Institutionalising A Binding Human Rights Due Diligence Obligation through Criminal-Law-Based Corporate Culture Model of Liability?

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ABSTRACT

This article examines legal implications of the corporate human rights due diligence (HRDD) obligation under the UN Guiding Principles on Business and Human Rights and its potential of becoming a binding obligation through criminal-law-based model of liability. It argues that the HRDD obligation as a binding duty of care may be established based on criminal negligence under the corporate culture liability model. Such binding duty of care may emerge when criminal law and human rights law intersect in criminal court proceeding in the domestic legal domain. This may be realised when HRDD is implemented by corporations and such HRDD exercise is adopted by court to establish the mens rea (knowledge - intent) of corporate culture model of liability. In practice, this corporate culture approach in criminal law is likely to resemble the "specific circumstances" (foreseeability-proximity-reasonableness) approach in tort law, in which HRDD exercises provide substance for "corporate culture" in the same way as it does for the "specific circumstances". The fact that a corporation implements HRDD may indicate a corporate culture, from which the courts may find evidence of relevant elements of mens rea to establish corporate criminal liability for the violation of a duty of care.

Key words: Corporate human rights obligation, corporate criminal liability, corporate culture model, business and human rights,

1. Introduction

This article aims to examine the legal implications of corporate human rights due

diligence (*hereinafter*: HRDD) obligation under the Guiding Principles on Business and Human Rights (*hereinafter*: Guiding Principles)[1]. It explores the extent to which a binding corporate HRDD obligation may be established through criminal law-based corporate culture model of liability. The relevance of this examination arises from the fact that the HRDD obligations as the core of "the corporate responsibility to respect human rights" under Pillar II of the Guiding Principles[2] was adopted by the Human Rights Council (*hereinafter*: HRC) in 2011 as a non-binding obligation.[3] This raises the question: whether with such a non-binding status would the HRDD obligation be effective in dealing with regulatory gap to hold corporations accountable due to some doctrinal and procedural matters, such as corporate legal status (legal personality), structure of corporation (corporate veil) and corporate business conducts (transnational operations). This question had motivated some countries to initiate a resolution, which was adopted by the HRC on 26 June 2014, calling for the setting-up of an inter-governmental working group "to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises."[4]

However, since the resolution was highly divisive,[5] the next day on 27 June 2014 the HRC adopted a new resolution initiated by countries that did not support an

[1] Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, UN. Doc A/HRC/17/31 (21 March 2011) [*hereinafter*: Guiding Principles].

[2] The Guiding Principles, which represents the most authoritative UN's standard on business and human rights so far, comprise of three main Pillars: the State duty to protect human rights (Pillar I), the corporate responsibility to respect human rights (Pillar II) and access to effective remedy (Pillar III). See *supra* note 1.

[3] In presenting the Guiding Principles to the Council on Human Rights in 2011, Ruggie asserted its non-binding nature. *See* J. Ruggie, *Presentation of Report to United Nations Human Rights Council Special Representative of the Secretary General for Business and Human Rights*, Geneva, 30 May 2011 <http://www.ohchr.org/Documents/Issues/TransCorporations/HRC%202011_Remarks_Final_JR.pdf> accessed 22 May 2017.

[4] The resolution was proposed by Ecuador and South Africa, and cosponsored by Bolivia, Cuba and Venezuela. See Human Rights Council, *Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, A/HRC Res. 26/9 (26 June 2014), para. 9.

[5] 20 states agreed (Algeria, Benin, Burkina Faso, China, Congo, Cote d'Ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Russia, South Africa, Venezuela, and Vietnam), 14 states rejected (Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Montenegro, South Korea, Romania, Macedonia, the United Kingdom, and the United States of America) and 13 states abstained (Argentina, Botswana, Brazil, Chile, Costa Rica, Gabon, Kuwait, Maldives, Mexico, Peru, Saudi Arabia, Sierra Leone, and the United Arab Emirates).

internationally binding treaty governing the activities of business enterprises.[6] This new resolution basically opted (1) to continue the mandate of the inter-governmental working group for another three years, (2) to reaffirm the normative substance of the Guiding Principles and (3) to strengthen domestic measures in order to implement the Guiding Principles.[7] The question is then how and to what extent can states develop such a non-binding corporate human rights obligation, in particular the HRDD obligation under the Guiding Principles, to become a binding one within their national legal systems in order to deal with the conduct of corporate entities operated within and outside their territories?

While the non-binding status of the HRDD obligation may lead some people to overlook its legal implications based on the assumption that it only creates moral obligation,[8] it should be noticed that the HRDD obligation under the Guiding Principles exists within a framework that is not "a law-free zone".[9] This means that despite its non-binding status, it has legal implication in its implementation. In practice, it can create direct duties of care upon the corporations that accept it and as a result a "failure to use due diligence is evidence of a breach of such duty."[10] In other words, in practice the human rights due diligence exercises can become a legal process, despite in principle not always being a legal obligation.[11] In this sense, the human rights due diligence exercise may lead to the creation of a legally binding duty of care for corporations to observe human rights.[12]

Recent state practices have indicated that this legal development occurs when human rights law intersects with other fields of law in legal proceedings of the courts or in parliamentary enacted laws. This legal development has been seen, for instance, at the intersection between human rights law and tort law, such as *Chandler v Cape Plc* in

[6] Human Rights Council Resolution 26/22, *Human Rights and Transnational Corporations and Other Business Enterprises*, A/HRC/ Res 26/22 (27 June 2014). It was initiated by Argentina, Ghana, Norway and Russia.
[7] *Id*.
[8] P. Muchlinski, *Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance and Regulation,* Business Ethic Quarterly (2012) 22(1),146.
[9] J. Ruggie, *Business and Human Rights: Further Steps Toward the Operationalization of the 'Protect, Respect and Remedy' Framework,* UN. Doc A/HRC/14/27 (9 April 2010) para 66 [*hereinafter*: Ruggie Report 2010].
[10] Muchlinski *supra* note 8, 146.
[11] O. Martin-Ortega, *Human Rights Due Diligence for Corporations: From Voluntary to Hard Law at Last?* Netherland Quarterly of Human Rights (2013) 31 (4), 52.
[12] Muchlinski *supra* note 8, 155, 177.

the UK, *Akpan v. Royal Dutch Shell* in the Netherlands and *Choc v. Hudbay* in Canada,[13] and the Duty of Vigilance Law in France,[14] all of which have been discussed at length in the literature. Another legal development has occurred to some extent at the intersections between human rights law and security law (*e.g.* the Dodd-Frank Act in the US)[15] and between human rights law and corporate law (*e.g.* The Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013 in the UK).[16]

There have been less discussions about the legal development of a binding HRDD obligations at the intersection between human rights law and criminal law. This may be because not all states have recognised criminal liability of legal persons, such as corporations due to difficulties in establishing mental element and causation aspect, especially for extraterritorial corporate crimes.[17] Nevertheless, there have been general movements towards recognition of criminal liability for legal persons.[18] In the case of corporations, there are efforts for the inclusion of criminal liability for corporations involved in international crimes in the International Criminal Court (ICC) and its Rome Statute,[19] as well as in the domestic criminal codes and court proceedings of both common and civil law jurisdictions.[20] The efforts have gained

[13] *Chandler v. Cape PLC*, [2011] EWHC 951; [2012] EWCA (Civ) 525 (UK). See also *Akpan v. Royal Dutch Shell PLC*, Arrondissementsrechtbank Den Haag, Jan. 30, 2013, Case No. C/09/ 337050/HA ZA 09-1580 (The Netherlands); *Choc v. Hudbay Mineral Inc* 2013 ONSC 1414, Judgment (22 July 2013) (Canada).

[14] LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre. English Trans. Duty of Vigilance Law (France), at <https://business-humanrights.org/en/french-duty-of-vigilance-bill-english-translation> accessed 14 December 2017.

[15] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, Stat. 1376 (2010).

[16] The Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013, No. 1970, coming into force 1st October 2013,

[17] M. Wilkinson, *Corporate Criminal Liability. The Move Towards Recognising Genuine Corporate Fault*, Canterbury Law Review (2003) 9 (1), 143.

[18] *E.g.* P. van Kempen, *Human Rights and Criminal Justice Applied to Legal Person. Protection and Liability of Private and Public Juristic Entities Under the ICCPR, ECHR, ACHR and AfChHPR*, Electronic Journal of Comparative Law (2010) 14 (3), 1 <http://www.ejcl.org>; OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* 1997, Art. 2; United Nations, *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, UN. Doc. A/RES/54/263 (2000), Art. 3 § 4; Council of Europe Convention on Action against Trafficking in Human Beings 2005, Art. 22.

[19] David Scheffer, for instance, has voiced value in contemplating the possible inclusion of juridical persons, such as corporations, within the ICC's jurisdiction. *See* D. Scheffer, *Corparate Liability Under the Rome Statute*, Harvard International Law Journal (2016) 57, 35-39; I. Sepiolo-Jankowska, *Corporate Criminal Liability in English Law*, Adam Mickiewicz University Law Review (2016) 6, 135-36.

[20] Scheffer *supra* note 19, 38; M. Pieth and R. Ivory, *Emergence and Convergence: Corporate Criminal Liability Principles in Overview* in M. Pieth and R. Ivory (eds), *Corporate Criminal Liability*

momentum in line with increasing demand to cope with new trends of serious criminal offences, such as organised crime, money laundering and terrorism, [21] and crimes arising from human rights abuses in the course of extraterritorial business operations. In this regard, the inter-governmental working group for the implementation of the Guiding Principles has called states that have not recognized corporate criminal liability of legal persons to adopt regulation on corporate criminal liability. [22] Along this line, this article seeks to explore the possibility for the institutionalisation of a binding corporate human rights due diligence obligation based on criminal negligence under the corporate culture model of liability. It argues that the development of such binding duty of care may emerge when criminal law and human rights law intersect in criminal court proceeding at the domestic legal domain. The human rights due diligence practices, from which the duty of care gets its content, is assumed to enable such intersection and law-making process possible.

This article is structured as follows. After this brief introduction in Part I, part II will answer the question of how and to what extent can the legal development for a binding norm at the intersection between human rights law and other fields of law be possible? To answer this question, it is necessary to explore the legal responsibility of

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(Springer 2011) 7-13; C. Kaeb, *The Shifting Sands of Corporate Liability under International Criminal Law*, The George Washington International Law Review (2016) 49, 351-52; D. J. Scheffer, *Supplemental Brief as Amicus Curiae in Support of the Petitioners*, *Kiobel v. Royal Dutch Petroleum Co*., 133 S. Ct. 1659 (2013) (No. 10-1491) 13-26; J. Kyriakakis, *Corporate Criminal Liability and the ICC Statute: The Comparative Law Challenge*, Netherlands International Law Review (2009) 56, 336–39, 342; R. Thompson, A. Ramasastry & M. Taylor, *Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, George Washington International Law Review (2009) 40, 841, 844.

[21] *E.g.* United Nations Convention against Transnational Organized Crimes, A/RES/55/25, (15 November 2000) Art. 10 (1); H. van der Wilt, *Expanding Criminal Responsibility in Transnational and International Organised Crime*, Groningen Journal of International Law (2016) 4 (1),1-9; A. M. Brennen, *Holding Members of Transnational Terrorist Groups Accountable Under Article 25 of the Rome Statute: Effectiveness, Legitimacy and Impact* (31 January 2015), [2013-2014] 18 Spanish Yearbook of International Law 115-140 <SSRN: http://ssrn.com/abstract=2640577> accessed 25 September 2017. The inadequacy of the identification model of liability in dealing with particular type of crimes, such as money laundering, funding terrorism and bribery, had prompted Switzerland to impose criminal liability on corporations on the basis of corporate culture model. *See* Schweizerisches Strafgesetzbuch, SR 311.0. English text for information purposes, see Swiss Criminal Code of 21 December 1937 (Status as of 1 January 2017) at <https://www.admin.ch/opc/en/classified-compilation/19370083/201709010000/311.0.pdf> accessed 1 October 2017; U. Cassani, *Corporate Responsibility and Compliance Program in Switzerland* in S. Manacorda, et al., *Preventing Corporate Corruption: The Anti-Bribery Compliance Model* (Springer 2014) 491, 496.

[22] Elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights, Chairmanship of the OEIGWG established by HRC Res. A/HRC/RES/26/9 (29 September 2017) 7-8, at <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf> accessed 14 December 2017.

corporations in the international and national legal system, and the role of States in shaping a binding human rights obligation of private actors, including corporations, under their jurisdictions. Part III provides basic understanding of corporate culture model of liability in comparison to the other two models of liability in criminal law, namely vicarious and identification model of liability. Part IV examines the possibility for the institutionalization of a binding corporate human rights due diligence obligation by exploring the criminal negligence liability arising from corporate organizational condition that disregards the human rights due diligence exercises.

2. Domain and Manner through which a Binding Corporate HRDD Emerges

In principle, corporations lack legal personality in international legal domain and do not come within the jurisdiction of the Rome Statute of the International Criminal Court.[23] Thus, the process for developing corporate human rights obligation is available only in the national legal domain,[24] in countries that recognize corporate liability in their criminal legal system. With full recognition of this legal fact, the Guiding Principles reaffirm the role of the States as the main duty bearer of international legal responsibility by reiterating - (1) the State duty to protect human rights against abuses by third parties within its jurisdiction (Pillar I)[25] and (2) the State obligation to provide access to remedy for abuses (Pillar III).[26] It is through the interaction between the State obligations in Pillar I (duty to protect) and Pillar III (providing remedy), in particular by means of the State-based judicial mechanisms in the municipal legal domain, that the corporate HRDD obligation (Pillar II) is expected to emerge into a binding measure to discharge corporate human rights obligations.

It should be noticed that, due diligence as a tool for risk management is common in business activities. But the application of due diligence obligation as corporate principle of conduct (a legal principle) and risk management (a procedural

[23] The Rome Statute of the International Criminal Court, Art. 25 (1).
[24] J. Dine, *Jurisdictional Arbitrage by Multinational Companies: A National Law Solution?* Journal of Human Rights and the Environment (2012) 3 (1), 45.
[25] Guiding Principles, princ 1.
[26] Guiding Principles, princ 25.

assessment) with regard to human rights is a notable departure.[27] As a principle of conduct, HRDD is known in international law as the primary duty of States as part of their duty to protect individuals under their jurisdictions from harms, including harms resulting from human rights abuses by third parties.[28] This HRDD obligation under the State duty to protect includes the setting up of regulatory and judicial measures to guarantee that the rights of individuals will not be violated, or otherwise those who violate those rights are properly punished.

In recent years this HRDD obligation as a principle of conduct has expanded to corporations as well. Pillar II of the Guiding Principles explicitly stipulates that "business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts of their acts."[29] In order to meet this principle of conduct, the Guiding Principles require corporations to develop procedural assessment tools by having in place a "due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights."[30]

Accepting such a HRDD process as a risk management tool is unconventional as it would mean that the due diligence process then is no longer focused exclusively on internal concerns regarding managing the risk to the company, but also the risk to society (external stakeholders), in particular the risk to victim (rights-holders).[31] The corporations may no longer avoid this shift of risk management that includes human rights-related risks. Because there have been allegations both in legal courts[32] and

[27] Muchlinski *supra* note 8, 156.
[28] *E.g. Velásquez-Rodríguez v Honduras*, IACtHR (Ser.C) No.4, (29 July 1988) [*Velásquez Rodriguez v. Honduras*]; *Osman v. United Kingdom* - 23452/94 [1998] ECHR 101 (28 October 1998); *Maria da Penha Maia Fernandes v. Brazil*, Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01, OEA/Ser./L/V/II.111 doc. 20 rev. (2001); *Z and Others v The United Kingdom* (App No 2939/95) 333 ECHR (2001); *Bevacqua and S. v. Bulgaria*, App. No. 71127/01, Eur. Ct. H.R. (2008); *Opuz v. Turkey*, App. No. 33401/02, Eur. Ct. H.R. (2009); *Declaration on the Elimination of Violence Against Women*, G.A. Res. 48/104, UN. Doc. A/RES/48/104 (23 February 1994) Art. 4; *Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women* (9 June 1994), *33 ILM. 1534*, Art. 7 (b); Committee for the Elimination of All Forms of Discrimination against Women, *CEDAW General Recommendation No 19: Violence against Women,* UN. Doc. A/47/38 (29 January 1992), para 9.
[29] Guiding Principles, princ. 11.
[30] Guiding Principles, princs. 15 (b) and 17-21.
[31] F. J. Sherman, *Exploring Human Rights Due Diligence*, Expert Meeting of North America Corporate and External Counsel Discussion Paper (30 April 2010) 2; Ruggie Report 2010 *supra* note 9, para 81; M. Power, *Organized Uncertainty* (Oxford University Press 2007) Chapter 5.
[32] A number of lawsuits against corporate human rights abuses abroad have been filed under the Aliens Tort Claim Act in the US and under general tort in the UK, Canada and the Netherlands, some of which are discussed in this paper.

courts of public opinion[33] against corporate human rights violations that often have unintended impacts on businesses, such as reputational damage and financial loss.[34] In fact, in response to this new concern, there are indications of a shift in corporate attitude in which "[t]he internal company drivers of risk management have been supplemented by a variety of hard and soft law external corporate governance standards requiring or encouraging companies to internalize external social expectations into their risk management programs."[35] Such an increasing concern to expand the human rights risk as a commercial risk demonstrates that "human rights risk is as much a commercial risk as a social or ethical concern."[36] Thus, a human rights risk element needs to be incorporated into business risks by means of implementing a risk-based approach to human rights as an integral part of business risk management.

In order to prevent and avoid human rights harms, HRDD becomes an essential tool to identify and mitigate the risk of human rights harms and to ensure the corporations' respect for the human rights standards. This due diligence practices can be met by (1) conducting a comprehensive assessment of actual and potential adverse human rights risks and impacts,[37] (2) collecting evidence of adverse human rights impacts, analysing them in the light of internationally recognised human rights and through consultation with affected groups and relevant stakeholders,[38] (3) integrating the findings into decision-making process in order to take necessary actions to prevent and mitigate them,[39] (4) verifying the effectiveness of addressing adverse human

[33] Consumer boycotts and negative campaign against Nike for violating labour-related human rights around the world successfully destroyed Nike's reputation and forced the company to change its human rights policies. *See* S. Birch, *How activism forced Nike to change its ethical game*, Guardian.co.uk, 6 July 2012; Reports and campaigns against Google, Yahoo and Microsoft for alleged complicity in abusing freedom of speech in China led to U.S. Congressional hearings and the introduction of the Global Online Freedom Act. See Amnesty International UK, *Undermining Freedom of Speech in China: The Role of Yahoo!, Microsoft and Google* (The Human rights Action Center 2006). For the latest cases, see Ethical Consumer, <http://www.ethicalconsumer.org/boycotts/successfulboycotts.aspx> accessed 12 September 2017.

[34] For detailed cases analysis in the extractive industries, *See* R. Davis and D.M. Franks, *Costs of Company-Community Conflict in the Extractive Sector*, Corporate Social Responsibility Initiative Report No. 66, Harvard Kennedy School (2014), <https://sites.hks.harvard.edu/m-rcbg/CSRI/research/Costs%20of%20Conflict_Davis%20%20Franks.pdf> accessed 25 September 2017.

[35] Sherman *supra* note 31, 2-3.

[36] Muchlinski *supra* note 8, 156.

[37] Guiding Principles, princ 17.

[38] Guiding Principles, princ 18.

[39] Guiding Principles, princ 19.

rights impacts through tracking and monitoring,[40] and (5) communicating with relevant stakeholders about human rights impacts and how these ought to be addressed.[41] This is not only a corporate strategy to avoid any types of business risks, including human rights risk, but also "a normative obligation emanating from the human rights regime which creates a responsibility on the part of companies [as organs of society] to respect the rights and freedoms of people."[42]

The expansion of the HRDD obligation to corporations does not means that the content and the scope of the obligation of the States and the corporations are the same. Although, States and corporations perform similar attitude of diligent conduct to avoid harm to others, the HRDD obligation of corporations is a "unique responsibility" attached to them as organs of society,[43] and it should not simply "mirror" the HRDD of the States.[44] The HRDD obligation of the States and that of the corporations operate in different domain and scope. International law becomes the legal domain of the State's HRDD obligations, while social expectation (crystallised in soft law) and national law are the basis of the corporate HRDD obligations. The scope of the State's HRDD obligation covers a State's sphere of control (jurisdiction), while the scope of the corporate HRDD obligation is determined by its leverage over human rights at issue. Within their distinct domains, States and corporations perform distinct functions that give rise to distinct roles and subsequent responsibilities.[45]

It is the role of the State through its HRDD obligation, as part of its "duty to protect" human rights, to institutionalise and to ensure corporations' compliance with their own HRDD obligation to respect human rights. By ensuring corporate compliance with their obligation to implement HRDD, States fulfill their own duty to protect human rights.[46] As such, as Martin-Ortega correctly notes, "ultimately the State's own due diligence in relation to compliance with such obligations could be measured

[40] Guiding Principles, princ 20.
[41] Guiding Principles, princ 21.
[42] *Id*.
[43] J. Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights,* UN. Doc. A/HRC/8/5 (7 April 2008), para 6 [*hereinafter*: Ruggie Report 2008].
[44] Ibid. para 53.
[45] O. de Schutter, *The Challenge of Imposing Human Rights Norms on Corporate Actors* in O. de Schutter (ed), *Transnational Corporations and Human Rights*, (Hart Publishing 2006) 12.
[46] Martin-Ortega *supra* note 11, 62.

by their demand for and support of due diligence by corporate actors."[47]

In this regard, State and corporate HRDD are differentiated by mutually complemented obligations. HRDD is a medium through which both the State and the corporation realise their respected duty and responsibility to protect and respect human rights. The State fulfils its HRDD obligation through horizontal application of human rights, for instance by means of developing legal reasoning or new laws in court proceedings to ensure corporate respect for human rights.[48] It is expected that in this national legal domain various measures, including due diligence mechanisms, will entwine with legal duty in other areas of law, including criminal law. This interaction lays the foundation for the evolution of the corporate legal obligations to observe human rights under the domestic legal regime.[49] It is from this domestic legal domain that new legal measures, such as the binding corporate HRDD obligation, are supposed to emerge and the relevant legal means to discharge such obligations are expected to evolve. The legal implications arising from this interaction "may result in the institutionalisation through legal practice of a legally binding duty to observe human rights."[50] How this legal development may occur at the intersection between human rights law and criminal law will be discussed in Part IV. However, since this article focuses on the possibility for the institutionalisation of a binding HRDD based on the corporate culture model of liability, it is necessary to discuss first the corporate culture model of liability in comparison to the derivative models of liability in criminal law.

3. The Inadequacy of Derivative Models and the Birth of Corporate Culture Model of Liability

The corporate culture model of liability, or as some call it "holistic" model of

[47] *Id*.
[48] For detailed discussion about the whole means for the application of the State's horizontal application of human rights, *See* A. Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006) Chapter 10.
[49] Muchlinski *supra* note 8, 151.
[50] *Id*; E. Mak, *Globalization of the National Judiciary and Dutch Constitution*, Utrecht Law Review (2013) 36 (2), 51 (arguing that while domestic legal system still constitutes the 'basis for all judicial decisions', there has been 'increasing intertwinement of legal orders and the search for a judicial approach which fits with this globalised legal order').

liability,[51] arises as a response to the shortcomings of the traditional (derivative) models of criminal liability, which attribute the wrongful acts of individual offenders to corporations.[52] These traditional liability models are represented by the widely accepted vicarious liability and identification liability models.[53]

3.1. Vicarious and Identification Model of Liability

Vicarious liability is established on the basis of the proximity of relationship between the corporation and its agents,[54] in which the corporation itself has a "distinct personality with its own rights, as well as being a person under the law."[55] In *United States v. A&P Trucking Co*, the court ruled that "a corporation may be held criminally liable for the acts of any of its agents who (1) commit a crime (2) within the scope of employment (3) with the intent to benefit the corporation."[56] This means that under vicarious liability model, the *actus reus* and *mens rea* of criminal offences committed by any corporate officer, employee or agent during the course of its employment in order to benefit the corporation is attributable to the corporation,[57] regardless of his/her position in the corporation. This last decade, the US court in the *US v. Potter*, for instance, has expanded the scope of vicarious liability, arguing that a corporation is liable for the criminal offence committed by any of its employee or agent as long as the above requirements have been met, even if the employee or the agent concerned "overstepped" or acted against the instruction of its principals or directors.[58] In this way, the difficulty to prove the *actus reus* and the *mens rea* of a corporate criminal

[51] O. Dixon, *Corporate Criminal Liability: The Influence of Corporate Culture*, Legal Studies Research Paper No. 17/14, 3, <http://ssrn.com/abstract=2921698> accessed 25 September 2017.
[52] A. A. Robinson, *'Corporate Culture' as A Basis for the Criminal Liability of Corporations*, (2008) Prepared for the United Nations Special Representatives of the Secretary General on Human Rights and Business, 4 <https://business-humanrights.org/sites/default/files/reports-and-materials/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf> accessed 25 September 2017.
[53] *Id*; Wilkinson, *supra* note 17, 142, 149. Other scholars have different ways for categorizing criminal liability model. Golbert, for instance categorizes it as: vicarious, identification, aggregation and corporate fault model. See J. Gobert, *Corporate Criminality: Four Models of Fault*, Legal Studies (1994) 14, 393-410.
[54] R. Mays, *Towards corporate fault as the basis of criminal liability of corporations*, Mountbatten Journal of Legal Studies (1998) 2 (2), 33.
[55] Pieth and Evory *supra* note 20, 6.
[56] 358 U.S. 121 (1958) at 124-127.
[57] O. de Schutter, et al., *Human Rights Due Diligence: The Role of States*, Report of a Joint Project by The International Corporate Accountability Roundtable, the European (December 2012) 12 <http://humanrightsinbusiness.eu/wp-content/uploads/2015/05/De-Schutter-et-al.-Human-Rights-Due-Diligence-The-Role-of-States.pdf > accessed 27 September 2017). Gobert *supra* note 53, 396.
[58] 463 F 3d 9 (1st Cir, 2006) at 45-46.

conduct can be overcome by imputing the acts, knowledge and intention of any individual corporate offenders to the body corporate.

Nonetheless, the problem as indicated in the two cases just mentioned above is that criminal liability may be imposed on a corporation despite the fact that most of its employees have not committed the crimes (violated the law) and some reasonable measures may have been taken to prevent the commission of the crimes.[59] This has also been recognised, for instance in *United States v. Automated Med. Labs., Inc.*[60] The Fourth Circuit ruled that liability may be attributable to a corporation for the acts of its employee even if "'such acts were against corporate policy or express instructions,"'[61] because an employee's acts that were "contrary to corporate policy do not absolve [the corporation] of legal responsibility."[62] Since there is no clear distinction between responsible corporations that have seriously taken reasonable compliance programs (corporate policy) and those that have not, any good corporate policy measures to prevent the offences by the former may be ignored under the vicarious liability model.[63] In this respect, the reach of its application can be too broad and disproportionate, given that corporation as a whole may still bear the burden of liability for any criminal acts of any corporate individuals and agents from the high ranking officials to the lowest level employees (regardless of their positions within the corporations). These are some of the reasons for the rejection of vicarious liability in criminal law.

In the case of identification liability, a corporation can be subject to criminal guilt if its conducts can be identified as the acts of individuals who act with requisite fault in their position as the directing mind and will of the corporations.[64] This assumes that, as noted by Judge Denning in *HL Bolton (Engineering) Co. Ldt. v. TH Graham & sons Ltd.,* like human body, a corporation has "brain and nerve centre which controls what it does" and "hands which hold the tools and act in accordance with directions

[59] Mays *supra* note 54, 37.
[60] 770 F.2d 399 (4th Cir. 1985),
[61] *Id*. at 406 (quoting *United States v. Basic Constr. Co.*, 711 F.2d 570, 573 (4th Cir. 1983)).
[62] *Id*. at 407. See also *United States v. Ionia Mgmt. S.A.,* 555 F.3d 303, 310 (2d Cir. 2009).
[63] C.L. Evans, *The Case for More Rational Corporate Criminal Liability: Where Do We Go from Here*, Stetson Law Review (2011) 41, 28-29.
[64] C. Wells, *Criminal Responsibility of legal Persons in Common Law Jurisdictions*, Paper Prepared for OECD Anti-Corruption Unit Working Group on Bribery in International Business Transactions (Paris, October 2000) 5.

from the centre."[65] In similar manner, some of the corporate actors "are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does."[66] Under identification liability model, the "state of mind of these managers is the state of mind of the company and is treated by the law as such."[67] They are "assumed to be acting as the corporation and not for the corporation,"[68] and therefore, their *actus reus* and *mens rea* are identified with those of the corporation.[69]

However, the standards that constitute corporate actors as the directing mind of corporations vary between jurisdictions, although in general they can be associated with directors and high-ranking officers who are at the centre of corporate command and management.[70] This was confirmed in *Tesco v. Nattrass*, in which the House of Lords limited attribution to individuals at the higher corporate management who acts as the directing mind and will of the corporation.[71] This means that the offence committed by store managers at the lower level of command, such as Tesco's retailing stores, could not be considered as that of the corporation because they are not the directing mind of the corporation. Hence, unlike the vicarious model that imputes liability to a wide range of corporate actors and agents from the high-ranking board of directors to the lower-level employees, the identification model narrowly attributes liability only to high-ranking corporate actors who are at the centre, or top, of corporate chains of command.

In *Meridian Global Fund Management Asia Ltd v. Security Commission*, the Privy Council moved beyond a narrow idea of the aforementioned identification model by convicting the corporation for the offence committed by corporate actor who was not

[65] [1957] 1 QB 159 at 172.
[66] *Id*.
[67] *Id*.
[68] Dixon *supra* note 51, 3.
[69] C. Harding, *Criminal Liability of Corporations-United Kingdom* in H. de Doelder & K. Tiedemann (eds) *La Criminalisation du Comportement Collectif: Criminal Liability of Corporations* (Kluwer Law International 1996) 370; *Tesco Supermarket v. Nattrass* [1971] 2 WLR 1166 (England) 1177.
[70] Robinson *supra* note 52, 4; Dixon *supra* note 51, 4.
[71] *Tesco Supermarket Ltd. v. Nattrass* [1972] AC 153, 171 (J Reid), 192 (J Dilhorne) and 198 (J Pearson). See also, E. Colvin, Corporate Personality and Criminal Liability, Criminal Law Forum (1995) 6, 1-2.

part of the corporate directing mind and will.[72] The Privy Council held that on a case-by-case basis a rule of attribution must be established by looking at the construction and language of the relevant substantive statute, its content and underlying policy.[73] Consequently, if the rule and policy oblige the corporation to exercise human rights due diligence as a part of its duty of care, it would be assumed that such a corporation as a whole should have known of the risk of human rights abuse when such abuse occurs.

3.2. Corporate Culture Model of Liability

Given that the vicarious model is considered too wide, whereas the identification model is too narrow as indicated in the previous section, and the individual corporate actors who committed the abuses or had the *mens rea* can be very difficult to identify, an alternative model based on the organisational policy and practices of corporations - known as corporate culture model - has emerged. Under this model, a corporation is regarded as a "community" that has "its own attitudes, norms, customs, habits" and the like.[74] In this sense, corporations pose as a kind of "distinct personality and ethos",[75] that construct an organisational culture in doing business. The feature of such an organisational culture is very much shaped by the circumstances in which business is operated, the corporate actors involved, and the value and objectives of a business operation.[76] Thus, corporate culture represents a "corporate character" in which "'bad' corporations can influence individual and group criminal behavior."[77]

For establishing corporate criminal liability, the holistic model tries to connect blameworthiness of an offence with this corporate culture. It focuses on corporations (instead of individuals) as being liable, because they are capable of committing offenses through their internal decision-making process and practices.[78] Or because

[72] *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500.
[73] *Id*. at 507 (J Hoffman).
[74] C. Stone, *Where the Law Ends: the Social Control of Corporate Behaviour* (Harper and Row 1975) 228.
[75] C. de Maglie, *Models of Corporate Criminal Liability in Comparative Law*, Washington University Global Study Law Review (2005) 4, 558
[76] T. E. Deal and A. A. Kenne, *Corporate Cultures* (Adison & Wesley 2000)13-15.
[77] P. Abril & A. M. Olazábal, *The Locus of Corporate Scienter,* Columbia Business Law Review (2006) 181, 121-122.
[78] Pieth and Ivory *supra* note 20, 6-7.

the corporate culture (ethos) – organizational structure, business objectives and behavior and existing compliance program – of a corporation motivates and enables individual corporate actor to commit an offence.[79] In this instance, "corporations [will be] directly liable for criminal offences in circumstances where features of the organization of a corporations, […], directed, encouraged, tolerated or led to the commission of the offence."[80] As opposed to the vicarious and identification model, the corporate culture model does "not require the imputation of human thoughts, acts and omissions to the corporations."[81]

An early body of law that recognises this corporate culture model of liability is the Australian Criminal Code.[82] The Code defines corporate culture as "an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities take place."[83] The *mens rea* element of an offence comprising of – intention, knowledge and recklessness - is attributed to a body corporate that "expressly, tacitly or impliedly authorised or permitted commission of offense."[84] The authorisation and permission that trigger liability can be established by proving that: 1) the "board of directors"[85] or a "high managerial agent"[86] carried out or authorised the conduct;[87] or 2) a corporate culture has "directed, encouraged, tolerated or led to non-compliance with the relevant provision"[88] or 3) "the body corporate failed to create and maintain a corporate culture that requires compliance with the relevant provision."[89] In this way, the *mens rea* element of the corporation that presumably does not have a 'mind' is to be inferred from its organisational state and practices. However, this process may not be straightforward due to the difficulty to establish criminal blameworthiness of a

[79] N. S. Elis and S. B. Dow, *Attaching Criminal Liability To Credit Rating Agencies: Use of the Corporate Ethos theory of Criminal Law*, University of Pennsylvania Journal of Business Law (2015) 17 (1), 172; A. S. Kircher, *Corporate Criminal Liability Versus Corporate Securities Fraud Liability: Analyzing the Divergence in Standards of Culpability,* American Criminal Law Review (2009) 46, 157, 172.
[80] Robinson *supra* note 52, 2; Elis and Dow *supra* note 79, 169; Abril & Olazábal *supra* note 77, 123.
[81] Pieth and Ivory *supra* note 20, 6.
[82] Criminal Code Act 1995 (Australia), Part 2.5, Sec 12.1-3.
[83] *Id*. Sec 12.3(6).
[84] *Id*. Sec 12.3.
[85] "board of directors" means the body "exercising the executive authority of the body corporate." *Id*. Sec 12.3(6).
[86] "high managerial agent" means corporate employee, agent or officer who by virtue of their responsibility represent the body corporate's policy. *Id*. Sec 12.3(6).
[87] *Id*. Sec 12.3 (1)-(2) (a-b).
[88] *Id*. Sec 12.3 (2) (c).
[89] *Id*. Sec 12.3 (2) (d).

particular corporate culture, in particular in the case of big corporations that operate under a less centralized decision-making process.[90]

The Code stipulated that there are instances where a corporation may be able to avoid any criminal charges. This will be the case if "the body corporate proves that it exercised due diligence to prevent the conduct, or the authorization or permission."[91] Nevertheless, no definition is provided as to what the term "due diligence" entails. Instead, the Code notes that the lack of due diligence is evidenced from circumstances where there is (1) "inadequate corporate management, control or supervision" or (2) "failure to provide adequate systems for conveying relevant information."[92] In other words, criminal liability arises when a corporation fails to incorporate and implement adequate system of controls and compliance programs to prevent the commission of an offence. These fault elements are also applicable when establishing negligence liability if "the body corporate's conduct is negligent when viewed as a whole (that is by aggregating the conduct of any number of its employees, agents or officers)."[93] Thus, where the fault element of an offence is negligence, in the sense that the corporation owed a duty of care to the affected parties and individuals, but failed to comply with that duty, it may give rise to liability on the ground of these provisions.

Despite the Code emphasises the significance of the compliance program, there are inadequate guidelines as to what such compliance program entails.[94] This would be different from, for instance, the U.S. Sentencing Guidelines for Organisations (hereafter: the Sentencing Guidelines), which require organisations to establish effective compliance and ethics programmes by exercising "due diligence to prevent and detect criminal conduct" and "otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law."[95] The effectiveness of this due diligence exercise and promotion of organisational culture is dependent on the organisation in meeting the following seven requirements of compliance programme: (1) establishing standards and procedures to prevent criminal

[90] Dixon *supra* note 51, 14.
[91] Criminal Code Act 1995 (Australia) Sec 12.3 (3).
[92] *Id*. Sec 12.5 (2) (a-b)
[93] *Id*. Sec. 12.4 (2).
[94] Dixon *supra* note 51, 14.
[95] United States Sentencing Commission, Guidelines Manual (1 November 2016), Chapter Eight – Sentencing of Organization, §8B2.1 (a) <https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2016/GLMFull.pdf> accessed 17 September 2017.

conduct, (2) assigning responsible and reasonable individuals, (3) using reasonable efforts to prevent an individual from engaging in illegal activities, (4) making effective compliance and ethics training a requirement for all employees, (5) taking reasonable steps to achieve compliance, (6) enabling the implementation of anonymity and confidentiality mechanisms: enforcing and encouraging compliance and (7) taking reasonable steps to prevent further similar criminal conduct.[96]

Together with these compliance requirements, the Sentencing Guidelines set up maximum penalties.[97] The penalties may be significantly reduced if the corporation demonstrates that the employee or agent who committed federal crimes was in fact a perpetrator who did not comply with the enforced corporation code of conduct and policies.[98] Hence, in order to mitigate the penalty, a corporation must prove that it had effective preventive measures, such as due diligence measures or compliance and ethics programme, in place at the time the crimes were carried out.

The trend to overcome the shortcomings of the vicarious and identification model of liability by means of corporate culture model is also demonstrated in the UK under the Corporate Manslaughter and Corporate Homicide Act (CMCHA).[99] The CMCHA stipulated that a corporation can be held criminally liable if the manner in which a corporation is managed and organised by its senior management constitutes a gross breach of its "relevant duty of care" that resulted in a person's death.[100] By relevant duty of care is meant a duty of an organisation to take reasonable measures to prevent an offence, for instance in relation to the system of work, the equipment used by employees and the condition of workplace.[101] It is a duty of care arising from a violation of the law of negligence.[102] Only corporation as an organization, and not specific individual corporate actors, can be persecuted,[103] despite this it requires that

[96] *Id*. §8B2.1 (b).
[97] *Id*. §8C.1.1.
[98] The reduction may reach up to 95%. See P. Fiorelli, *Will U.S. Sentencing Commission Amendments Encourage a New Ethical Culture Within Organizations?* Wake Forest Law Review (2004) 39, 565, 567.
[99] Corporate Manslaughter and Corporate Homicide Act (2007), § 1-2.
[100] Ibid. §1(1) – (3).
[101] Ministry of Justice, 'A guide to the Corporate Manslaughter and Corporate Homicide Act 2007, October 2007, 8, available at http://www.gkstill.com/Support/Links/Documents/2007-justice.pdf, accessed 15 October 2017.
[102] Corporate Manslaughter and Corporate Homicide Act (2007), § 2 (1).
[103] *Id*. § 18.

the senior management's role in organizing the corporation must have a substantial causal link to the breach that caused death in order to establish liability under the CMCHA.[104]

The exclusion of individual liability is problematic as it may allow individuals to avoid liability simply by putting blame on corporation. At the same time, it may be difficult to prove the substantial causal link between the senior management and the breach that caused death, which as a result may lead to serious deficiencies on the effectiveness of the CMCHA.[105] In *R v. Lion Steel Equipment ltd*, for instance, the company pleaded guilty under the CMCHA for the death of its employee after falling from a factory roof, but none of its directors accused of manslaughter were convicted, due to the lack of evidence about the director's control and responsibility that could give rise to a duty of care.[106]

Another body of law that recognised corporate culture model is Swiss Penal Code.[107] Article 102 of the Code provides two alternative bases for the imposition of corporate criminal liability on the basis of corporate culture model. Firstly, a corporation commits an offence in the course of its commercial activities and in furtherance of its commercial interests, and the offence cannot be attributed to any individuals due to the corporation's own organisational deficiencies (known as subsidiary liability).[108] Secondly, a corporation commits highly relevant offences listed at Articles 260ter (criminal organization), 260quinquies (financing terrorism), 305bis (money laundering), 322ter (bribery of Swiss official), 322quinquies (granting an advantage), 322septies para 1 (bribery foreign officials) or 322octies (bribery private individuals) of the Code, provided the corporation has failed to take all necessary organisational measures to prevent such offences (known as primary liability).[109]

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[104] *Id*. § 1 (3).
[105] G. C. Hadjikyprianou, *Corporate Manslaughter and Corporate Homicide Act 2007: A 'Cadmean Victory' or a Worthwhile Reform?* White Collar Crime Journal (2016) 10 (10), 43, <SSRN: https://ssrn.com/abstract=2742207 or http://dx.doi.org/10.2139/ssrn.2742207>
[106] R. Lion Equipment Ltd, Manchester Crown Court (20 July 2012, unreported, <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Judgments/hhj-gilbart-qc-sentence-remarksr-v-lion-steel.pdf > accessed 20 December 2017.
[107] Swiss Criminal Code of 21 December 1937, as amended by No. 1 of the Federal Act of 25 September 2015.
[108] *Id*. Art. 102 (1).
[109] *Id*. Art. 102 (2).

The subsidiary liability covers all kinds of offences in a corporation's commercial activities. It focuses on the question: whether there is a "causal link" between the mismanagement within the corporation and the inability to find the individual perpetrator.[110] The liability does not arises from organizational condition that caused the commission of the offence, but from corporate policies and practices that "allowed the perpetrator not to be identified."[111] This as a result may create gap that allows corporations to avoid liability simply by placing the blame on individual corporate actors, but also "invites manipulation of justice by sacrificing a person designated to assume criminal liability in order to protect the company."[112]

In contrast, the primary liability is attributable only to limited number of offences.[113] It focuses on a causal link between the offence and organizational culture by proving that organisational culture (mismanagement) caused the commission of the offence. Criminal liability arises if this causal link provides evidence of a failure on the part of the corporation to take reasonable and effective measures to prevent the offence.[114] In other words, the "prosecution must prove that the company failed to implement adequate preventive measures as well as the causal nexus between this inadequacy and the fact that the offence was committed."[115] Thus, the reasonable and effective measures to prevent the commission of an offence are at the centre of the blameworthiness of a corporate conduct on the basis of the corporate culture model of liability.

In sum, it is obvious that the corporate culture model finds its relevance in the inadequacy of the derivative models. The fact that the corporate culture model of liability allows for finding the *mens rea* of an offence in the conduct of the corporation as an organisation provides "one of the strongest cases for holding companies liable" for an offence. Having said that, the process of establishing criminal liability is not straightforward. This is due to (1) the lack of specificity on the nature of corporate culture that may trigger corporate criminal liability; (2) the

[110] Cassani *supra* note 21, 497-499; A. N. Martin and M. M. de Morales, *Compliance Programs and Criminal Law Response: A Comparative Analysis* in S. Manacorda, et al, *supra* note 21, 337.
[111] Cassani *supra* note 21, 498-499.
[112] *Id*. at 499.
[113] Martin and De Morales *supra* note 110, 337.
[114] *Id*.; Cassani *supra* note 21, 497, 499-500;
[115] Cassani *supra* note 21, 499.

absence of clarification on the distinction between different elements (degrees) of culpability (knowledge, recklessness, negligence), [116] and (3) the inadequacy of guidance on compliance programme to effectively prevent an offence. The issues in point (1) and (2) are beyond the scope of this article and need a separate study. Nonetheless, the argument can be made concerning the issue in point (3) that the inadequacy of guidance on compliance programme can be overcome by adopting and implementing the HRDD obligation as stipulated under the Guiding Principles. It is the role of State as part of its duty to protect human rights to ensure that corporations under its jurisdiction comply with their HRDD obligation.

4. Implications for the Development of a Binding Corporate HRDD

4.1. The Necessity of HRDD as Preventive Measure or Compliance Programme

The aforementioned legal development carries far-reaching implications for corporate governance and management in relation to the responsibility of corporations concerning the impacts of their conducts in doing business. Corporate executives and representatives should be aware of the impacts of their conducts in doing business and ensure that they comply with the standard of conduct required by law and public expectation. To meet this standard of conduct, the corporation may have to implement effective risk management programs with the purpose of anticipating and mitigating the occurrence of an offence by adopting adequate legal compliance mechanisms. These legal compliance mechanisms can be in the form of well-drafted policies, such as those of the HRDD mechanism, training of staff and monitoring. They must develop collective awareness and commitment among corporate actors about the significance of such compliance mechanisms throughout business operations. At the operational level, this process will allow various issues concerning corporate criminal liability to become closely integrated into a comprehensive system of corporate governance. As a result, this will create a corporate culture in which an effective implementation of the corporate compliance standards and practices are carried out to avoid liability.[117]

[116] Dixon *supra* note 51, 8.
[117] About the relationship between corporate culture, risk management and compliance program, See A. Belcher, *Imagining How a Corporation Thinks: What Is Corporate Culture?*, Deakin Law Review (2006) 11, 9-21.

In dealing with potential offences arising from human rights risks, adopting and enforcing the HRDD obligation under the Guiding Principles may create a good corporate culture in which a compliance programme can be effectively implemented. Presuming that the court adopted this corporate culture-based approach in order to establish liability for criminal offences committed either intentionally or by negligence, the existence and quality of due diligence practices may help the courts to determine whether the corporation was liable and can be subject to certain criminal sentences. A poor corporate culture that results in human rights abuses may be considered as entailing culpability for intentional (foreseeable/knowledgeable) negligence and the reckless conduct of individual directors, and such conduct may lead to negligence liability for both corporations and individual corporate executives.

In practice, there are judicial customs[118] and legal documents[119] that authorised the courts to look upon corporate due diligence practices while charging and passing sentence upon a corporation convicted of a crime.[120] The criminal court in India for instance, as noted by de Schutter et al., may consider due diligence practices within an organisation as evidence of *mens rea* that may have an impact on the court decision at the sentencing stage.[121] Similarly, under the Norwegian Criminal Code, an enterprise may be liable for a penalty for an offence committed by a person acting on behalf of the enterprise.[122] In assessing the penalty vis-à-vis the enterprise at the sentencing stage, the Code allows the court to pay particular consideration to, among other things, "whether the enterprise could by guidelines, instruction, training, control or other measures have prevented the offence."[123] Although these legal practices are not directly related to human rights, these elements of corporate culture assume to include

[118] *E.g.* In the US, about 37 states have enacted statutory duty of care provisions. See American Law Institute, Principles of Corporate Governance (2005), Reporter's note to Section 4.01.
[119] *E.g.* United States: U.S. Sentencing Guidelines Manual (2011) <http://www.ussc.gov/guidelines/2011_Guidelines/Manual_HTML/>; Canada: Corruption of Foreign Public Officials Act, S.C., 1998, c. 34; Migratory Birds Convention Act, 1994, S.C. 1994, c. 22; Environmental Assessment Act, 2012, S.C. 2012, c. 19; Australia: Work Health and Safety Act 2011 (Cth); United Kingdom: Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment Regulations 2008, S.I. 2008/37 (U.K.); Control of Substances Hazardous to Health Regulations 2002, S.I. 2002/2677.
[120] de Schutter, et al *supra* note 57, 16.
[121] *Id*.
[122] The General Civil Penal Code (Norway), Act of 22 May 1902 No 10, with subsequent amendments, the latest made by Act of 21 December 2005 No. 31, Sec. 48 a.
[123] *Id*. Sec. 48 b.

the HRDD measures as stipulated under the Guiding Principles in case the corporation implement them in their business operations. The court may adopt similar approach by considering the HRDD requirement under the Guiding Principles in order to establish culpability in relation to corporate human-rights-related offences in criminal proceedings. By exercising human rights due diligence, the corporation is assumed to have knowledge arising from the business culture related to corporate management on the impacts of its business operations on human rights.

4.2. Convergence between "Corporate Culture" and "Specific Circumstances"

Considering the difficulties in the application of the vicarious and identification approach noted above, it could be argued that the corporate culture model seems to provide a more feasible and realistic approach for institutionalising the HRDD obligation as a binding duty of care through criminal negligence liability. This potential can be viewed from the recent emerging practices of legal developments, in which the basic elements required to establish liability in criminal law are likely to resemble those of the tort law or vice versa.[124] As Robinson properly notes,

> "the threshold for tortious liability in common law systems – a breach of a duty of care to address foreseeable risks – is already likely to turn on many of the same factors that are relevant to a 'corporate culture' analysis. However, corporate culture provisions are likely to have a significant impact on the scope of criminal liability, by instituting a conceptual shift on the basis of this liability and making it easier, as a practical matter, to find corporations criminally liable."[125]

Thus, there is a possibility for intersection and convergence, as the "corporate culture" analysis that gives rise to criminal negligence liability is for the most part similar to

[124] Legal analysis of the basic elements required to establish corporate aiding and abetting liability in tort law, in particular for cases filed under the Alien Tort Claim Act, have been heavily relied on the criminal jurisprudence of the Nuremberg, ICC, Ad Hoc and Hybrid tribunals. Eg *Doe I v. Unocal Corp*., 395 F.3d 932, 950 (9th Cir. 2002); R. S. Lincoln, *To Proceed with Caution: Aiding and Abetting Liability under the Alien Tort Statute*, Berkeley Journal of International Law (2010) 28, 604, 606; S. Michalowski, *Doing Business with a Bad Actor: How to Draw the Line Between Legitimate Commercial Activities and Those that Trigger Corporate Complicity Liability*, Texas International Law Journal (2015) 50 (2), 407.

[125] Robinson *supra* note 52, 61.

"specific circumstances" – foreseeability, proximity and reasonableness (or policy consideration) – that give rise to tortious negligence liability for the violation of a duty of care. Before discussing further how this convergence may happen in practice it is necessary to discuss in brief the notion of the "specific circumstances", from which tortious negligence liability for violation of a duty of care can be established.

The tortious negligence liability of corporations based on the "specific circumstances" that gives rise to a duty of care was developed in the English Courts in *Chandler v. Cape Plc*.[126] This case concerned a claim against Cape Plc., a UK parent company, for the harms caused by asbestos dust exposure at its subsidiary. In examining whether Cape Plc owed a duty of care to Chandler who was exposed to the asbestos dust during his work at the subsidiary, the Court of Appeal made reference to the basic elements for the test that constituted a duty of care adopted in the *Caparo v. Dickman* – namely foreseeability of harms, relationships of proximity and fairness and reasonableness of applying a duty of care.[127] On the basis of this three-stage-test, the Court of Appeal formulated the "specific circumstances" that could give rise to the duty of care as follows:

> "(1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection." [128]

Looking at the relationships between parent and subsidiary more widely, the Court of Appeal added that for the purposes of (4) it is not necessary to show that the parent is "in the practice of intervening "in the subsidiary health and safety policies.[129] Rather, the court will look at the corporate group relationship more widely and may find the evidence that "the parent has a practice of intervening in the trading operations of the

[126] *Chandler v Cape Plc* [2012] EWCA Civ 525.
[127] *Caparo Industries Plc v Dickman* [1990] 1 All ER 568 (HL).
[128] *Chandler v Cape Plc* [2012] EWCA Civ 525, para. 80.
[129] *Id*.

subsidiary, for example production and funding issues."[130] In such circumstances, the English Court of Appeal found in *Chandler v. Cape* that an English parent corporation owed a duty of care to the employees of its subsidiaries based on knowledge and a clear proximity of the involvement between the two.[131]

This decision has been reviewed in *Thompson v. The Renwick Group Plc*.[132] In this case, the Renwick Group appealed the decision of the County Court that decided in Mr Thompson's favour that the company had assumed a duty of care to him for an asbestos-related illness caused by unhealthy working conditions during his employment in its subsidiary.[133] The Court of Appeal found no evidence (basic elements) to establish a duty of care in this case due to the lack of facts to impose a duty of care as found in *Chandler v. Cape Plc*. The court was of the opinion that duty of care liability would not arise simply because of the presence of a director appointed by the parent company to its subsidiary, or the presence of the subsidiary as the division of the parent company.[134] The court acknowledged, however, that a duty of care liability may arise if the requirements of *Caparo v. Dickman,* as applied *Chandler v. Cape Plc*,[135] have been satisfied.[136] Moreover, the Court emphasised that the relevant circumstances must be exhaustively considered and there must be sufficient evidence of superior knowledge and proximity, which show the fairness and reasonableness of attaching a duty of care responsibility.[137] The sufficient knowledge and proximity arise if there is clear connection between the harm and the role the parent company has played in it. This connection (proximity) provides evidence of a circumstance in which "the parent company is better placed, because of its superior knowledge or expertise, to protect the employees of subsidiary company."[138] There was no such relationship in the present case, because the director appointed by the Renwick Group was not acting on behalf of the parent company, but simply running the day-to-day operations pursuant to his fiduciary duty owed to the subsidiary company (not the parent). This is different from the situation in *Chandler v Cape Plc,*

[130] *Id*.
[131] *Id*.
[132] *Thompson v The Renwick Group Plc* [2014] EWCA Civ 635 (13 May 2014).
[133] *Id*. para. 3.
[134] *Id*. para. 28.
[135] *Id*. paras 29-32.
[136] *Id*. paras. 24-26.
[137] *Id*. para. 33.
[138] *Id*. para. 37.

in which the parent company had certain level of control and supervision over its subsidiary by employing medical team who was responsible for healthy and safety of all employees within the company group and authorising many aspects of production at the subsidiary.[139]

Hence, for establishing a duty of care, it is important to examine the facts of the relationships between the parent and the members of its corporate group in a case-by case basis. It should be noticed, as these decisions seemed to suggest, that the more knowledge, expertise and control a parent company has over the business operations of its corporate groups or business partners, the more unveiled it is to the fact which assumed that it is responsible for managing the impacts of their business operations.

The decision in *Chandler v. Cape Plc* about the circumstances that could give rise to a duty of care liability has particular importance, as it was a decision on merits that could constitute a precedent for similar corporate duty-of-care-based claims in other courts.[140] The District Court of The Hague, for instance, made reference to the three-stage-test in *Chandler v. Cape Plc*. while examining the circumstances that could give rise a duty of care in *Akpan v. Royal Dutch Shell*.[141] The case concerns claim of negligence against Royal Dutch Shell plc (RDS) and its subsidiary, Shell Petroleum Development Company of Nigeria (SPDC), for failing to provide a safety system required under the scope of their social responsibility in two oil spills that caused damages to claimant's farms and residence.[142] The Court argued that the parent corporations like RDS in general have no obligation to prevent their subsidiaries from inflicting damage on others through their business operations,[143] unless "special circumstances" such as sufficient proximity between RDS and the local community affected by its Nigerian subsidiary could give rise to a duty of care.[144] In the absence of such sufficient proximity that could establish a duty of care, the Court found that the parent corporation RSD did not commit any tort of negligence against Akpan.[145]

[139] *Chandler v Cape Plc* [2012], paras. 30-31.
[140] *Chandler v Cape Plc* [2012] EWCA Civ 525, para. 2 (The court acknowledged the significance of this case).
[141] *Akpan v. Royal Dutch Shell PLC*, Arrondissementsrechtbank Den Haag, Case No. C/09/ 337050/HA ZA 09-1580 (30 January 2013.
[142] *Akpan v. Shell,* 2.1-2.14.
[143] *Id*. 4.26.
[144] *Id*. 4.26-4.32 (citing duty of care test under *Chandler v. Cape*).
[145] *Id*. 4.34.

In line with the aforementioned judiciary trend, the Ontario Superior Court of Justice applied similar duty of care test in *Choc v. Hudbay*.[146] The plaintiffs accused Hudbay of being responsible for the shooting, killing and gang rape of Guatemalan indigenous people by its subsidiary's security personnel while on duty to secure a mining project in Guatemala.[147] In response to the defendant's motion to dismiss the case, the Court was of the opinion that it would be up to the Court to apply the *Anns v. Merton London Borough Council* test (*Anns Test*) on the specific circumstances that give rise to the duty of care - foreseeability, proximity and policy consideration -, which are for the most parts similar to the three-stage-test applied in the *Chandler v. Cape Plc* and *Akpan v Shell* mentioned above.[148] The Court rejected the motion on the ground that this three-stage-test had been met. This was indicated by the facts that (1) Hudbay had knowledge about the bad record of the security personnel (foreseeability),[149] (2) it provided statement about the standard of conduct with regard to the use of armed security (proximity)[150] and (3) the application of a duty of care was necessary to reduced human rights risks and to redress the victims (policy consideration).[151]

Similar to the *Choc v. Hudbay*, in two of the most recent cases of *Garcia v. Tahoe Resources Inc*.[152] and *Araya v. Nevsun Resources Ltd.*,[153] the duty of care claim has become one of the major issues raised by plaintiffs in the Canadian courts. Although, this duty of care issue is yet to be examined in the court, in both cases the plaintiffs whose rights were abused at the mines of operating subsidiaries claimed that the parent corporations owed them a direct duty of care for the conduct of their subsidiaries and affiliates based on the aforementioned three-stage-test. Both cases have been allowed to proceed to trial in Canadian courts after the defendants filed the motions to dismiss them.[154]

[146] *Angelica Choc v. Hudbay Mineral Inc,* 2013 ONSC 1414.
[147] *Choc v. Hudbay*, paras. 4-7.
[148] *Id*. paras. 56-58.
[149] *Id*. para. 64.
[150] *Id*. paras. 67-70.
[151] *Id*. paras. 72-73.
[152] *Garcia et al. v Tahoe Resources Inc.* 2015 BCSC 2045.
[153] *Araya et al v Nevsun Resources Ltd*. 2016 BCSC 1856.
[154] *Garcia et al. v Tahoe Resources Inc*. 2017 BCCA 39; *Araya et al v Nevsun Resources Ltd*. 2016, paras. 434-457.

Given that these three cases have successfully overcome the problem of jurisdiction in the Canadian courts, it is expected that the subsequent decisions of Canadian courts will focus more on the issues of the duty of care of corporations for the conduct of the subsidiaries, affiliates and supply chains thereof abroad. The fact that the Canadian legal system follows the common law tradition, may provide a greater possibility that the legal analysis of the UK court while establishing liability in response to the duty of care pleadings, as in the case of Chandler, may be reflected in the Canadian courts as well.[155]

The potential implications for the development of the HRDD obligation under the Guiding Principles as a binding duty of care is noteworthy in these cases. This is because the possibility of a negligence liability on the basis of a "duty of care" is recognised in legal proceedings as a standard for holding Canadian corporations accountable for torts abroad.[156] In *Hudbay*, for instance, Amnesty International Canada (AIC) – as an interlocutor that was asked to comment on the existence or scope of the duty of care in international law and standards[157] - made reference to the due diligence obligations under the Guiding Principles and the OECD Guidelines on Business and Human Rights (hereafter: OECD Guidelines)[158] as sources of the duty of care standards for holding Canadian corporations accountable. Citing the Commentary to the Guiding Principles, which calls on corporations to be aware of the human rights risks of business operations in conflict areas, AIC emphasised the significance of the Guiding Principles in *Choc v. Hudbay*.[159] In addition, AIC submitted that since the Canadian government had endorsed them, "Canadian courts should have no difficulty in recognizing the [due diligence obligation in] these principles and drawing upon international norms and standards of conduct in considering whether a Canadian corporation owes a duty of care in the circumstances

[155] N. Baker, *Toward Justice – The Road Ahead in Gracia v Tahoe Resources Inc.* The Law Firm – SISKINDS (2017) available at <http://www.siskinds.com/toward-justice-road-ahead-garcia-v-tahoe-resources-inc/> accessed 25 August 2017.
[156] Y. Aftab, *Choc v. Hudbay: The emerging Standard of Care for International Human Rights Due diligence and Response*, Commercial Litigation and Arbitration Review (2013) 2 (4), 49.
[157] *Choc v. Hudbay*, para. 3.
[158] The 2011 revised edition of the OECD Guidelines has included a chapter on human rights by incorporating the UN "Protect, respect, remedy" Framework and the GPs. See OECD Guidelines for Business and Human Rights 2011 Edition, Part I, Ch. IV, <http://mneguidelines.oecd.org/2011HumanRights.pdf>
[159] *Choc v Hudbay*, para 34-35 (AIC Factum cited Guiding Principles, Comm. princ 23).

of this case."[160]

This implies that the HRDD obligation under the Guiding Principles and the OECD Guidelines provide greater potential to constitute a standard of care for Canadian corporations in case the duty of care is recognised by Canadian courts in corporate human rights abuse litigations. Since the numbers of the States that endorsed the Guiding Principles continue to increase, HRDD will become an internationally recognised standard of care for business and human rights should the duty of care be applied in dealing with corporate human rights abuses in their domestic courts. If that is the case, the HRDD obligation potentially provides substance not only for "specific circumstances" in order to establish a duty of care in tortious liability as discussed above, but also for "corporate culture" that is necessary to establish knowledge and intent (*mens rea*) of criminal liability.

This is the point where HRDD enables the notion of "specific circumstances" and "corporate culture" to converge. By recognising and utilising corporate culture at the liability stage in legal proceedings for criminal offence in the same way as that of the "specific circumstances" in legal proceedings for tort, the court "increases the breadth of application of corporate criminal liability substantially" and therefore "increases the incentives to improve internal control as a failure to do so increases the risk of prosecution."[161] This internal control may include compliance and ethics programs as stipulated under the U.S. Sentencing Guidelines or the HRDD requirement as set forth under the Guiding Principles.

Since "corporate culture" arising from having implemented HRDD may provide evidence for corporate foreseeability, proximity and reasonableness in the commission of an offence, it may help to overcome the *mens rea* problem when establishing corporate criminal liability, should the knowledge standard of *mens rea* is applied by the court at the liability stage. In India and Norway for instance, as discussed earlier, the court may apply due diligence exercises as evidence of *mens rea* that may affect the court decision on the sentencing stage. For imposing a sophisticated remedial measure upon the corporations on behalf of the victims, such

[160] *Id*. para. 36.
[161] *Id*.

an application of corporate culture requirement at the sentencing stage is very significant.[162] Nonetheless, in order to institutionalise a mandatory compliance program, such as a binding HRDD measure, it would be essential to apply it at the liability stage as well.

Assuming that corporations implement the HRDD policy, the shortcomings of identification model that attributes corporate blameworthiness only to board directors (the directing mind) as represented in *Tesco v. Nattrass* discussed above, may be overcome in the future, should the court adopt the HRDD measures to establish negligence liability on the basis of the corporate culture model of liability. Similarly, the use of the shortage of identification liability as an excuse to avoid liability for a share responsibility that cause harm as in the classic case of *R. v. P&O European Ferries (Dover) Ltd*[163] may be prevented in the future, should the HRDD measure of a company provide evidence for the court to establish negligence liability based on corporate culture.

In the latter case, the judicial inquiry found that Herald of Free Enterprises Ferry sank and kill killed 193 people because it sailed with its bow door still open.[164] This indicated that there was a "share responsibility" of the many individual crew from all level of jobs within a body corporate that "was infected with the disease of sloppiness"[165] (organizational mismanagement). The accident resulted in death was a result of a corporate culture endorsed by the P&O European Ferries that ignored the required safety regulations.[166] Under the identification model, the corporation and corporate officers concerned could not be prosecuted, due to the difficulty to identify those who were "the embodiment of a corporation and acting for the purpose of a corporation doing the act or omission, which caused death."[167] Had the corporate culture model of liability been in place and applicable when the accident occurred (but non-existence) - the defendant could have been held liable, given that the cause of the accident resulted in the death was a failure of the manner in which business

[162] Robinson *supra* note 52, 61-62,
[163] [1991] 93 Cr. App. R. 72.
[164] Department of Transport, The Merchant Shipping Act of 1894: MV Herald of Free Enterprise - Report of the Court No. 8074 (24 July 1987) para. 16 (J Sheen, Wreck Commissioner).
[165] *Id*.
[166] R.A.G. Monks & Nell Minow, *Corporate Governance, Fifth Edition* (John Wiley & Sons, Ltd 2011) at 25.
[167] [1991] 93 Cr. App. R. 72 at 98-99 (J Turner).

activities related to safety were managed and organised.

Principle 18 of the Guiding Principles requires corporations to implement HRDD measures to identify the risk of harms and crimes arising from the human rights abuses at all layers of their business operation and relationships. The implementation of HRDD measures may provide strong evidence of a corporate culture regarding human rights at all levels and chains of business operations and relationships. Any defense of "not knowing about human rights abuses linked to its operations, products or services is unlikely *by itself* to satisfy key stakeholders, and may be challenged in a legal context, if the enterprise should reasonably have known of, and acted on, the risk through [human rights] due diligence."[168] Therefore, by implementing HRDD throughout corporate groups and divisions, the defense to avoid criminal liability by arguing that human rights abuses at a lower level of business operation are a result of the decisions made by a lower level manager, as in the case of *Tesco v. Nattrass*, or that those who are the embodiment of the corporation are difficult to be identify as in *R. v. P&O European Ferries,* is no longer tenable.

With HRDD measures in place, criminal culpability may be attributable to a corporation whose corporate culture (policies and practices) allows for or encourages criminal offences. The HRDD measures may indicate the fact about the foreseeability of the corporation in enabling criminal offence at all level of business operations. In this respect, the implementation of HRDD measures may solve the problem arising from corporate legal structure or any rule that allows for separation of information between different layers of business operations and relationships (subsidiaries, supply chains, retail shops) to avoid liability. This may also enable the court to establish negligence liability of a corporation for criminal offense resulting from human rights abuses at all levels of business operations and relationships.

5. Conclusion

This article has demonstrated that there is a possibility for the institutionalisation of a binding HRDD obligation based on corporate culture model of liability. This will be

[168] United Nations Human Rights Office of the High Commissioner, The Corporate Responsibility to Respect Human Rights: An Interpretative Guide (New York and Geneva 2012), 42 (Q 40).

the case if HRDD is implemented by corporations and such HRDD is adopted by the court to establish the *mens rea* for negligence liability based on corporate culture model of liability. Although the extent to which the courts may apply this approach in dealing with claims against corporate human rights abuses abroad remains to be seen, in practice, this corporate culture approach in criminal law is likely to resemble the "specific circumstances" approach in tort law, in which the HRDD exercises may provide substance and content for "corporate culture" in the same manner as that of the "specific circumstances". The fact that a corporation implements HRDD or similar compliance programmes, may indicate a corporate culture, from which the courts may find evidence of relevant elements of *mens rea* – knowledge and intent – in order to establish corporate criminal liability for the violation of a duty of care. By adopting the HRDD obligation as a normative tool to understand the corporate culture required to establish criminal negligence of an offense resulting from human rights abuse, the court does not only create a precedent that establishes HRDD as a mandatory obligation. But it may also demonstrate that the corporate culture approach potentially provides an answer for the conceptual and procedural problems in establishing corporate criminal liability due to the mismatch between the essence of criminal law (centralising on the act and mental element of a natural person) on the one hand, and complex corporate structures (separated legal form) and conducts (transnational business activities) as well as on the other hand.