be asserted before German courts as compensation claims against German companies, a further question is raised: Under which conditions is the German parent company legally responsible for the damage? It needs to be considered that the German parent company has no contractual relationship with the workers in India. If the subsidiary or subcontractor is based in India, it has an independent legal status under Indian law. It is these companies, situated outside of Germany, that have the direct working relationship with the employees and the obligations deriving from this relationship. The parent company is not directly involved. Legally speaking, subsidiaries act completely independently of the parent company. On this basis that German parent companies often pass on all legal responsibility for working conditions to the subsidiary or subcontracting company. Nevertheless, there are, in principle, two different paths leading to the liability of the German parent company. On the one hand, there is the concept of strict liability (lifting the corporate veil). In those cases the parent corporation must assume responsibility for the hu-

man rights violations committed by the subsidiary. On the other hand, the corporation can be held liable for its own misconduct. The UN Guiding Principles further distinguish between the possibility of a company directly infringing human rights by its own conduct and the option that a company is only connected to other entities which violate human rights. The UN Guiding Principles try to establish behavioural principles for both cases to guide the actions of parent companies. Similarly, current rules of duty of care in German civil law provide guidance for determining what constitutes reasonable corporate behaviour in both cases.

4.1 Parent and Subsidiary Companies: The Problem of Separate Legal Personalities

The strict liability of parent companies for the offensive acts committed by their subsidiaries contravenes a basic principle of corporate law (Mares 2011/12). According to the so-called principle of separate legal personality, which exists in most legal systems, a parent company's liability is limited to its own entity (ICJ: 2008: 46). If a German company sets up a foreign company and holds or acquires shares in that company, it becomes a shareholder of the foreign company. Under the separation principle, claims made against the foreign subsidiary would not apply to the shareholder, even if he owns all the subsidiary's shares.

Direct liability on the assets of the parent company (piercing the corporate veil) will only be permitted in the most exceptional cases. The required conditions for this differ hugely between legal systems. All of the exceptions to the separation principle in German law are irrelevant to the cases under discussion. However, these transnational cases will mainly be decided under the law of the state in which the subsidiary is located. The exceptions to the separation principle in other legal codes are often broader than those in Germany. Direct liability may be established if the parent company has completely dominated the subsidiary and its decision-making process that it practically dictated the human rights violations. Many legal systems consider it an abuse to rely on the principle of separate legal entities to avoid responsibility in such cases of absolute control of parent over subsidiary.³⁰ Nevertheless, establishing the direct liability

30. For China: Guo/Ho (2008: 190, 191); Malaysia: Wong/Kok (2008: 177, 186); South Africa: ICJ (2009: 10 et seq.); USA: Arnim (2000: 1001, 1006).

of the parent company will always involve considerable efforts.³¹ It is not unusual that a parent company has a relationship of dependence and domination to its subsidiary when the parent holds all or the majority of a company's shares. This is not automatically considered abusive in the sense that the parent company must accept liability for rights abuses committed by the subsidiary, since it can be argued that merely establishing a subsidiary in another country and holding 100 per cent of its shares is a necessity of global business, which is not per se abusive.

The German *Arbeitnehmer-Entsendegesetz* (AEntG) is an interesting legislative regulation of direct liability. The expressed goal of the law is to move corporations to adopt better monitoring mechanisms in relation to subcontractors and to prevent wage dumping in the construction industry and other sectors (Schwab 2010: 225). Irrespective of their own misconduct, the main corporation will be held liable for any failure to fulfil important duties arising from the employment contract between the subcontractor and the worker. Although the AEntG cannot be applied to the cases considered here, the example shows that when dealing with social ills, it can be appropriate to break with basic legal principles. It is therefore conceivable that further exceptions to the principle of separation would arise in cases of severe human rights violations within subsidiary firms.

5. Liability for Parent Companies' Own Actions and Omissions with Regard to Its Subsidiaries and Suppliers

In addition to the liability of German parent companies for human rights abuses in subsidiaries and suppliers, compensation claims can also be directed against a parent company alleging actions or omissions that cause liability.³² If the parent company enacted certain measures that resulted in human rights violations in the

subsidiary firm, this may constitute a violation of its own duty of care, giving rise to a claim by those affected.

The concept of duty of care can cover cases in which the parent company has not directly injured human rights, nor abused the subsidiary to cloak its own actions (direct liability). The duty of care applies where the company influenced the subsidiary in a way that it actually contributed to or caused the violation of human rights, even though the facts of the case would not trigger direct liability. The duty of care is also relevant in cases in which the corporation has not actively carried out any actions but has failed to take action. There may be actions that a corporation is obliged to carry out – certain protective measures, for example. The failure to carry out this action – omitting, for example, to act upon the subsidiary to prevent human rights abuses – would constitute a violation of the duty of care. In general the duty of care is well established in German law. Nevertheless, it is anything but clear if, and to what extent, the duty of care applies to practices that violate human rights in foreign subsidiaries and supplier firms.

As a reference point for determining what duty of care means in the present cases, the existing principles of German law will be applied to the situations under discussion. By incorporating the reasoning of the UN Framework and the Guiding Principles, it is possible further develop the current duty of care principles in German law. When determining the duty of care, three questions are particularly relevant:

- How must a company located in Germany deal with dangers that existed prior to the establishment of the foreign subsidiary or before any contact was made with the supplier firm? Which actions should be refrained from or actively carried out?
- How must the German company deal with dangers that were created through the activities of the subsidiary through the contractual relationship with the supplier firm? Which actions should be refrained from or actively carried out?
- Is the parent company obliged to carry out further duties with regard to the subsidiary or supplier?

31. BGH, judgement of 9.5.1980, I ZR 76/78 – Asbestimporte; the BGH rejected any wrongdoing on the part of the German importers on the grounds that the asbestos goods had been manufactured according to the health protection guidelines governing the foreign production site. Case law is obliged to respect the varying standards of protection in international competition, provided that this does not violate widely recognised international law.

32. Differentiated discussion can be found at Mares (2011: 237-244); see BGH, *Bundesgerichtshofentscheidungen in Zivilsachen*, 13, 8-13.

5.1 Typical Human Rights Risks and the Influence of German Companies

In order to determine the extent of duty of care that a parent company has, both the human rights risks that typically arise from the company's business, and the actual influence of the parent on these risks needs to be considered.

Via its subsidiary or supplier firm, the corporation will come into contact with labour and human rights realities that are far removed from those in Germany, despite the fact that ILO core norms, the ILO conventions, and other human rights conventions are equally binding upon most states. Very often, state regulations on overtime and holidays are weaker than in Germany, and there is very little compliance oversight by the state. Minimum wages are often so low that employees cannot survive adequately. Women are frequently discriminated against in the workplace, and have access only to precarious, poorly paid positions.

Parent companies are connected with these situations through their (foreign) subsidiaries in different ways. In cases where the parent company owns large shares of the subsidiary, the parent company usually directs the subsidiary through contractual provisions, or the delegation of managing directors, who are also directors in the parent company.³³ In this way, the parent company influences the dangers described here. Parent companies set the business goals for their subsidiaries that define salary levels or determine the resources put into training employees in safety measures and other health and safety provisions.

The global trend in production relationships is characterised by subcontracting structures, ranging from contract manufacturing or the outsourcing of services and franchising, to licensing and management contracts. However, even these forms of business allow transnational corporations to influence management at the firms in the target countries (Falk 2011: 3). In supplier relationships, the commissioning company can greatly influence the timing of the procurement and delivery times. Repeatedly, it is claimed that suppliers cannot meet the demands of short-order placement – as is standard in the textile industry –

without excessive overtime (Plank /Staritz/Lukas 2010: 24 et seq., 36 et seq.). The same goes for the high volume of orders. In times of high production, part of the work has to be passed on to a further subcontractor. However, because the unit price remains the same, it is clear that the price paid to the subcontractor is pushed down, which in turn pushes down the wage paid to the workers. The pressure on prices, which is particularly high in the textile and electronics industries, is passed on directly from shoppers to production firms. This pressure often makes it impossible for suppliers to pay workers an adequate salary. Typically, it is women who suffer most from this practice. Due to their precarious working conditions, they are particularly vulnerable to both price pressure from the purchasing corporation and short-term contracts.

5.2 Duty of Care in German Law

In order to clarify the duties that are incumbent upon a parent company in relation to human rights problems foreign subsidiaries and suppliers may cause, it is useful to look at the existing principles of duty of care in German law. These principles, which were developed from jurisprudence dating back as far as the 19th century,³⁴ could also be applied to litigation that is otherwise being decided according to foreign law, if they were considered to be regulation of safety and conduct in the sense of Art. 17 Rome II Regulation.

Within the framework of duty of care, a corporation's activities can typically give rise to liability in two ways: active behaviour (a decision on purchasing policy which through further activity of the subsidiary leads to the violation of human rights) or an omission (being aware of, and tolerating, human rights abuses by subsidiaries and suppliers). Corporations can be held liable for such action or omission if there was a behavioural obligation that the company violated.

Given the sheer number of possible situations and hazards, there is no definitive catalogue of duties of care in German law. There are, however, several principles

33. In double financial management, both the parent company and the subsidiary are managed by the same person(s).

34. The doctrine of *Verkehrspflichten* developed out of the first cases at the *Reichsgericht* to protect against dangers arising from a rotting tree on the property of the duty holder, or from ice on steps. It was stressed from the start, however, that this matter concerned a general principle of tort law. As such, the terminology of *Verkehrspflicht* is used to date synonymously with that of general duties of care arising from the law of tort. See, for example, Wagner (2008: line 233).

which can be applied on a case-by-case basis to evaluate if a duty of care was breached. German law differentiates between two different categories of duties of care.³⁵

The duty to monitor safety hazards

The duty to monitor safety hazards refers to the actions and things which fall within one's own sphere of responsibility. A person who takes advantage of these actions or things is also responsible for the correspondent hazards. For a corporation, this means that the executive must ensure that any dangers created through the activities of the company are monitored and limited to prevent risks to third parties.

The duty to protect certain legally protected rights from external dangers

This duty obliges a corporate executive to create an operational organisation that ensures the protection of rights of persons which are in the sphere of influence of the company from infringements of third parties.³⁶

The duty of care can only be considered violated if it was possible for the corporation to perform a certain action in order to fulfil the concrete obligation. The action that is required by the company needs to be factually and legally possible to fulfil. Working within the parameters of what is possible, all reasonable measures should be taken to eliminate hazards. A cost-benefit analysis is used to judge whether a measure is reasonable. The extent of possible damages and the likelihood of these damages occurring are measured against the cost of the security measure. The severity of the possible damage should not be assessed in economic terms only, as explicitly stated by the German Federal Court (BGH 1984: 801 et seq.). Dangers to immaterial interests should also be considered.

As the potential of immaterial damage increases, and the probability of damages occurring becomes greater,

the level of expenditure for safety measures should also increase. When other persons are also responsible for preventing the hazards in question, this should not automatically lessen the required duty of care. The Duty of care always extends as far as the party is able to influence events. The obligations of due care remain even if a third party is causing damage against the will of the duty holder, as long as this damage could have been foreseen and averted by the dutyholder. When a safety hazard can also be managed by different persons, this does not liberate any one from their obligations. Each person must exert his or her influence in order to prevent the violation.

5.3 Importance of Corporate Due Diligence in Overseas Human Rights Violations

If one applies the principles outlined above to the cases discussed presently, it is necessary to differentiate between fully owned corporations and majority-held ones on the one hand, and minority shareholding and supplier firms on the other. In addition, the study focuses on cases in which the parent company indirectly causes the human rights abuses, as well as on cases in which the corporation enters into situations of pre-existing human rights risks, rather than creating this situation directly.

Duty to Monitor Hazards

These duties cover cases in which certain human rights risks are caused by the activities of the (subsidiary) company itself. Parent companies can create certain situations that endanger human rights in the subsidiary or supplier firm, for example, if an Indian subsidiary introduced a new pesticide to improve productivity on the advice of, or with the cooperation of, a parent company in Germany. The introduction of a new pesticide may not always automatically cause injury to human rights. However, one must ask whether and to what extent monitoring systems are needed to ensure that workers get the training and other safety measures required to prevent possible intoxication or death.

In cases of subsidiaries that are controlled³⁷ by the parent company contractually or through majority ownership,

35. The following discussion of due diligence obligations under German law is based primarily on Wagner (2009).

36. *Bundesgerichtshofentscheidungen in Zivilsachen* (BGH) 109, 297 »Building Materials«, tenor: A GmbH's [corporation's] duties to guard absolute objects of legal protection may also be extended to the CEO as a guarantor due to the entrusted functions. In the case of neglect of these duties, he or she might be made liable under tort law; see Thümmel (1996: line 272).

37. While the control would not rise to the threshold of abusive control causing strict liability.

the parent company has a relatively high chance of influencing all of the practices that lead to the violation of human rights. This influential position gives rise to further obligations. On the one hand, the parent company has co-determined the subsidiary's behaviour from the start, and this behaviour has endangered human rights (Fleischer 2006: para 101; Emmerich/Habersack 2010: para 13). On the other hand, the strong position of the parent company makes it relatively easy for it to shut down practices that are endangering human rights.

To give a concrete example of this, it is reasonable to expect the German corporation to test the general security levels in the Indian subsidiary before introducing a new pesticide. One could further expect that the German corporation would develop sensible measures with the subsidiary to prevent the pesticide poisoning of workers. While the new pesticide would increase productivity, granting the parent company additional financial benefits, pesticide poisoning would, at the same time, seriously violate the human right to life and health. It can, therefore, be expected of the parent company to take safety measures seriously. In fully-owned subsidiaries, which are founded with the sole aim of carrying out the business of the parent companies overseas, it is clear that the financial benefits of the measure give rise to the obligation to prevent human rights violations from occurring.

A parent corporation is not permitted to hide behind claims that the subsidiary management – or even the workers themselves – are at fault. As discussed above, the erroneous behaviour of a third party does not release one from one's obligations. Should the subsidiary management disregard the security measures agreed upon with the parent company, or if workers misuse the pesticide when applying it despite sufficient training and equipment, the parent company would have to prove that it did all it possibly could to prevent pesticide poisoning. This includes, for example, a monitoring system to ensure that the executive's resolutions are being implemented by the subsidiary.

It is also not possible to fall back on the argument that the corporation was unaware of the concrete human rights problems, or unable to influence the situation. First, these suggestions are scarcely conceivable in cases where the German corporation owns the majority of shares in the foreign subsidiary and regularly entrusts

subsidiary employees with important functions (Pohl/Schulte 2008: 136). If managers are active both on the board of the parent and of the subsidiary, it is highly likely that knowledge of the hazards resulting from the managers' decisions can be attributed to the parent company.³⁸ Second, applying the concept of due diligence, developed in the UN Framework and operationalised in the UN Guiding Principles, companies have to do human rights risks assessments with regard to all their activities. Transferring this concept to German law could mean that not knowing of a potential human rights risk arising from the subsidiaries activities in itself constitutes a breach of a duty of care

Duty to Protect from External Threats

These duties cover the situation, described above, in which a corporation comes into contact with pre-existing threats to human rights. Certain dangers, such as the systematic and brutal persecution of trade unionists in Colombia, will be discovered by any corporation that seeks to found a subsidiary in the country. The same is true for deep-rooted discrimination. This raises the question of whether a corporation must simply prevent these dangers from increasing or being exploited, or whether it is obliged to improve the situation in their respective enterprises. Is it sufficient for a parent company to ensure that a very low minimum wage is not reduced yet further, that typical forms of discrimination within the company do not get worse, and that the security situation of trade union workers is not exacerbated? Or, should corporations pay workers a reasonable wage within the economic context, work towards the advancement of discriminated groups, and take measures to improve the security situation of union workers?

As has already been stated, corporations are obliged to create organisational structures that prevent the violation of absolute rights such as the rights to health and life. If, through its subsidiaries, a corporation becomes active in certain conflict regions where the risk to human rights is particularly high, then it must equip itself and its subsidiaries with appropriate organisational structures to manage these risks.

38. In this common situation, personal knowledge is attributed to the manager according to § 31 BGB.

In order to do this, the company must first be informed about the human rights problems in the region. A correspondent procedure for acquiring and checking information is needed, as required under the UN Guiding Principles (Art. 17, due diligence).³⁹ Based on information gathered through a human rights risk-analysis, the corporation must develop adequate corporate policies on location. To return to the example of Colombia, one such policy could be to carefully select and review subsidiary management as it is common knowledge that businessmen working in a particular sector and region have close involvement with paramilitary groups who are responsible for murdering trade unionists. When confronted with such a situation, the parent company must ensure that managers employed in the subsidiary are not hostile to the work of trade unions and would not arrange for paramilitary-led persecution of trade unionists.

It should be considered here that when a corporation begins its operations, it takes on the role of an employer. In a conflict of interests between the employer and the employed, the employer will always be in the stronger position. This imbalance necessitates organised trade unions. Via the subsidiary, the corporation's work results in the creation of trade unions, with all the human rights risks this brings with it in certain situations. Subsidiaries must therefore encourage trade union organisation within the firm and offer unionists effective protection against persecution. The resulting concrete measures must ultimately be part of the subsidiary's organisation. The fact that this matter touches on the subsidiary's duties of care does not lessen the parent company's obligations. As described above, every person is obliged to act according to his or her influence. Processes must take place regularly within the parent company to guarantee that the subsidiary conducts adequate human rights risk-assessments and creates remedies where needed. Possibilities for influencing concrete practices within the subsidiary vary according to the extent of the shares held. Corporations which own 100 per cent of shares, or which have arranged a dependency agreement, are undoubtedly in the strongest position.

It should also be possible to introduce mechanisms to monitor human rights, particularly within large companies with strong personnel capacity. Medium-sized and small companies should also be able to collect information

on the human rights risks involved in their businesses overseas – the smaller a corporation is, the more limited the corporate engagement is likely to be. The bandwidth of human rights risks will therefore be correspondingly smaller. Given that responsible managers in any company know their business, it is not far fetched to suggest that the typical human rights risks would already be known or could be easily identified.

For a discussion of the »reasonableness« of the measures involved, the aforementioned is also applicable. Concerning trade union persecution, it should be remembered that the freedom of association and collective bargaining is the most fundamental human right in the work place. In the sense of social partnership, serious steps must be taken in response to threats on the life of trade unionists. In a situation like that of Colombia at present, it is not possible to exclude the possibility that trade unionists will be murdered. This difficulty, however, should not serve as an excuse for taking no protective measures at all.

Supplier Firms and Subsidiaries with Minority Participation

The previous considerations on due diligence were developed with reference to examples of controlled subsidiaries. When talking about supplier firms, or subsidiaries with no majority participation, the decisive questions are different. Here, the discussion of the parent company's responsibility for human rights abuses must address the extent to which the parent company can influence the subsidiary or supplier, and how this influence can be exerted.

According to the UN Framework and Guiding Principles, corporations are always obliged to conduct a human rights risk-analysis of all their activities. They must create a management system that provides a concrete overview of human rights risks. Without this, they will be unable to fulfil their basic obligation to respect human rights.⁴⁰ German law also compels corporations to establish organisational systems that prevent rights violations by third parties. Since a corporate organisation includes the relationship with suppliers and subsidiaries with minority shareholding it could be argued that parent

39. Cf. Institute for Business and Human Rights (2011).

40. The OECD makes similar recommendations on subsidiaries and suppliers in relation to weak governance; OECD (2006: 21 et seq., 27 et seq.)

companies are also obliged to identify possible human rights risks under German law, when harmonized with the UN Guiding Principles.

According to the UN Guiding Principles, when a human rights risk-analysis shows that human rights are being threatened or even abused in a non-controlled subsidiary or supplier, the parent company has to react. It is not sufficient to claim a lack of influence: the UN Guiding Principles state that every entity linked to the human abuse must do everything within its power to mitigate human rights abuses.⁴¹ If there is no sufficient leverage over its supplier the parent must seek to gain influence.

In practice, a corporation can influence its supplier in different ways. It will be always possible to draw attention to human rights problems by putting them on the agenda of business meetings. Various different tools are available depending on the particular constellation of the issue. By deploying these tools, corporations could succeed in changing practices in the subsidiary or supplier. Which measures are reasonable and appropriate in a specific situation must be decided on a case-by-case basis.

The extent of responsibility for supplier firms seems to be, however, dependent on the type of outsourcing involved. Some corporations outsource primary tasks – such as the production of marketed products. Others pass over tasks that do not belong to its core business. The more central to the business the outsourced task is, the more stringent the obligation should be in terms of risk-analysis and efforts to rectify unsatisfactory situations. According to the Commentary on the UN Guiding Principles, businesses confronted with human rights violations in supplier firms may have to terminate the partnership if extensive efforts to improve the situation do not yield results.⁴² Corporations should begin by using their influence on the subcontractor to improve the human rights problem. If the corporation does not have any influence, it should take steps to increase its influence. If these efforts fail to stop the abuses, and the problem remains severe, the company must consider terminating the contractual relationship. This process can happen more quickly in cases where

the supplier is not responsible for supplying essential products.

When discussing corporate obligations to prevent human rights abuse, corporations occasionally argue that the organisation and surveillance of all subsidiaries and suppliers is impossible, given the complexity of corporate structures and supplier relationships (Jütte-Overmeyer 2008: 375-386). In putting forward this argument, corporations use the supposed legal or practical impossibility to block discussion of even the basic grounds for duties. To counter this argument, one should note that corporations developed such complex structures for themselves. It is not acceptable, then, that corporations are sidestepping their obligations under human rights due diligence by restructuring themselves in a way that makes monitoring impossible.

Causality

In a successful law suit the plaintiffs will have to establish that the violation of rights was caused by a contravention of the due diligence principles described above. In addition, it must be shown that the violation of protected rights was a typical result of violation of duty of care, and not simply an isolated occurrence arising from exceptional conditions.

5.4 Preliminary Conclusion: Existing Duties of Care Suitable for Transnational Claims for Human and Labour Rights Violations

Interacting with principles developed at the UN level, the basic principles of duty of care in German law provide sensible guidelines for determining the duties of care of parent companies in relation to their subsidiaries and suppliers. Although anything from well established it can be argued that corporations are obliged to know of human rights risks arising from all their business activities and to prevent human rights violations being committed through any activity over which the corporation has influence. The degree of influence is determined by the extent of the corporation's concrete participation in, and control over, the subsidiary.

The establishment of systematic human rights risk-analyses can be seen as part of a duty of care of a parent

41. UN Guiding Principles 17-19; similarly, Ruggie (2010).

42. Commentary to UN Guiding Principles (UNHRC 2011: 19).

company in regard to its subsidiaries and suppliers. The concrete measures resulting from such a risk-analysis must be determined on a case-by-case basis and are dependent on varied parameters. It will depend, for example, on whether the human rights risks existed prior to the initiation of corporate activities, or whether the activities themselves gave rise to the risks. Other decisive factors will include: the extent of the corporation's participation in the subsidiary, how close the relationship is between the corporation and the supplier, and the importance of the supplier's tasks to the wider work of the corporation.

6. Conclusion

This analysis has demonstrated that civil law claims before German courts for human rights abuses committed by the subsidiaries or suppliers of German corporations are feasible. At present, however, there is a total lack of precedent cases, resulting in a corresponding lack of legal discussion around the issues of tort law highlighted here.

On the basis of current European conflict of laws, the cases under discussion here would, as a rule, be judged according to foreign law. German law would only be applied in exceptional situations. As a consequence, any discussion on law reform must first examine whether the law under review would in fact be applied. This study has found that German law would most probably be applicable for cases of duty of care. As such, the field of duty of care is a particularly promising area for legal development. In addition, existing standards of duties of care in German law offer a good starting point for determining in concrete terms the ways in which a parent company is obliged to prevent human rights abuses in subsidiaries and supplier firms. These standards can be sensibly supplemented with the Guiding Principles developed at the UN level. Doing so would underline the obligation within German law to create systematic and routine human rights risk-assessments in foreign suppliers and subsidiaries.

Human rights risk-analyses as demanded by the UN Guiding Principles cover all subsidiaries and supplier firms and give rise to further behavioural obligations. Which actions should follow the risk assessment is determined by the available means of influencing the human rights hazards. These available means are in turn

determined by the legal and economic relationships of control and participation between the corporation and the subsidiary.

Furthermore this study came to the conclusion that certain human rights typically threatened in the global supply chain are protected in almost all legal systems. This is particularly true of personal rights such as the rights to life, health, and freedom of movement, as well as the right to be protected from discrimination. Important human rights such as the freedom of association may also be covered, even if the violations did not result in damages to health or similar abuses. This issue, however, has not yet been clarified. Bearing in mind the injustice of these human rights violations, this lack of clarification is highly unsatisfactory. Domestic legislation should provide adequate recognition of such injustices.

7. Policy Recommendations

In the current situation, workers whose labour and human rights have been violated by Indian supplier or subsidiary companies face significant obstacles when seeking compensation from German companies. In order to strengthen these legitimate claims, German policy makers should consider the following:

A. Duty of Care

Standards of duty of care for corporations working with overseas subsidiaries or suppliers should be clarified, for example in the code of commercial law (*Handelsgesetzbuch*, HGB). These standards should correspond to the requirements of the UN Framework and the UN Guiding Principles.

B. Clarification of Exceptions to the Rome II Regulation

It should be clarified that in relation to human rights risks in foreign subsidiaries and suppliers, duty of care principles in German law are binding upon German corporations according to the exception clauses in Art. 17 of the Rome II Regulation. Art. 7 Rome II Regulation should be extended to cover extraterritorial human rights violations.



C. Expansion of Tort Law Provisions

Existing tort law provisions should be expanded to also cover infringements on the freedom of association and excessive labour exploitation. Alternatively, it should be made clear that acts such as infringements on the freedom of association and excessive labour exploitation are already included within present tort law, even if they do not result in bodily harm.



References

- Alstom, P., and J. Heenan** (2004): Shrinking the International Labor Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work? New York.
- Arnim, C. von** (2000): *Haftungsdurchgriff im deutschen Kapitalgesellschaftsrecht und Piercing the Corporate Veil im Recht der U.S.-amerikanischen Corporation*. In: *Neue Zeitschrift für Gesellschaftsrecht*: 1001-1006.
- Augstein, D.** (2010): Study on the Legal Framework on Human Rights and the Environment Application to European Enterprises Operation Outside the European Union. Edinburgh.
- Baeter, J.** (2005): § 823. In: T. Soergel and J. Baeter, *Kommentar zum BGB*, vol. 10, §§ 823 853: para 18, 211.
- Bangladesh Institute of Labour Studies** (2009): Women's Participation in Trade Unions in Bangladesh: Status, Barriers and Overcoming Strategies. Dhakar.
- BGH** (*Bundesgerichtshofentscheidungen in Zivilsachen*) (1984): In: *Neue Juristische Wochenzeitschrift*: 801 et seq.
- ECCJ (European Coalition for Corporate Justice)** (2010): Principles and Pathways: Legal Opportunities to Improve Europe's Corporate Accountability Framework. Brussels.
- Emmerich, V., and M. Habersack** (2010): *Aktien- und GmbH-Konzernrecht. Kommentar*, § 311: para. 13.
- Falk, R.** (2011): *Direktinvestition und Subcontracting im Ausland: Globalisierung im Krisenmodus*. In: *Informationsbrief Weltwirtschaft & Entwicklung*: 3.
- Fleischer, H.** (2006): *Handbuch des Vorstandsrechts*. München, Beck: § 13: para. 101.
- Guo, L., and S. Ho** (2008): People's Republic of China. In: Oxford Pro-Bono Publico (Publ.), *Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse*. Oxford: 190, 191.
- Huarte Melgar, B., K. Nowrot, and Y. Wang** (2011): The 2011 Update of the OECD Guidelines for Multinational Enterprises: Balanced Outcome or an Opportunity Missed?, Halle/Saale.
- ICJ (International Commission of Jurists)** (2008): Panel Report, vol. 3: Corporate Complicity & Legal Accountability. Geneva: 46.
– (2009): Human Rights Abuses Involving Corporations: South Africa. Geneva: 10 et seq.
- ILO (International Labour Organisation)** (2007): General Survey. Geneva: 20.
– (2005): A Global Alliance Against Forced Labour Global Report Under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work 2005. Geneva: 6.
- Institute for Business and Human Rights** (2011): The »State of Play« of Human Rights Due Diligence. Anticipating the Next Five Years. Volume One: General Overview. London.
- Junker, A.** (2007): *Die Rom II-Verordnung: Neues Internationales Deliktsrecht auf europäischer Grundlage*. In: *Neue Juristische Wochenzeitschrift*: 3675 et seq.
– (2010): Art. 16 Rome II Regulation. In: *Münchener Kommentar zum BGB*, vol. 10. München, Beck.
- Jütte-Overmeyer, J.** (2008): *Caught Between Two Worlds: Erfahrungen westlicher Einzelhandelsunternehmen mit Sozialklauseln in globalen Beschaffungsmärkten*. In: *Verfassung und Recht in Übersee*: 375-386.
- Kaleck, W., and M. Saage-Maaß** (2010): *Kämpfe um soziale Rechte: Können strategische Prozesse gegen transnationale Unternehmen einen Beitrag leisten?* In: *Juridikum*. Vienna: 436-448.
- Kampagne für saubere Kleidung** (2008): *Wer bezahlt unsere Kleidung bei Lidl und Kik?* Bonn.
- Kocher, E.** (2010): *Corporate Social Responsibility: Eine gelungene Inszenierung?* In: *Kritische Justiz*, Baden-Baden: Nomos: 29-37.
- Kolben, K.** (2010): Labor Rights as Human Rights? *Virginia Journal of International Law*: 450-484.
- Mares, R.** (2011): The Limits of Supply Chain Responsibility: A Critical Analysis of Corporate Responsibility Instruments. *Nordic Journal of International Law* 79: 237-244.
– (2011/12): Responsibility to Respect: Why the Core Company Should Act When Affiliates Infringe Human Rights. In: (Publ.): *The UN Mandate on Business and Human Rights: Siege or Cavalry Charge?* Brill, Martinus Nijhoff.
- Misereor, Brot für die Welt, and ECCHR (European Center for Constitutional and Human Rights)** (2011): *Transnationale Unternehmen in Lateinamerika: Gefahr für die Menschenrechte?*
- Musiolek, B.** (2010): *Geschlechtergerechtigkeit und freiwillige Instrumente der Unternehmensverantwortung in globalen Produktionsnetzwerken und Lieferketten*. Duisburg: *Institut für Entwicklung und Frieden*: 41.
- OECD (Organisation for Economic Co-operation and Development)** (2006): Weak Governance Zones Risk Awareness Tool for Multinational Enterprises. Paris: 21 et seq., 27 et seq.
- OECD Watch** (2010): 10 Years On: Assessing the Contribution of the OECD Guidelines for Multinational Enterprises to Responsible Business Conduct: 43-54.
- (OLG) Higher Regional Court Munich** (1985): OLGZ 1985, 466-467.
- Plank, L., C. Staritz, and K. Lukas** (2010): Labour Rights in Global Production Networks. An Analysis of the Apparel and Electronics Sector in Romania. Vienna.
- Pohl, D., and N. Schulte** (2008): Joint-Venture-Gesellschaften. Cologne: 136.
- Ruggie, J.** (2010): The Corporate Responsibility to Respect Human Rights in Supply Chains. 10th OECD roundtable on corporate responsibility. Paris, June 30.
- SALIGAN (Sentro ng Alternatibong Lingap Panlegal)** (2009): Annual Report. Manila: 19 et seq.
- Schmidt, J.P.** (2009): *Zivilrechtskodifikation in Brasilien*. Tübingen: Mohr Siebeck: 527-533.



- Schwab, B.** (2010): *Das neue Arbeitnehmer-Entsendegesetz*. In: *Neue Zeitschrift für Arbeitsrecht – Rechtsreport*: 225.
- Thümmel, R.** (1996): *Persönliche Haftung von Managern und Aufsichtsräten*. Baden-Baden: Nomos: para. 272.
- Thüsing, G.** (2007): AGG. In: *Münchener Kommentar zum BGB*, vol. 1-2. München, Beck: para. 86.
- UNCTAD (United Nations Conference on Trade and Development)** (2011): *World Investment Report 2011: Non-equity Modes of International Production and Development*, New York and Geneva: United Nations: 5 et seq.
- UNHRC (UN Human Rights Council)** (2008): *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. UN doc A/HRC/8/5, 7. April.
- (2011): *Guiding Principles on Business and Human Rights: Implementing the United Nations »Protect, Respect, Remedy« Framework*. UN doc. A/HRC/17/31, March 21.
- Utz, B.** (2011): *Update oder Upgrade? Eine Bilanz zur Revision der OECD-Leitsätze für multinationale Unternehmen*, Berlin.
- Voigt, B.** (2008): § 15. In: A. Schleusener, J. Suckow, and B. Voigt, *Kommentar zum AGG*. Köln: Luchterhand: para. 23.
- Wagner, G.** (2008): *Comparative Tort Law*. In: M. Reimann, and R. Zimmermann (Publ.): *The Oxford Handbook of Comparative Law*. Oxford: Oxford University Press: 1003 – 1013.
- (2009a): § 823. In: *Münchener Kommentar zum BGB*, vol. 4. München, Beck: para. 99.
- Wick, I.** (2009): *Arbeits- und Frauenrechte im Discountgeschäft. Aldi-Aktionswaren aus China*. Siegburg.
- Wong, Y.F., and A. Kok** (2008): Malaysia. in: *Oxford Pro-Bono Publico* (Publ.), *Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse*, Oxford: 177, 186.
- Zimmer, R.** (2008): *Soziale Mindeststandards und ihre Durchsetzungsmechanismen. Sicherung internationaler Mindeststandards durch Verhaltenskodizes?* Baden-Baden: Nomos.



About the author

Miriam Saage-Maaß holds a PhD in law and works in Berlin as Program Director for Business and Human Rights at the European Center for Constitutional and Human Rights (ECCHR).

Imprint

Friedrich-Ebert-Stiftung | Global Policy and Development
Hiroshimastraße 28 | 10785 Berlin | Germany

Responsible:
Britta Utz | Human Rights

Tel.: ++49-30-269-35-7429 | Fax: ++49-30-269-35-9246
www.fes.de.GPol/en

To order publications:
Sandra.Richter@fes.de

Global Policy and Development

The department Global Policy and Development of the Friedrich-Ebert-Stiftung fosters dialogue between North and South and promotes public and political debate on international issues in Germany and Europe. In providing a platform for discussions and consultation we the aim at raising awareness of global interdependencies, developing scenarios for future trends and formulating policy recommendations.

This publication is part of the working line »Human Rights«, in charge: Britta Utz, Britta.Utz@fes.de.

The views expressed in this publication are not necessarily those of the Friedrich-Ebert-Stiftung or of the organization for which the author works.

This publication is printed on paper from sustainable forestry.



ISBN: 978-3-86872-965-8