4 Corporate responsibility to respect human rights vis-à-vis legal duty of care

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4.1 Introduction

This chapter deals with the intersection of corporate responsibility to respect human rights and tort law in the context of complex corporate structures and business relationships. More specifically, it considers the relationship between a company's duty of care, on the one hand, and the same company's responsibility to seek to prevent or mitigate adverse human rights impacts linked to its operations, products or services by its business relationships, such as those concerning subsidiary companies (as a headquarters, parent, or controlling company), contractors, and other business partners. In this regard, this chapter proposes three types of legal reform: a disclosure obligation for a company as regards the control it exercises over its business partners (Scenario I), a rebuttable presumption of control a company exercises over its business partners (Scenario II), and a statutory duty for a company to conduct human rights due diligence (Scenario III).[1]

The analysis builds on the answers to two consecutive surveys solicited from distinguished legal experts from France, Germany, the Netherlands, Sweden, Switzerland, and the UK. Altogether, the authors received twenty opinions from

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experts, whose names are listed in the acknowledgements. The aim of these surveys and of this work was threefold:

1. Clarify obstacles connected to tort law that undermine the realization of corporate responsibility to respect human rights.
2. Identify the most feasible and effective reforms to overcome these obstacles and improve access to remedy for victims of human rights abuse.
3. Consider the scope and other characteristics of such reforms, taking into account the principles of tort law, precedents, and legitimate interests of corporate actors.

The authors have examined eight different scenarios for reforms and a number of associated questions, including role and definition of control in the context of corporate groups and business relationships, connection between the definition of human rights violations and the tort concept of harm, the effect of corporate statutory duties on the position of victims, and the causation between meeting or failing standards of care and harm suffered. Three of these reform scenarios are presented alongside assessment of several options concerning their scope.

These scenarios consider the situation of a legal action launched before the court of an EU member state by victims of corporate human rights abuses against an EU company that holds control over another company that has caused or contributed to the abuse in a non-EU state. The legal basis of such action in tort law is that the defendant-company breached its duty of care by causing, contributing or not preventing a human rights abuse in the operations of another company or other entity over which it exercised control with respect to the harmful activities.

This does not consider the cases where the liability of the parent company is based on piercing the corporate veil, under corporate law. The conditions for piercing the corporate veil differ in different countries, but in general they include situations where the subsidiary had no free will, was set up for fraudulent purposes, or established to avoid an existing obligation.

This chapter proposes three options for legal reform, which would also be complementary to one another if all are adopted:

- Scenario I: facilitating victims' access to evidence of the defendant-company's control over its business partner, e.g. subsidiary or contractor that has committed the alleged human rights violation.
- Scenario II: in terms of burden of proof, presuming the existence of such control when certain conditions are met that show control prima facie.
- Scenario III: introducing a company's statutory duty to identify, prevent, and take action to cease human rights abuses by its business partners, analogous to the human rights due diligence outlined in the UN Guiding Principles.

Before discussing each of these scenarios in detail in separate sections, this chapter briefly sets out their legal context.

4.2 Legal context

4.2.1 Implementing the UN Guiding Principles

The EU law on jurisdiction in civil matters[2] allows victims of corporate human rights abuse to bring a tort claim against a company domiciled in the EU, including when the harm that provides basis for the claim occurred outside of the EU. Often, this is the only option for victims of corporate human rights abuses committed in non-EU states to get access to remedy, due to the corruption or lack of capacity of judiciary in their countries, or because the company responsible for the harm has limited assets located in these countries.

The UN Guiding Principle 26 outlines the duty of a state to ensure the effectiveness of their judicial mechanisms and remove barriers that could lead to a denial of access to remedy.[3] The commentary to this principle states: 'Legal barriers that can prevent legitimate cases involving business-related human rights abuse from being addressed can arise where, for example: The way in which legal responsibility is attributed among members of a corporate group under domestic criminal and civil laws facilitates the avoidance of appropriate accountability; [or] Where claimants face a denial of justice in a host State [where the harmful event has occurred] and cannot access home State courts [where the company-defendant is domiciled] regardless of the merits of the claim.'[4]

The possibility for victims of human rights abuses to start civil proceedings against the company that is controlling, or greatly influencing, the company which has caused the harm is in line with the scope of the corporate responsibility to respect human rights, and the human rights due diligence process relating thereto, described in the UN Guiding Principles. This twin concept consists of two elements that require business enterprises to:

(a) avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
(b) seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

These elements bear similarity to the duty of care concept in tort law, which requires a person that is found liable of having acted with negligence thereby

2 EU Regulation No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), *OJ L 351/1*, 20 December 2012, Art. 2.

3 Guiding Principle 26 states as follows: 'States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.'

4 UN Doc. A/HRC/17/31, 21 March 2011, Commentary on Guiding Principle 26.

causing harm to another, to compensate the victim of such harm.[5] A breach of the corporate responsibility to respect human rights can, therefore, amount to a breach of the duty of care.

The question of under which conditions a company can be held liable for acts of other legally separate persons such as subsidiaries,[6] contractors, and other business partners violating human rights, has only rarely been subject of court decisions in the Member States of the EU.[7] Therefore, the answer to this question is subject to debate. One of the obstacles for victims is to prove that the company exercised control over the relevant activities of the (legal) person(s) causing the harmful situation, which depends on the circumstances of the case. If the company exercises control it is usually only liable if it can be considered to have breached the duty of care towards the third parties suffering harm as a result of the situation. Although the exact requirements will differ across jurisdictions, a pivotal consideration for this breach of the duty will be whether, considering the likeliness and magnitude of the potential harm suffered by the victims of a human rights violation, the company should have taken measures to prevent the harm from occurring or to mitigate its consequences.

In practice, one of the major problems for victims to access remedy is that they are usually not in a position to prove the existence of such control. Indeed, in many situations the victims lack evidence to prove their case, because much of the relevant information on the control relationship in corporate structures and other relationships is not within their reach.

4.2.2 Following the general legal trend

The three scenarios that are outlined in this chapter correspond with the general tendency in law to improve transparency and accountability in the operations of business enterprises. In Europe, there have been several attempts to embed the corporate duty to prevent human rights impacts by business partners (i.e. by their subsidiaries and contractors), both in company law and civil law. First, in 2014 the EU adopted the non-financial reporting directive, which will require large corporations to report on how they address risks of human rights impacts linked to their operations, including by products, services, and business

5 For further details, see A. Sanders, 'The impact of the 'Ruggie framework' and the United Nations guiding principles on business and human rights on transnational human rights litigation'. In *The business and human rights landscape: moving forward, looking back,* K. E. Bravo & J. Martin (eds.) (2015) Cambridge University Press: Cambridge, 288–315.

6 In this chapter the term 'subsidiary' includes all legal entities that are part of the group, including subsubsidiaries.

7 See, for example, the English cases of *Chandler v Cape* [2012] EWCA Civ 525 and *Thompson v The Renwick Group plc* (2014) EWCA Civ 635.

relationships.[8] The EU institutions discuss further steps in the area of conflict minerals[9] and garment supply chains.[10]

Second, in the UK, the Modern Slavery Act (2015) requires businesses to publish an annual statement that confirms the steps taken to ensure that slavery and human trafficking are not taking place in the business (or in any supply chain).[11]

Third, the French Parliament is discussing a reform of the Commercial Code recognizing a duty of vigilance of parent companies with content and scope analogous to the concepts outlined in the UN Guiding Principles.[12]

Fourth, in Switzerland a coalition of 77 organizations launched a popular initiative that aims to put to a public vote in referendum a proposal for legal reform that would oblige companies to carry out due diligence and introduce their liability for human rights abuses and environmental violations caused abroad by companies under their control.[13]

In March 2016, the Committee of Ministers of the Council of Europe adopted a recommendation[14] providing that Member States should take measures that: (a) encourage or, where appropriate, require, that business enterprises carry our human rights due diligence throughout their operations; (b) encourage and, where appropriate, require such businesses to provide information on their efforts

8 EU Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, *OJ L 330/1*, 15 November 2014.

9 See C. Barbière, EU institutions still divided over conflict minerals (5 February 2016). Retrieved from EurActive website: http://www.euractiv.com/section/development-policy/news/eu-institutions-still-divided-over-conflict-minerals/, accessed 30 May 2016.

10 On 25 April 2016, the European Commission hosted the first High-level Conference on responsible supply chain management in the garment sector, to promote successful existing initiatives, including from Member States and industry, and provide a platform for continuing the dialogue at EU level (see European Commission, High-level Conference on Responsible Management of the Supply Chain in the Garment Sector (n.d.). Retrieved from https://ec.europa.eu/europeaid/news-and-events/high-level-conference-responsible-management-supply-chain-garment-sector_en, accessed 30 May 2016).

11 *Modern Slavery Act 2015* (cl. 30).

12 See additional and up-to-date information on the official French website of legal information: http://www.vie-publique.fr/actualite/panorama/texte-discussion/proposition-loi-relative-au-devoir-vigilance-societes-meres-entreprises-donneuses-ordre.html, accessed 30 May 2016. The latest draft of the bill, as approved by the French National Assembly on 23 March 2016 is available at: http://www.assemblee-nationale.fr/14/ta/ta0708.asp, accessed 30 May 2016.

13 See E. Umlas, Human rights due diligence: Swiss civil society pushes the envelope (n.d.). Retrieved from the Business and Human Rights Resource Centre, http://business-human-rights.org/en/human-rights-due-diligence-swiss-civil-society-pushes-the-envelope, accessed 30 May 2016; see also the official website: http://www.konzern-initiative.ch/ accessed 30 May 2016.

14 Council of Europe (Committee of Ministers), Recommendation CM/Rec(2016)3 on human rights and business, 2 March 2016.

on corporate responsibility to respect human rights;[15] and (c) ensure that human rights abuses caused by business enterprises give rise to civil liability, and examine the possibility of creating civil causes of action against business enterprises that cause human rights abuses as a consequence of a failure to carry out adequate due diligence processes to prevent or mitigate risks to human rights.[16]

In November 2014, the Office of the UN High Commissioner for Human Rights launched an initiative 'to make domestic legal responses fairer and more effective for victims of business-related human rights abuses, particularly in the most severe cases.' The initiative, called the 'Accountability and Remedy Project' (ARP), 'aims to deliver credible and concrete recommendations and guidance to States to enable more effective implementation of the Access to Remedy pillar of the UN Guiding Principles.' On 10 May 2016, the High Commissioner published the ARP final report, which will be discussed at the 32nd session of the UN Human Rights Council in June 2016.[17] This report includes guidance to UN Member States that 'The principles for assessing corporate liability under domestic private law regimes are properly aligned with the responsibility of companies to exercise human rights due diligence across their operations.'[18]

Finally, there are multiple examples in law recognizing the liability of companies for the acts of other entities, such as their subsidiaries, business partners, or agents. These examples can be found in environmental law,[19] labour law,[20] and criminal law.[21] The conditions for liability differ depending on the nature

15 *Ibid*., paras 20 and 21.

16 *Ibid*., para. 32 and Explanatory Memoradum, para. 54.

17 UN Doc. A/HRC/32/19, 10 May 2016.

18 *Ibid*., Policy Objective no. 14.

19 See, for example, U.S. Comprehensive Environmental Response, Compensation, and Liability Act – 'CERCLA' (42 U.S.C. § 9601–9675) and Canadian Waste Management Act, R.S.B.C. 1996, c. 482. In *United States v Bestfoods*, No. 97–454 (1998) the Supreme Court of the United States held that parent companies can be directly liable under CERCLA § 107(a) if they are directly involved in the subsidiary's management of hazardous substances.

20 The Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals (*OJ L 168,* 30 June 2009) provides that both an employer who employed illegally staying third-country nationals and a contractor to whom the employer was subcontractor, should be liable for financial sanctions and back payments. In the UK, the Pensions Act 2004 (cl. 35) provides that, if the pension fund established by the service company that employs employees of the group of companies goes into deficit, the other group companies cannot insulate themselves from that deficit and can be made to contribute to the fund to meet the liabilities to the employees.

21 In the UK, s. 7 of the Bribery Act 2010 (cl. 23), recognizes a criminal offence of the failure of commercial organizations to prevent bribery on their behalf. Bribery may be carried out by an employee, an agent, a subsidiary, or another third party, as found in s. 8. In France, on 25 September 2012, the Cour de cassation in Paris found the company Total liable for a criminal offence as regards the tanker Erika oil spill in 1999. Erika was operated by a subcontractor of Total's subsidiary. The court has made clear that criminal liability could be found liable beyond legal separation made between two companies when de facto they work as a single one, so that such separation can be considered as a 'legal fiction'. (Cass (crim.), judgement no. 3439, 25 September 2015).

and the purpose of the regulation. In some instances, the liability of the company is absolute, such as, for example, in competition law. In other cases, liability is built on principles similar to the human rights due diligence concept, that is, that the company may discharge its liability if it took all reasonable steps to prevent the violation.

4.3 Scenarios

4.3.1 Scenario I: access to evidence on control

4.3.1.1 Background

The exact conditions under which a company is liable for not having prevented a human rights violation by its business partner (e.g. a subsidiary or a contractor) have not yet been fleshed out comprehensively in the case law and they are subject to debate. Generally speaking, however, liability of the company will require the victim to prove that the company breached a duty of care that it owed to him, and that his damage was caused by this breach. One of the conditions for the breach of a company's duty of care, when this company did not cause the harm itself, is that the company exercised sufficient control over the business partner causing the harm, and that the company did not use this control in such a way as to prevent the business partner from violating human rights, while if 'acting like a reasonably acting company put in the same conditions',[22] the company would have done so. A pivotal consideration for this will be whether, considering the likeliness and magnitude of the potential harm to third parties by violating human rights, the company should have taken measures to prevent the harm from occurring or to mitigate its consequences.

Control can be of a formal character (such as in parent-subsidiaries relationships) or mainly factual (such as in supply chain situations). It may also imply that the company one way or another had the power to influence the conduct of its business partner. The case law does not yet provide a clear definition as to what amounts to sufficient control. The courts have to assess this on a case-by-case basis and the assessment may differ per jurisdiction. The usual default position is that it is for the victim to provide the court with satisfactory evidence that the company exercised sufficient control over its business partner to influence its conduct. This illustrates the importance of victims gaining access to the relevant information.

Although much evidence of a company's business relationships may be collected and obtained by claimants from publicly available sources, this is usually

22 The 'reasonable company' is defined based on several criteria that depend, notably, on the size and sector of the company.

a very time-consuming and costly affair. Moreover, claimants can simply not access evidence that is in the realm of the company. The latter is particularly problematic with respect to evidence that a company controlled or influenced the actions which caused or contributed to the harm, but which were carried out by a third party, such as a company's subsidiary or a contractor.

One of the main reasons why victims of human rights abuses often cannot get access to relevant information to demonstrate the liability of a company is that the national rules on disclosure of evidence that are in force in the forum country often do not allow for this.

In this respect, common law and civil law systems differ considerably. Roughly speaking, common law systems of civil procedure contain general rules on disclosure of evidence[23] whereas civil law systems of civil procedure do not.[24] In England and Wales, there is a general duty to disclose evidence relevant to the case under the Civil Procedure Rules (CPR). In practice, this means that before the trial 'a party discloses a document by stating that the document exists or has existed' and 'a party to whom a document has been disclosed has a right to inspect that document' and obtain a copy. 'Document' has a very broad meaning and includes anything in which information of any description is recorded, covering any form of electronic document, on any media device. The only limitations are the overriding principle of proportionality of the disclosure requests, which should be limited by either date, persons, place or categories, and the fact that privileged documents are limited to inspection only.

In civil law systems, of civil procedure this option is not available. It is usually for the claimant to request the court to order the defendant to disclose specific documents. The burden of adequately specifying the documents and to justify a legitimate interest in inspection of those documents is on the claimant. The courts are generally very reluctant to allow such a request and to order the defendant to disclose one or more of the specified documents.[25] This means that companies have no incentive to be transparent about their involvement

23 In this chapter the English term 'disclosure' will be used. In the US this phenomenon is known as 'discovery'. The rules differ in detail but not in principle.

24 In some jurisdictions like the Netherlands, the courts may require a defendant to provide information enabling the claimant to substantiate his claim. See Hoge Raad 20 November 1987, *Nederlandse Jurisprudentie* 1988/500 (Timmer/Deutman) and Hoge Raad 18 February 1994, *Nederlandse Jurisprudentie* 1994/368 (Schepers/De Bruijn). So far, such a rule has, however, not been applied in cases against parent companies with respect to their control over subsidiaries. In the Netherlands, legislative reform with respect to disclosure is also considered, but no specific action has yet been taken.

25 An example of a small breakthrough is Court of Appeal The Hague, *Milieudefensie a.o./ Shell*, 18 December 2015. See Liesbeth F. H. Enneking, 'Multinationals and Transparency in Foreign Direct Liability Cases. The Prospects for Obtaining Evidence under the Dutch Civil Procedural Regime on the Production of Exhibits,' 3 *Dovenschmidt Quarterly* (2013) 134–147.

because this might give a clue to claimants as to which documents they would like to request. For the claimants, this is an unfortunate position as it involves the risk of requesting the wrong documents or not all the relevant documents.

4.3.1.2 Description of Scenario I

Civil law jurisdictions introduce a specific disclosure obligation in a civil court procedure with respect to the control a parent company exercises over its subsidiaries and contractors. This would oblige a company-defendant to disclose all details of the control it exercises over its subsidiaries and contractors, and its general involvement in the management of its subsidiaries and contractors as well as its control and involvement in the specific case connected to the claim, inasmuch as this information is relevant for assessing the company-defendant's duty of care. The aim of this scenario is to limit the current discretion of the courts and to extend the basis for claimants to access information, albeit on a limited aspect of the liability question as a whole.

Effective disclosure is also key to brokering any possible early dispute resolution where appropriate (as often happens in common law jurisdictions by pre-trial out of court settlements). Thus it contributes to the limitation of time and costs of the proceedings.

This reform does not concern common law jurisdictions because they already provide for extensive pre-trial disclosure obligations.

4.3.1.3 Feasibility

For the scenario to be feasible a number of issues need to be addressed, particularly with respect to the question as to which information is legally required.

In this regard, the concept of control needs to be clarified and developed. Defining such control could be done in legislation. The legislation could provide guidelines with respect to control and leave it to the court that hears the case to apply these guidelines, specify the disclosure obligation, and tailor it to the circumstances of the case. This would allow the court to keep the disclosure obligation up to date. In fact, circumstances under which a parent company may be held liable might change over time and so may the information on control that is relevant to assess the duty of care.

The issues regarding confidentiality and competitiveness can be dealt with in line with provisions in common law jurisdictions that contain strong safeguards in this respect.

This scenario may be implemented as a procedural rule or as a substantive rule. Implementing it as a procedural rule would imply amending the national codes of procedure, which might be challenging for Member States of the EU. Implementing it as a substantive rule would mean that according to the Rome II

Regulation on applicable law,[26] the court must in principle apply the law of the place where the harm occurred. There are several exceptions provided in the Regulation, but it is disputed whether they would fit this scenario.[27] This issue needs to be clarified by drafting the reform as an overriding mandatory provision in the sense of Article 16, which would allow the court to apply it as a mandatory provision of the law of the forum country, which will usually be the country where the parent company is based, instead of the law of the country where the harm occurred.

4.3.1.4 Effectiveness

In order for the information made available to be effective, the document subject to disclosure in court should not be limited to general and formal documents but should include emails and reports of meetings, etc. Again, this can be brought in line with existing disclosure obligations in common law jurisdictions like England.

4.3.2 Scenario II: rebuttable presumption of control

4.3.2.1 Background

The background for Scenario II is the same as in Scenario I. That is, in current tort law, the victim-claimant has the burden of proof with respect to the control exercised by the company-defendant over its subsidiary, or another business partner, which caused the harm. The problem as regards access to remedy is the lack of information for claimants in this respect.

4.3.2.2 Description of Scenario II

This scenario requires a court to accept prima facie evidence[28] that a company exercises control over its subsidiaries or other business partners, and then shifts the burden of proof to the company to prove that it did not exercise such control (the shift only concerns control, not the duty of care and the breach of duty). The court could use prima facie control definitions from, for example, accounting law, thus assuming control: (i) if the company controls the majority

26 EU Regulation No. 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), *OJ L-199/40*.

27 A provision of domestic provision can be applied instead of a provision of the normally applicable law if the latter provision is manifestly incompatible with the public policy (*ordre public*) of the forum (Art. 26). Domestic mandatory provisions shall always be applied in addition the normally applicable law (Art. 16).

28 Prima facie evidence means evidence that upon initial examination appears to support a case.

of shareholders' voting rights; (ii) if the company has appointed or has the right to appoint the majority of the subsidiary's management; or (iii) if the company has the power to exercise or exercises dominant influence on its subsidiary.[29] If the company would not meet such a threshold, the court would not accept the existence of control prima facie, so the victims would have to demonstrate the existence of such control under ordinary principles of law (i.e. as usual).

This scenario is limited to claims concerning the control a company exercises as regards its potential duty of care in tort. It does not apply to other types of disputes, such as breach of contract.

The disclosure obligation described in Scenario I allows the claimant to obtain information in order to prove that the parent exercised control over the subsidiary or another business partner in the specific case, while this Scenario II goes a small step further by, under certain conditions, assuming a rebuttable presumption of control. In both scenarios the requirements for liability (duty of care, the breach of that duty, causation and damage) will still need to be established. However, both scenarios will be of considerable help for claimants in having access to remedy for the abuse of their human rights.

4.3.2.3 Feasibility

The scenario, if implemented as a reform of substantive law, would not be applied in cases for which it would be designed. The reason for this is that, according to the Rome II Regulation on applicable law,[30] the court must in principle apply the law of the place where the harm occurred. There are several exceptions provided in the Regulation, but it is disputed whether they would fit this scenario.[31] This issue needs to be clarified by drafting the reform as an overriding mandatory provision in the sense of Article 16, which would allow the court to apply it as a mandatory provision of the law of the forum country, which will usually be the country where the parent company is based, instead of the law of the country where the harm occurred.

The scenario represents a gradual rather than a departure in principle from existing law. Courts may already be able to partially alleviate the burden of proof placed on claimants where the facts speak for themselves (known as '*res ipsa loquitur*'). They should be encouraged to do so also for the questions of

29 In accounting law meeting these criteria means that the accounts of this company need to be included in the accounts of the group (See Directive 2013/34/EU of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, *OJ L 182*, 29 June 2013, pp. 19–76).

30 EU Regulation No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), *OJ L-199/40.*

31 A provision of domestic provision can be applied instead of a provision of the normally applicable law if the latter provision is manifestly incompatible with the public policy (*ordre public*) of the forum (Art. 26). Domestic mandatory provisions shall always be applied in addition the normally applicable law (Art. 16).

a parent company's control of its business partners, although the full implementation of this scenario requires a statutory reform.

The rebuttable presumption is a less radical approach than the option of a full reversal of the burden of proof of control, because it still requires claimants to present prima facie evidence. It does not radically change the legal situation of the defendant companies, in that it would not result in automatic liability for the conduct of their subsidiaries, or cause any obviously onerous issues with respect to competitiveness and confidentiality.

4.3.2.4 Effectiveness

Just like Scenario I, Scenario II requires a clear definition of the concept of the control, which should be flexible so that the courts can adapt its specific contents to the evolution of business behaviour and practices.

The proposal can be effective in helping claimants to address a failure of a company to adequately supervise its subsidiaries. However, it does not address other evidential gaps, for example regarding difficulties with respect to the scientific, technical and legal connection between the victims' injuries and company's conduct, which would need to be addressed by a more far-reaching reform of evidence disclosure.

4.3.3 Scenario III: statutory duty for a company to conduct human rights due diligence

4.3.3.1 Background

In most legal systems, it is difficult for victims of corporate human rights abuses to establish that a company owed them a duty of care not only to prevent its subsidiaries,[32] but also its suppliers and other business partners, from committing human rights abuses against them and/or to mitigate the consequences of any such abuses that have already occurred. There is very little case law clarifying this point and, if it does, such duties are only accepted, if at all, under strict and narrow conditions.

4.3.3.2 Description of Scenario III

This scenario proposes making human rights due diligence (HRDD) compulsory by creating statutory duties to identify, prevent, mitigate and cease human rights abuses for which the company conducting the HRDD is directly or indirectly responsible, that is, those caused by its business partners, over which the company can exercise control, and by providing remedies (damages, injunctions) in

32 See with respect to parents and subsidiaries, the English cases of *Chandler v Cape* [2012] EWCA Civ 525 and *Thompson v The Renwick Group plc* (2014) EWCA Civ 635.

the case that one or more of these duties should be breached. The HRDD of the UN Guiding Principles still goes considerably further than this scenario, as it is not limited to situations of legal or factual control.

The statutory duty to conduct HRDD implies a duty of care owed by the company to victims of human rights abuse that corresponds with the extent of the HRDD. Liability of the company would depend on the question of whether it effectively carried out the HRDD, and whether there was a sufficient causal connection between the harm suffered by the victims and the lack of HRDD by the company.

Conducting HRDD is not an absolute standard but depends on the circumstances of the case.[33] In this respect, the statutory standard will be comparable with the general tort law standard of 'acting as a reasonable person'. It would mean that if the company did not meet the HRDD requirements, it can be considered not to have acted as a 'reasonable person' or a 'reasonable company' put in the same conditions and would therefore be liable subject to certain additional conditions.[34] This 'reasonable company' is based on several criteria, such as the magnitude of the risk of a human rights violation, the burden for the company (in terms of time and costs) to take precautionary measures, as well as the size and sector of the company. Generally accepted industry standards would further inform the assessment of the reasonableness of an action taken to discharge the duty.

If the company has breached its duty by not properly carrying out HRDD, it will be liable for the damage that occurred as a consequence of this breach. This will, for example, be the case if carrying out HRDD would have enabled the company to identify the human rights risk that threatened the victim and to take measures to prevent the human rights violation or to limit the consequences of such violation.

If these requirements are met, the company is obliged to pay compensation for the damage suffered by the claimants.

This statutory duty may not only be enforced by victims of human rights abuses in the framework of tort law but at the same time also by public law measures. As regards the latter, one may think of enforcement by a public body (regulator) that is entitled to fine a company that breaches such duties or order the company to refrain from certain conduct or to do something, for example, providing an effective remedy for a human rights violation in which the company was involved.[35] This way of public enforcement could be akin to rules applying in competition law, consumer protection law, and financial services law.

33 Compare UN Guiding Principle 17B: 'Human rights due diligence [. . .] will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations'.

34 See section entitled 'Description of Scenario III – comparison with existing tort law'.

35 For example, in the UK, regulators have the statutory power to order a company to pay compensation to individuals or companies that have been negatively affected by the breach of statutory regulatory duties with respect to market behaviour (See Financial Services and Markets Act 2000 (cl. 8), s. 212).

DESCRIPTION OF SCENARIO III – VARIATIONS

Some variations of this scenario are conceivable. First, the company's liability might initially be limited to subsidiaries over which it exercises control, for example, as provided for in the definition in accounting law as suggested in Scenario II. Later, the scope can be extended to other business partners over whom the company exercises sufficient control (such as companies in the supply chain, for example, direct contractors that are not also the company's subsidiaries). For these latter cases, it needs to be established how much control is needed to create a legal duty and, in conjunction with this, what such a duty would entail. The content of this duty can be partially clarified by the emerging standards for value chain responsibility, such as the OECD general[36] and sector-wise due diligence standards,[37] and government supported multi-stakeholder initiatives such as the Dutch Garment Covenant.[38]

Second, the company's liability might initially be limited to certain specific human rights risks. This may link to certain human rights or to a certain level of breach such as 'serious human rights abuses'. Alternatively, it may link to internationally recognized standards, for example, with respect to environmental harm. Limiting the scope of the statutory duty in this way would also help to provide a private right of action in common law jurisdictions.[39]

Third, the burden of proof with respect to the breach of this statutory duty is, in principle, on the claimant. This burden may be alleviated with respect to information that is in the realm of the company in line with Scenario I and with respect to the legal control in line with Scenario II. It is, however, also conceivable to reverse the burden of proof of the breach of the duty altogether, or for the causation between the failure to conduct HRDD and the damage. This would mean that it is for the company to prove that it carried out due diligence/acted as would a reasonable company. Such a scenario would strengthen the position of victims of human rights abuses even further than by

36 See OECD Guidelines for Multinational Enterprises available at: http://www.oecd.org/corporate/mne, accessed 30 May 2016. As of May 2016, OECD develops detailed due diligence guidance for responsible business conduct.

37 See, for example, OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas available at: http://www.oecd.org/corporate/mne/mining.htm, accessed 30 May 2016; OECD-FAO Guidance for Responsible Agricultural Supply Chains available at: http://www.oecd.org/daf/inv/investment-policy/rbc-agriculture-supply-chains.htm, accessed 30 May 2016; and the Draft OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector available at: https://mneguidelines.oecd.org/Draft-for-Consultation-Due-Diligence-Guidance-Responsible-Supply-Chains-Garment-Footwear-Sector.pdf, accessed 30 May 2016.

38 The full document is available in Dutch on the webpage: http://www.ser.nl/~/media/files/internet/publicaties/overige/2010_2019/2016/convenant-duurzame-kleding-textiel.ashx, accessed 30 May 2016. The English translation is available at: http://eu-roadmap.nl/wp-content/uploads/2016/05/agreement-sustainable-garment-textile.pdf, accessed 30 May 2016.

39 See section entitled: 'Description of Scenario III – Comparison with existing tort law'.

introducing a statutory HRDD duty and it would lower their threshold for access to justice. Still, in such a variation, the victim would need to prove the basic facts, such as that he suffered harm because of a human rights violation by a subordinate company. It may then be up to the company–defendant to prove that it did not breach its duty, for example, because it did not have sufficient control over the violating company, or because it could not reasonably prevent the violation from happening.

Fourth, the legal duty could initially be limited to large companies.

DESCRIPTION OF SCENARIO III – RELATIONSHIP WITH UN GUIDING PRINCIPLES

The proposal brings the company's duty of care to business relationships in line with the scope of the HRDD in the UN Guiding Principles, which require companies to address risks of human rights abuses which may be directly linked to its operations, products, and services by its business relationships alongside those that the company may cause or contribute to. However, Scenario III is limited to situations of legal and factual control, whereas the HRDD of the UN Guiding Principles is not.

The traditional focus of due diligence is on identifying risks. This is understandable from the perspective of the traditional aim of carrying out due diligence: to identify (hidden) risks in the books of a company that is about to be taken over or becomes part of a merger. However, HRDD has a broader focus. It is not only aimed at identifying human rights risks but also at *preventing* and *mitigating* them. This implicitly includes *ceasing* the risk from continuing to exist. If a human rights violation occurs, the question is therefore whether the company's HRDD could and should have avoided it, ceased it, or limited its consequences.

DESCRIPTION OF SCENARIO III – COMPARISON WITH EXISTING TORT LAW

This scenario would establish a statutory duty for a company to carry out HRDD. Apart from this new step, the conditions under which the company would be liable are the same as under traditional tort law.

First, the statutory duty must have been breached, which means that it has to be established that the company did not effectively carry out HRDD.

Second, it needs to be established that the claimants have suffered damage and that this damage was caused or contributed to by the company's breach of duty of carrying out HRDD. The burden of proof for the breach of the duty, causation and damage remains, in principle, on the claimants. Claimants may, therefore, still need help from Scenarios I and II, which partially alleviate this burden with respect to the question of control.

Third, under English law, the new statute must either include an express provision for civil liability or it must be clear from the context of the statute that it allows a person damaged by the breach to bring an action for breach of

statutory duty. In fact, in common law, a breach of statutory duty does not, by itself, give rise to any private law cause of action.[40] For example, the statutory duties owed by company directors to the company exist for the benefit of its members, and not for the benefit of third parties.[41] As a result, a person suffering a human rights abuse because of a breach of a statutory duty will not necessarily be eligible to launch a legal action for damages. Conversely, in civil law jurisdictions, the breach of a statutory duty does, in principle, give someone who suffers damage because of this breach a right to compensation against the company. However, the scope of this statutory duty may imply that it does not protect certain victims, or not against certain types of harm. This may follow from the context in which the statute was adopted by parliament or from the wording of the statutory duty.

DESCRIPTION OF SCENARIO III – COMPARISON WITH EXISTING LEGAL PROPOSALS

i) The Swiss responsible business initiative In Switzerland a coalition of seventy-seven organizations launched the Swiss Responsible Business Initiative (RBI), which is a popular initiative that aims to put to a public vote in referendum a proposal for legal reform that would oblige companies to carry out due diligence and introduce their liability for human rights abuses and environmental violations caused abroad by companies under their control.[42] A popular initiative succeeds if the initiators manage to collect 100,000 signatures from Swiss citizens across eighteen months. As of April 2016, twelve months after the launch of the initiative, the initiative collected 140,000 signatures. Just before the launch of the initiative, the Swiss parliament first accepted but then narrowly voted down a motion calling for mandatory HRDD.[43]

RBI aims to embed the key principles of the corporate responsibility to respect human rights as outlined in the UN Guiding Principles into Swiss law. To this end, it presents a constitutional proposal that has four elements:

- Duty to respect: companies have to respect internationally recognized human rights and international environmental standards, and must ensure that these

40 See M. A. Jones *et al.* (eds.) *Clerk & Lindsell on Torts* (2014) London: Sweet & Maxwell, 9–06.

41 Companies Act 2006 (cl. 46), s. 172.

42 English translation of the initiative is available on the official website: http://konzern-initiative.ch/wp-content/uploads/2015/11/150421_sccj_factsheet_5_-_responsible_business_initiative.pdf, accessed 30 May 2016.

43 See further information in the complication from OECD Insights Blog prepared for OECD Week 2015: *How international investment is shaping the global economy*, OECD 2015, 8, available at: http://www.oecd.org/investment/2015-international-investment-blog-compilation.pdf, accessed 30 May 2016.

standards are respected also by companies under their control. Control is to be determined according to the factual circumstances and may also result through the exercise of power in a business relationship.
- Mandatory due diligence: companies are required to carry out due diligence. In line with the UN Guiding Principles, this duty applies to controlled companies as well to all business relationships.
- Civil liability: companies are liable for damage caused by companies under their control. They can discharge this liability if they can prove that they took all due care in line with the HRDD requirement, or that the damage would have occurred even if all due care had been taken.
- Overriding mandatory provision: the aforementioned provisions will apply irrespective of the law applicable under private international law.

The main difference of RBI from Scenario III is that the company's civil liability is not derived from the duty to conduct due diligence, which has a broader scope in RBI. Instead, the company is strictly, vicariously liable for the conduct of controlled entities. This type of liability, which is analogous to liability of employers, parents, or pet owners, provides the company with effective defence of demonstrating due diligence, which is not difficult if the company actually conducted due diligence.

This approach relieves victims of the burden of proving that the company did not exercise due care, evidence of which may not be publicly available. However, they still need to prove damage, illegality, causation between the damage and conduct of the controlled company, and control of the company-defendant over the company causing the damage.

ii) The French duty of vigilance legislative bill The French Parliament is discussing a reform of the Commercial Code recognizing a duty of vigilance of parent companies with content and scope analogous to the concepts outlined in the UN Guiding Principles.

The draft bill, in a version approved by the National Assembly on 23 March 2016,[44] requires large companies[45] to elaborate, effectively implement, and disclose a plan of vigilance. The plan should include appropriate measures to identify and prevent risks of infringements to human rights and fundamental freedoms, risks of serious injuries or environmental harms or health risks, as well as passive or active corruption, resulting directly or indirectly from

44 The draft bill is available at: http://www.assemblee-nationale.fr/14/ta/ta0708.asp, accessed on 30 May 2016. See up to date information on the legislative development on the official French website of legal information: http://www.vie-publique.fr/actualite/panorama/texte-discussion/proposition-loi-relative-au-devoir-vigilance-societes-meres-entreprises-donneuses-ordre.html, accessed 30 May 2016.

45 Those employing more than 5,000 persons in France or above 10,000 employees in France and abroad.

company's activities and activities of companies it controls and of its subcontractors and suppliers, with whom the company has an established business relationship.[46] Details on the content of the plan of vigilance and its implementation are subject to a State Council's decree of application. Every person that has a justifiable interest can require the competent jurisdiction to order a company, subject to penalty, to establish the plan of vigilance, ensure its publication and account for its effective implementation. The bill further provides that non-compliance with this duty gives rise to civil responsibility under French civil code Articles 1382 and 1383, that is, for the damage caused to another by act, imprudence, or negligence.

The duty of vigilance outlined in the bill is similar to Scenario III with several variations. First, it is limited to very large companies. Second, the earlier version of the draft included a rebuttable presumption that linked any damage to a lack or defect of the company's vigilance plan. The current draft leaves the burden of proof on the victim to prove the tort. Third, the specification of control of business partners relies on the definition of an established relationship provided in the legislation. Similarly, the standard of vigilance should be defined in an implementing decree. These definitions may increase legal certainty at the expense, however, of the court's discretion to consider factual control and evolving social expectations concerning the standards of care.

iii) The German civil society proposal A report commissioned by a coalition of NGOs in Germany sets out in detail the case for a duty of care for companies under German law. It proposes the introduction of a statutory duty of care for companies to make a human rights risk analysis, take appropriate preventive measures, and monitor their effectiveness. If a human rights risk has materialized, the company should take measures to attenuate the consequences. In the interest of the (potential) victims, the company must properly document the measures it takes. The statutory duty is both of a public law and a private law nature. First, in the case of a breach of this duty, a public authority can impose a fine on the company. Second, the breach of this duty constitutes the company's liability in tort and entitles the victims of human rights violation to compensation for the damage suffered as a consequence of this violation.[47]

46 These relationships are defined under French law as stable, regular relationships, with or without contract, with a certain volume of business, creating a reasonable expectation that such relation will last. See Code de Commerce, Art L. 442–6-I-5 and the decision of the Cour de Cassation (commercial chamber) of 18 December 2007.

47 R. Klinger *et al., Verankerung menschenrechtlicher Sorgfaltspflichten von Unternehmen im deutschen Recht*, Berlin, Amnesty International *et al.*, 2016. Available at: https://germanwatch.org/de/11970, accessed 30 May 2016.

iv) The United Kingdom Bribery Act The United Kingdom Bribery Act[48] takes a different approach by imposing due diligence as a defence against criminal liability. Section 7(1) of the Bribery Act makes clear that the company's responsibility extends to persons 'associated with the company' if they bribe another person with intention to obtain or retain business or an advantage in the conduct of business for the company. A person associated with the company is defined in section 8 as a person who performs services for or on behalf of the company, for example, as employees, agents, and subsidiaries.

On the other hand, the Bribery Act requires a company only to have procedures in place designed to prevent such persons from committing bribery (section 7(2)). HRDD goes further by focusing on the factual measures taken by the company to prevent, mitigate or cease human rights abuses in which the company is involved and to provide a remedy to victims in case no sufficient and adequate measures were taken.

4.3.3.3 Feasibility

Like Scenario II, this scenario faces the applicable law problem: according to the EU Rome II Regulation,[49] the court must apply the law of the place where the harm occurred. Also here, exceptions may be applicable, but it is not beyond dispute whether they fit this scenario. This issue needs to be clarified by drafting the reform as an overriding mandatory provision in the sense of Article 16 (see above under Scenario II), which would allow the court to apply the law of the forum country, which will usually be the country where the company-defendant is based.

Apart from this obstacle of private international law, this scenario follows the general tendency in the discourse on business and human rights. It expands the boundaries of tort law by requiring companies to look beyond their current legal borders. This seems to be a big step but in practice a large number of companies have already pledged to adhere to the UN Guiding Principles and to implement human rights due diligence. The duty also corresponds with the increasing level of self-regulation in different areas and industries. This implies that many companies follow the principles of corporate responsibility to respect human rights, as expressed in the UN Guiding Principles.

A statutory obligation to conduct due diligence is not necessarily disadvantageous for companies, as there is an increasing need for a level playing field and legal certainty. A company that actually manages its risks properly will carry out due diligence to detect risks in order to minimize any negative impact for the company. In this sense, carrying out due diligence is primarily a risk management tool and not a legal obligation. At the same time, this model encourages

48 Bribery Act 2010 (cl. 23)

49 EU Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), *OJ L-199/40.*

companies to work closely with and to monitor subsidiaries and other business partners to prevent their involvement in human rights abuses, and, where the abuses occur, to mitigate them and provide a remedy at the operational level. Responsibly acting companies that invest means, time, and money in properly carrying out due diligence may be unjustifiably disadvantaged in comparison with companies that do not make these efforts. A statutory duty to carry out HRDD could, therefore, also make a significant contribution towards a level playing field on the EU internal market.