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# Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence

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## Articles

# Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence

Doug CASSEL\*

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### Abstract

*This article outlines the case for a business duty of care to exercise human rights due diligence, judicially enforceable in common law countries by tort suits for negligence brought by persons whose potential injuries were reasonably foreseeable. A parent company's duty of care would extend to the human rights impacts of all entities in the enterprise, including subsidiaries. A company would not be liable for breach of the duty of care if it proves that it reasonably exercised due diligence as set forth in the Guiding Principles on Business and Human Rights. On the other hand, a company's failure to exercise due diligence would create a rebuttable presumption of causation and hence liability. A company could then avoid liability only by carrying its burden to prove that the risk of the human rights violations was not reasonably foreseeable, or that the damages would have resulted even if the company had exercised due diligence.*

**Keywords:** common law, due diligence, duty of care, negligence, torts

## I. INTRODUCTION

In the light of international standards that are now widely accepted,<sup>1</sup> this article makes a case for judicial recognition of a common law duty of care of business to exercise due diligence with regard to the potential human rights impacts of business activity.<sup>2</sup> In the case of parent companies, this common law duty of care would include due diligence with respect to the human rights impacts of activities by all entities in an enterprise, including subsidiaries.<sup>3</sup> Consistent with international standards obligating states to ensure effective remedies for business-related human rights violations,<sup>4</sup> the duty would

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<sup>1</sup> Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (Guiding Principles), A/HRC/17/31 (21 March 2011); Organization for Economic Cooperation and Development, 'OECD Guidelines for Multinational Enterprises', 2011 edn., <http://www.oecd.org/daf/inv/mne/48004323.pdf> (accessed 1 February 2016).

<sup>2</sup> Guiding Principles, note 1, Principles 11–24; OECD Guidelines, note 1, paras II.2, II.10, and Chapter IV. For a quite similar proposal, see Amnesty International, *Injustice Incorporated: Corporate Abuses and the Human Right to Remedy* (London: Amnesty International, 2014) 143–9, 202.

<sup>3</sup> See Part II.B below.

<sup>4</sup> Guiding Principles, note 1, Principles 1 and 25–6.

be enforceable in a tort action for negligence brought by victims whose injuries were of the kind reasonably foreseeable by the exercise of due diligence.

A company would not be liable for breach of its duty of care if it proved that it reasonably exercised due diligence as set forth in the United Nations (UN) Guiding Principles on Business and Human Rights (Guiding Principles),<sup>5</sup> though it might still be liable under other grounds of liability.<sup>6</sup> On the other hand, a company's failure to exercise due diligence—its negligence—would create a rebuttable presumption of causation and hence liability. Where a plaintiff proves that a business activity adversely affected her human rights, causing injury and resulting in damages, a company could then avoid liability for breach of its duty of care, or mitigate the amount of damages, only by carrying its burden to prove that the risk of the human rights violation was not reasonably foreseeable, or that the damages would have resulted even if the company had exercised due diligence.<sup>7</sup>

So far as this writer is aware, this duty of care has yet to be recognized definitively by any court. However, common law tort actions for damages, including judicial recognition of new duties of care in negligence cases, evolve with societal needs and expectations, in response to what common law courts view as just, equitable and reasonable in changing circumstances. The time is ripe for common law courts to enforce the now widely recognized human rights responsibilities of business enterprises to exercise human rights due diligence.

By recognizing this duty of care, courts would not impose on business enterprises any responsibility not already assigned to them by widely adopted international human rights standards, but would simply incorporate those standards into domestic tort law.<sup>8</sup> The business responsibility to exercise human rights due diligence (as an international norm of business conduct, not as a principle of tort law) was endorsed without dissent by the 47 member states of the UN Human Rights Council (HRC) in 2008,<sup>9</sup> and detailed in the Guiding Principles, endorsed by the HRC in 2011, again without dissent.<sup>10</sup> The business responsibility has also been adopted by the world's leading economic powers through the Organisation of Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises.<sup>11</sup> Common law states accepting the business responsibility to exercise human rights due diligence through the UN or OECD norms include not only the United Kingdom—birthplace of common law—but also major common law economies such as Australia, Canada, India and the United States, and other common law states such as Bangladesh, Ghana, Ireland, Israel, Malaysia, New Zealand, Nigeria,

<sup>5</sup> Ibid, Principles 15–22.

<sup>6</sup> Liability, for example, may arise for intentional torts or under statutory or treaty bases of liability; enterprise theory; agency theory; or 'piercing the corporate veil'. See generally Gwynne Skinner, 'Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law' (2016) 72 *Washington & Lee Law Review* 1769, 1796–9 (piercing the corporate veil), 1819–25 (enterprise liability) and 1848–61 (proposed statutory remedy).

<sup>7</sup> On shifting the burden of proof, see Amnesty International, note 2, 143–4.

<sup>8</sup> See Parts III and IV below.

<sup>9</sup> Human Rights Council, 'Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', A/HRC/RES/8/7 (18 June 2008).

<sup>10</sup> Human Rights Council, 'Human Rights and Transnational Corporations and Other Business Enterprises', A/HRC/RES/17/4 (16 June 2011).

<sup>11</sup> OECD Guidelines, note 1, paras II.2, II.10, and Chapter IV.

Pakistan, Sri Lanka and Uganda.<sup>12</sup> This author is aware of no common law state that rejects the responsibility of business to exercise human rights due diligence.

Moreover, recognition of the business responsibility to exercise human rights due diligence is not limited to common law countries. In the last decade it has become a global norm reflecting societal expectations for business as well as sound public policy. Due diligence is widely accepted by governments,<sup>13</sup> international organizations,<sup>14</sup> businesses,<sup>15</sup> business organizations<sup>16</sup> and civil society.<sup>17</sup>

In the case of parent companies, a common law duty of care to exercise due diligence would not hold parents vicariously liable for wrongful actions of their subsidiaries. It would not purport to 'pierce the corporate veil'. Rather it would hold parent companies responsible only for the foreseeable consequences of their own failures to exercise due diligence with regard to the enterprises over which they have control or effective leverage.<sup>18</sup>

The common law duty of care would authorize judicial remedies, in the form of tort suits for negligence, for damages caused by the failure to exercise human rights due diligence. This, too, is consistent with the Guiding Principles, which call on both states and businesses to ensure effective remedies for business-related human rights violations.<sup>19</sup> For states, affording judicial remedies is an existing legal duty, imposed by human rights treaties and recognized by international jurisprudence.<sup>20</sup> The duty is

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<sup>12</sup> When the HRC adopted a resolution endorsing the Guiding Principles in June 2011, common law members of the HRC at that time included Bangladesh, Ghana, Malaysia, Nigeria, Pakistan, Uganda, the United Kingdom and the United States. UN Human Rights Council, Membership of the Human Rights Council 19 June 2010–18 June 2011 by Regional Groups, <http://www.ohchr.org/EN/HRBodies/HRC/Pages/Group20102011.aspx> (accessed 1 February 2016). Common law members of the OECD include at least Australia, Canada, Ireland, Israel, New Zealand, the United Kingdom and the United States. OECD, 'Members and Partners', <http://www.oecd.org/about/membersandpartners/> (accessed 1 February 2016).

<sup>13</sup> For example, as of early February 2016, national action plans to implement the Guiding Principles have been adopted by ten states (UK, the Netherlands, Italy, Denmark, Spain, Finland, Lithuania, Sweden, Norway and Colombia), and are in development or committed to be done in 18 other states (Argentina, Azerbaijan, Belgium, Chile, Germany, Guatemala, Greece, Ireland, Jordan, Malaysia, Mauritius, Mexico, Mozambique, Myanmar, Portugal, Slovenia, Switzerland and the US). Office of the High Commissioner for Human Rights, 'State National Action Plans', <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx> (accessed 1 February 2016).

<sup>14</sup> See, e.g., 'Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', A/HRC/29/28 (28 April 2015), paras 7–8 (listing support from, among others, International Organization for Standardization, International Finance Corporation, UN Global Compact, European Union, Council of Europe, Organization of American States and African Union).

<sup>15</sup> World Business Council on Social Development, 'Scaling Up Action on Human Rights: Operationalizing the UN Guiding Principles on Business and Human Rights' (2014) (reporting on efforts to implement the Guiding Principles by ABB, Anglo American, ArcelorMittal, Coca-Cola, DSM, Eni, Heineken, Hitachi, Holcim, JPMorgan Chase, Michelin, Nestle, Novartis, RWE, Total, Unilever and Vale), <http://www.wbcasd.org/Pages/EDocument/EDocumentDetails.aspx?ID=16382&NoSearchContextKey=true> (accessed 1 February 2016).

<sup>16</sup> See, e.g., International Organization of Employers, International Chamber of Commerce, and Business and Industry Advisory Committee to the OECD, 'Joint Statement on Business & Human Rights to the United Nations Human Rights Council' (30 May 2011), [http://www.ioe-emp.org/fileadmin/ioe\\_documents/publications/Policy%20Areas/business\\_and\\_human\\_rights/EN/%282011-05-30%29%20Business%20Statement%20on%20the%20UN%20Guiding%20Principles.pdf](http://www.ioe-emp.org/fileadmin/ioe_documents/publications/Policy%20Areas/business_and_human_rights/EN/%282011-05-30%29%20Business%20Statement%20on%20the%20UN%20Guiding%20Principles.pdf) (accessed 1 February 2016).

<sup>17</sup> See, e.g., Amnesty International, note 2, 144–5; Global Reporting Initiative, 'Linking G4 and the UN Guiding Principles', [https://www.globalreporting.org/resource/library/GRI-UNGP\\_LinkageDoc.pdf](https://www.globalreporting.org/resource/library/GRI-UNGP_LinkageDoc.pdf) (accessed 1 February 2016); International Corporate Accountability Roundtable, 'ICAR Coalition Letter to President Obama on Implementation of the UN Guiding Principles', <http://icar.ngo/analysis/icar-coalition-letter-to-president-obama-on-implementation-of-the-un-guiding-principles/> (accessed 1 February 2016).

<sup>18</sup> See Part II.B below.

<sup>19</sup> Guiding Principles, note 1, Principles 15(c), 22 and 25–31.

<sup>20</sup> See note 52.

imposed on all state organs, including the judiciary.<sup>21</sup> For business, ensuring effective remedies is part of its responsibility under the Guiding Principles to respect human rights.<sup>22</sup>

Despite these international norms, it is widely acknowledged that victims of business-related human rights abuses do not now generally enjoy access to effective remedies.<sup>23</sup> Recognizing a common law duty of care in tort suits for negligence would not overcome all obstacles to redress in all cases.<sup>24</sup> However, by creating a new cause of action, reflecting norms of business conduct that are widely accepted, a common law duty of care to exercise human rights due diligence could significantly contribute to fulfilling the remedial goals of the Guiding Principles.

As other scholars have recognized,<sup>25</sup> a duty of care for parent companies to exercise due diligence would also create salutary incentives for business to respect human rights. Some current doctrines (e.g., piercing the corporate veil, enterprise theory) hold parent companies responsible for actions taken by subsidiaries, based on the extent of the parent's control of the subsidiary's relevant conduct.<sup>26</sup> These doctrines create perverse incentives: in order to avoid exposure to legal liability, the parent company has an incentive to minimize its control over the subsidiary. In contrast, a duty of care to exercise due diligence would incentivize the parent company effectively to monitor its subsidiary, in order to show that it has exercised due diligence. This incentive could lead to companies' avoiding or mitigating human rights violations before they occur, thereby obviating or reducing the need for remedial litigation.

If a judicially established duty of care were adopted by all common law countries, it would cover the more than 40 per cent of the world's 2,000 largest publicly held enterprises that are headquartered in common law countries.<sup>27</sup> Even if adopted only in the UK and US, it would cover a third of the 2,000 largest companies.<sup>28</sup> While a common law duty of care would not directly cover enterprises headquartered in civil law or other non-common law countries, it could nonetheless be applied to their subsidiaries operating in common law countries. An added benefit of a widely recognized common

<sup>21</sup> *Gelman v Uruguay*, Inter-American Court of Human Rights (judgment of 24 February 2011) para 193.

<sup>22</sup> Guiding Principles, note 1, Principle 22.

<sup>23</sup> See generally Jennifer Zerk, 'Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies' (2014), <http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf> (accessed 1 February 2016); Gwynne Skinner, Robert McCorquodale and Olivier De Schutter, 'The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business' (2013), <http://icar.ngo/wp-content/uploads/2013/02/The-Third-Pillar-Access-to-Judicial-Remedies-for-Human-Rights-Violation-by-Transnational-Business.pdf> (accessed 10 February 2016). The Office of the High Commissioner for Human Rights has commenced a large work plan focused on the access to remedy for gross human rights abuses. Office of the High Commissioner for Human Rights, 'Initiative on Enhancing Accountability and Access to Remedy in Cases of Business Involvement in Human Rights Abuses', <http://www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx> (accessed 1 February 2016).

<sup>24</sup> See note 139.

<sup>25</sup> Olivier De Schutter, 'Towards a New Treaty on Business and Human Rights' (2015) 1 *Business and Human Rights Journal* 41, 51–2; Skinner, note 6, 1828.

<sup>26</sup> Skinner, *ibid*, 1823.

<sup>27</sup> According to Fortune's 2015 Global 2000 report, 850 of the world's 2,000 largest publicly held companies are based in just the top seven common law countries (579 in the US, 94 in the United Kingdom, 56 in India, 52 in Canada, 34 in Australia, 19 in Ireland and 16 in Malaysia). Forbes, 'The Global 2000', <http://www.forbes.com/sites/liyanchen/2015/05/06/the-worlds-largest-companies/#1a3993354fe5> (accessed 1 February 2016).

<sup>28</sup> *Ibid*.

law duty of care is that it might stimulate businesses in common law countries, in order to preserve their competitive positions, to promote the adoption of due diligence standards in civil law countries.<sup>29</sup>

Other scholars have proposed that a business duty to exercise human rights due diligence could be imposed by a statute.<sup>30</sup> That is legally possible (even if politically challenging). However, there is no necessary inconsistency between common law and statutory initiatives. When societal needs and expectations are apparent, as here, common law courts have a long and productive history of recognizing new duties of care, judicially enforceable in tort, without waiting for legislatures to act.<sup>31</sup>

Conditions for judicial recognition of this duty of care are ripe. If a duty to exercise due diligence were asserted in the absence of mounting societal needs, and prior to widespread international recognition of the business responsibility to respect human rights, courts might not recognize a new duty of care. But the potential negative (as well as positive) impact of business on human rights is now globally significant and widely acknowledged to be so.<sup>32</sup> The resulting public need and societal concern are akin to those which have historically led common law courts to recognize not only new torts (e.g., invasion of privacy), but also new duties of care in negligence cases, such as the duty of manufacturers to produce products in ways not foreseeably likely to harm those who may eventually use them.<sup>33</sup> A court recognizing a business duty of care to exercise human rights due diligence would thus act in the best tradition of the common law.

Recognition of the business duty of care would entail no departure from factors widely considered by common law courts in recognizing new duties of care: foreseeability, proximity, fairness, and public policy.<sup>34</sup> Businesses would face potential liability for breach of the duty of care only for harm reasonably foreseeable by the exercise of due diligence, and only with regard to harm that might reasonably have been avoided by the exercise of due diligence. Internationally adopted public policy recognizes both the responsibility of business to exercise due diligence, and the duty of states to provide effective judicial remedies.

The aim of this article is to outline the case for a common law duty of care for business to exercise human rights due diligence. Limits of space preclude an exhaustive treatment of all aspects of this issue. Following this introductory part, Part II summarizes the norms of the Guiding Principles and OECD Guidelines on (a) the business responsibility to exercise human rights due diligence; (b) the responsibilities of parent companies in enterprises; and (c) the duty of states to ensure effective judicial and other remedies.

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<sup>29</sup> A similar phenomenon occurred in regard to business bribery of foreign government officials. After the US adopted unilateral legislation, businesses successfully lobbied the OECD to adopt an anti-bribery treaty, so as not to leave US companies at a disadvantage compared to European and other competitors. See Kenneth Abbott, 'Rule-Making in the WTO: Lessons from the Case of Bribery and Corruption' (2001) 4 *Journal of International Economic Law* 275, 282–3.

<sup>30</sup> See, e.g., De Schutter, note 25, 53; Gwynne Skinner, 'Beyond Kiobel: Providing Remedies for Violations of International Human Rights Norms By Transnational Businesses in a New (Post-Kiobel) World' (2014) 46 *Columbia Human Rights Law Review* 158, 261. But see Skinner, note 6, 1829–31.

<sup>31</sup> See, e.g., *Anns v Merton London Borough Council* [1978] AC 728 (UK House of Lords); *Kamloops (City of) v Nielson* [1984] 2 SCR 2 (Supreme Court of Canada).

<sup>32</sup> John Ruggie, 'Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', E/CN.4/2006/97 (2006), paras 9–30.

<sup>33</sup> See, e.g., *Donoghue v Stevenson* [1932] AC 562 (UK House of Lords).

<sup>34</sup> See, e.g., *Odhavji Estate v Woodhouse* [2003] 3 SCR 263 (Supreme Court of Canada), para 52.

Part III reviews the historic and doctrinal dynamism of the common law, including the development of new duties of care in tort negligence cases. Part IV argues that a business duty of care to exercise human rights due diligence is a reasonable extension of precedent and consistent with the factors of foreseeability, proximity, fairness and public policy generally considered by common law courts in recognizing new duties of care. Part V briefly addresses potential objections and reservations to a business duty of care. Part VI concludes that the time is ripe for common law courts to recognize a business duty of care to exercise human rights due diligence, enforceable by victims of violations through common law tort suits for negligence.

## II. GUIDING PRINCIPLES: DUE DILIGENCE, ENTERPRISES AND JUDICIAL REMEDIES

After studies and consultations with diverse stakeholders worldwide, in 2008 the UN Special Representative on Business and Human Rights, Professor John Ruggie of Harvard University, recommended that the UN adopt a three-part 'Framework' on business and human rights: 'Protect, Respect and Remedy'.<sup>35</sup> The Framework 'comprises three core principles': (i) 'the State duty to protect against human rights abuses by third parties, including business'; (ii) 'the corporate responsibility to respect human rights'; and (iii) 'the need for more effective access to remedies'.<sup>36</sup> The three principles 'form a complementary whole in that each supports the others in achieving sustainable progress'.<sup>37</sup>

Ruggie articulated the business 'responsibility to respect,' not as a new international legal obligation, but as a duty assumed 'because it is the basic expectation society has of business'.<sup>38</sup> It is 'part of what is sometimes called a company's social license to operate'.<sup>39</sup>

In response, the HRC decided by consensus to 'welcome' the framework, including 'the corporate responsibility to respect all human rights, and the need for access to effective remedies, including through appropriate judicial or non-judicial mechanisms ...'.<sup>40</sup>

After further research and consultations on how to operationalize the framework, in 2011 Ruggie presented a set of some 31 Guiding Principles, together with commentaries on each principle.<sup>41</sup> Principles 11–24 detail the business responsibility to respect human rights, including Principles 17–21 on human rights due diligence; numerous principles address the responsibilities of parent companies of business enterprises; and Principles 25 and 26 elaborate on the duties of states to ensure effective judicial and other remedies for business-related human rights violations. In June 2011, the HRC formally 'endorsed', again by consensus, the Guiding Principles.<sup>42</sup>

<sup>35</sup> UN Special Representative on Business and Human Rights, 'Protect, Respect and Remedy: A Framework for Business and Human Rights', A/HRC/8/5 (7 April 2008).

<sup>36</sup> *Ibid.*, 4, para 9.

<sup>37</sup> *Ibid.*, 5, para 9.

<sup>38</sup> *Ibid.*, 4–5, para 9.

<sup>39</sup> *Ibid.*, 16–17, para 54.

<sup>40</sup> Human Rights Council, 'Mandate of the SRSG', note 9, para 1.

<sup>41</sup> Guiding Principles, note 1.

<sup>42</sup> Human Rights Council, 'Human Rights and TNCs', note 10, para 1.

## A. The Business Responsibility to Exercise Due Diligence

The business responsibility to respect human rights in essence has two aspects. The first is a negative obligation: 'To respect rights essentially means not to infringe on the rights of others - put simply, to do no harm.'<sup>43</sup> The second is a positive responsibility:

What is required is due diligence – a process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it, mitigating it and providing remediation in the event harm occurs. The scope of human rights-related due diligence is determined by the context in which a company is operating, its activities, and the relationships associated with those activities.<sup>44</sup>

Principle 15 identifies three components of the responsibility of business enterprises to respect human rights: (i) a 'policy commitment to meet their responsibility to respect human rights' (which should be approved 'at the most senior level of the business enterprise'<sup>45</sup>); (ii) a human rights due diligence 'process'; and (iii) processes for 'remediation of any adverse human rights impacts they cause or to which they contribute'.

Throughout this article, the phrase 'due diligence' is used to encompass all three of the foregoing components: the threshold policy commitment, the processes by which due diligence is exercised, and any ensuing remedial responsibility.

Principles 17–21 detail due diligence processes. They generally include 'assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed' (Principle 17). More specifically, they include:

- conducting human rights impact assessments and 'meaningful consultation' with 'potentially affected' groups and other stakeholders (Principle 18);
- integrating the findings from the impact assessments across relevant internal functions and processes, and taking appropriate action (Principle 19);
- tracking 'the effectiveness of their response' (Principle 20); and
- externally communicating how they address their human rights impacts, particularly when concerns are raised by or for stakeholders (Principle 21).

## B. Responsibilities of Parent Companies of Enterprises

The business responsibility to exercise due diligence applies to all business 'enterprises', large or small, although the extent of due diligence required may be greater for larger companies (Principle 14). The Guiding Principles generally refer to the responsibilities, not of a particular 'corporation' or 'company', but of a 'business enterprise'.<sup>46</sup> The term 'enterprise' is not defined. However, the language and logic of the Principles suggest that the term embraces both a parent company and its subsidiaries. For example, the Commentary on Guiding Principle 2 cites, as an example of a state's domestic

<sup>43</sup> Ibid, 9, para 24.

<sup>44</sup> Ibid, para 25.

<sup>45</sup> Guiding Principles, note 1, Principle 16(a).

<sup>46</sup> Ibid, Principles 11–24 and 29.

measures with extraterritorial implications, ‘requirements on “parent” companies to report on the global operations of the entire enterprise’. This would make no sense unless the concept of ‘enterprise’ in Principle 2 covered the operations of both parent companies and their subsidiaries. Nothing in the Guiding Principles suggests that the meaning of ‘enterprise’ in Principle 2 differs from its meaning elsewhere in the Guiding Principles.

In addition, the Guiding Principles provide an alternate route to require a parent company to exercise due diligence with regard to its subsidiaries.<sup>47</sup> Principle 13 requires enterprises not only to avoid adverse human rights impacts through their own activities, but also to ‘[s]eek to prevent or mitigate’ adverse impacts to which they are directly linked through their ‘business relationships’. Principle 17 (a) accordingly specifies that due diligence should cover not only an enterprise’s own activities, but also those activities to which it is directly linked by ‘business relationships’. A parent company should then exercise due diligence to seek to prevent or mitigate adverse impacts to which it is directly linked by its business relationships with subsidiaries.

The OECD Guidelines similarly impose on parent companies the responsibility to exercise due diligence with respect to all entities in an ‘enterprise group’, including subsidiaries. In calling on business to carry out human rights due diligence,<sup>48</sup> the Guidelines:

extend to enterprise groups, although boards of subsidiary enterprises might have obligations under the law of their jurisdiction of incorporation. Compliance and control systems should extend where possible to these subsidiaries. Furthermore, the board’s monitoring of governance includes continuous review of internal structures to ensure clear lines of management accountability throughout the group.<sup>49</sup>

In short, under widely accepted UN and OECD norms, and without prejudice to the independent due diligence responsibilities of subsidiary companies, parent companies should exercise due diligence with regard to all entities in the ‘enterprise’ or ‘enterprise group’, including their subsidiaries.

But what if a parent company lacks effective control over a subsidiary? Suppose it lacks majority ownership or is barred from exercising control by the terms of a contractual relationship. Must it exercise due diligence with regard to subsidiaries it does not control?

The answer is yes. The Guiding Principles do not limit a parent company’s responsibilities only to entities it controls. A company has due diligence responsibilities to use whatever leverage it has over a business relationship. Leverage in this sense is a pragmatic concept: ‘Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm’.<sup>50</sup> A parent company should therefore use its leverage even over subsidiaries it may not control:

If the business enterprise has leverage to prevent or mitigate the adverse impact, it should exercise it. And if it lacks leverage there may be ways for the enterprise to increase it.

<sup>47</sup> I am indebted to Professor Surya Deva for suggesting this line of argument.

<sup>48</sup> OECD Guidelines, note 1, paras II.2, II.10, and Chapter IV.

<sup>49</sup> Ibid, Commentary on General Policies, para 9.

<sup>50</sup> Guiding Principles, note 1, Commentary on Guiding Principle 19.

Leverage may be increased by, for example, offering capacity-building or other incentives to the related entity, or collaborating with other actors.<sup>51</sup>

### C. State Duties to Ensure Effective Judicial and Other Remedies

Guiding Principle 25 provides that states ‘must’ take ‘appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means’, that victims have ‘access to an effective remedy’ for business-related human rights abuses. The mandatory language of ‘must’ reflects the fact that, independently of the Guiding Principles, states are obligated by human rights treaties and jurisprudence to ensure effective remedies for human rights violations.<sup>52</sup> These obligations extend to all organs of the state, including the judiciary.<sup>53</sup>

Judicial remedies are the key. As the Commentary on Principle 26 recognizes, ‘Effective judicial mechanisms are at the core of ensuring access to remedy’. Principle 26 thus provides that states ‘should take appropriate steps to ensure the effectiveness of judicial mechanisms when addressing business-related human rights violations’.

The Guiding Principles impose these judicial obligations on states with varying legal systems. Understandably, therefore, they do not specifically require states to adopt common law remedies. But in most common law states, unlike many civil law states, compensation for damages is not generally available in criminal cases. In common law states tort suits are the generally accepted judicial vehicle for victims to recover compensation for harm caused by negligence. Tort suits for negligent violation of duties of care are thus plainly consistent with the duties of common law states under the Guiding Principles to provide effective judicial remedies.

The Commentary on Guiding Principle 26 cautions states against barriers to access to justice that arise when parent companies, which may often be sued only in their home countries, are not required to exercise human rights due diligence with regard to the activities of their subsidiaries in other countries. Barriers to justice thus 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; [and]

Where claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim.

By imposing a duty of care to exercise human rights due diligence on both parents and subsidiaries in an enterprise, judges hearing common law tort suits can ensure that victims are not left stranded in these jurisdictional gaps.

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<sup>51</sup> Ibid.

<sup>52</sup> *Velásquez Rodríguez v Honduras*, Inter-American Court of Human Rights (judgment of 29 July 1988) para 166. To similar effect, see UN Human Rights Committee, ‘General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant’, CCPR/C/21/Rev.1/Add.13 (2004); and African Commission on Human and Peoples’ Rights, *Social and Economic Rights Action Center v Nigeria*, Communication No. 155/96 (2001) paras 43–8.

<sup>53</sup> *Gelman v Uruguay*, note 21.

### III. COMMON LAW DUTIES OF CARE

The common law is a dynamic body of law, capable of recognizing new causes of action in tort, even when the legislature has not done so. In regard to a business duty of care to exercise human rights due diligence, however, there is no need to recognize a new tort. A business failure to exercise due diligence falls within the existing tort of negligence, consistent with widely recognized factors relevant to recognizing a new duty of care: foreseeability, proximity, fairness and public policy.

#### A. Dynamic Nature of Common Law

Over two centuries ago the eminent British jurist William Blackstone expounded the view, in the words of one American scholar, that ‘the common law existed and judges merely formalized that law’.<sup>54</sup> Common law judges did not ‘make the law’, they found it.<sup>55</sup>

Blackstone’s view did not survive the legal realist movement of the twentieth century. Writing in 1921, Roscoe Pound saw the common law as ‘essentially a mode of judicial and juristic thinking, a mode of treating legal problems rather than a fixed body of definite rules . . . [a process of] molding rules . . . into accord with its principles’.<sup>56</sup> The ‘disciplined reason of judges’, or ‘reason applied to experience’, was ‘the means of progress in our law’.<sup>57</sup>

That same year Benjamin Cardozo famously wrote that the common law ‘is not found, but made’.<sup>58</sup> Where there is no pre-existing rule, he opined, an ‘impartial arbiter [should] declare what fair and reasonable men, mindful of the habits of life of the community, and of the standards of justice and fair dealing prevalent among them, ought in such circumstances to do, with no rules except those of custom and conscience to regulate conduct’.<sup>59</sup>

More recently, Professor Mary Ann Glendon understands the common law as a method for judges to decide each case by reference to principles that transcend the facts of the case.<sup>60</sup> The task of the common law judge is ‘maintaining continuity with past decisions, deciding like cases alike, and providing guidance for other parties similarly situated; and all in the spirit of caring for the good of the legal order itself and the polity it serves’.<sup>61</sup>

At least since the early twentieth century, common law judges have felt free to exercise the ‘disciplined reason’ espoused by the realist view. This extends even to recognizing wholly new causes of action, such as the tort of violation of privacy proposed in an

<sup>54</sup> Kelly Kunsch, ‘The Corners of the Common Law: Creating Causes of Action’ (2012) 2, [http://works.bepress.com/kelly\\_kunsch/1/](http://works.bepress.com/kelly_kunsch/1/) (accessed 10 February 2016). I am indebted to Ms Kunsch for much of the analysis and citations in this subsection.

<sup>55</sup> See, e.g., William S Brewbaker III, ‘Found Law, Made Law and Creation: Reconsidering Blackstone’s Declaratory Theory’ (2006) XXII *Journal of Law and Religion* 255.

<sup>56</sup> Roscoe Pound, *The Spirit of the Common Law* (Francestown, New Hampshire: Marshall Jones Co, 1921) 1.

<sup>57</sup> *Ibid.*, 183.

<sup>58</sup> Benjamin N Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921) 115.

<sup>59</sup> *Ibid.*, 142–3.

<sup>60</sup> This is the characterization by Kunsch, note 54.

<sup>61</sup> Mary Ann Glendon, *A Nation Under Lawyers: How the Crisis in the Legal Profession is Transforming American Society* (New York: Farrar, Straus and Giroux, 1994) 180–1.

1890 law review article by Samuel Warren and Louis Brandeis.<sup>62</sup> In recognizing the tort of privacy judicially for the first time in 1905, the Supreme Court of Georgia declared that ‘although there be no precedent, the common law will judge according to the law of nature and the public good’.<sup>63</sup> The Court justified its decision as in accord with ‘the principles of the law of every civilized nation, and especially with the elastic principles of the common law, and ... thoroughly in harmony with those principles as molded under the influence of American institutions’.<sup>64</sup>

Even so, entirely new causes of action are rarely recognized by common law courts, and for good reason.<sup>65</sup> Both judges and prominent commentators heed the wisdom expressed by Cardozo a century ago: ‘Generally it is the nature of the common law to move slowly and by accretion; swift and massive movements are not impossible, but they are relatively rare.’<sup>66</sup>

More common is a far lesser step: judicially recognizing new applications of existing principles or precedents. As explained in the next subsection, that is what common law courts do when they identify new duties of care in tort suits for negligence. And that is precisely what is advocated here: judicial recognition, within the framework of existing common law principles and precedents, of a new duty of care by business to exercise human rights due diligence.

## B. Judicial Recognition of New Duties of Care

Although common law principles and methodologies for recognizing new duties of care vary among national jurisdictions and over time within jurisdictions, they have important elements in common. In assessing duties of care, common law judges seek what is ‘fair, just and reasonable’.<sup>67</sup> They seek resolutions consistent with community expectations and ‘common sense’.<sup>68</sup> They recognize new duties of care in light of ‘altering social conditions and standards’ and ‘changing circumstances of life’.<sup>69</sup> ‘The categories of negligence are never closed’.<sup>70</sup>

The door of the common law is open, then, to recognize a business duty of care to exercise human rights due diligence, so long as the duty of care is fair, just and reasonable, in accord with community expectations and common sense, and reflective of altering social conditions and standards.

The methodologies and factors considered by common law courts making such assessments are broadly similar, however, they are not uniform. They vary somewhat along four axes. First, there has long been a tension between recognizing duties

<sup>62</sup> Samuel D Warren and Louis D Brandeis, ‘The Right to Privacy’ (1890) 4 *Harvard Law Review* 193.

<sup>63</sup> *Pavesich v New England Life Insurance Company* (1905) 50 SE 68, 69 (Georgia).

<sup>64</sup> *Ibid.*, 80.

<sup>65</sup> See generally Kunsch, note 54.

<sup>66</sup> Cardozo, note 58, 24.

<sup>67</sup> *Michael and Others v The Chief Constable of South Wales Police and Another Respondent* [2015] UKSC 2, para 159 (Lord Kerr, dissenting, citing with approval Lord Browne-Wilkinson in *Barrett v Enfield London Borough Council* [2001] 2 AC 550, 559).

<sup>68</sup> *Donoghue v Stevenson*, note 33, 599 (Lord Atkin).

<sup>69</sup> *Ibid.*, 619 (Lord Macmillan).

<sup>70</sup> *Ibid.*

of care based on generally applicable principles, versus a focus on the distinctive characteristics of particular classes of cases. As stated by Lord Bridge in *Caparo Industries v Dickman*:

In determining the existence and scope of the duty of care which one person may owe to another in the infinitely varied circumstances of human relationships there has for long been a tension between two different approaches. Traditionally the law finds the existence of the duty in different specific situations each exhibiting its own particular characteristics. In this way the law has identified a wide variety of duty situations, all falling within the ambit of the tort of negligence, but sufficiently distinct to require separate definition of the essential ingredients by which the existence of the duty is to be recognised.<sup>71</sup>

That ‘traditional approach’ contrasts with the ‘more modern approach of seeking a single general principle which may be applied in all circumstances to determine the existence of a duty of care’.<sup>72</sup> This ‘modern’ approach is illustrated by the leading case of *Anns v Merton London Borough Council*,<sup>73</sup> in which Lord Wilberforce articulated a two-stage, generally applicable principle. ‘[T]he position has now been reached’, he concluded,

that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter—in which case a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise ...<sup>74</sup>

In subsequent cases, however, the House of Lords abandoned this approach. British decisions after the *Anns* case, in the words of Lord Bridge, emphasized ‘the inability of any single general principle to provide a practical test which can be applied to every situation to determine whether a duty of care is owed and, if so, what is its scope’.<sup>75</sup> In *Murphy v Brentwood District Council*,<sup>76</sup> Lord Keith stated flatly that ‘the two-stage test has not been accepted as stating a universal applicable principle’.<sup>77</sup>

In a 2015 opinion joined by four other members of the UK Supreme Court, Lord Toulson rejected the general principle approach and set forth a more traditional, situational approach:

The development of the law of negligence has been by an incremental process rather than giant steps. The established method of the court involves examining the decided cases to see how far the law has gone and where it has refrained from going. From that analysis it looks to see whether there is an argument by analogy for extending liability to a new situation, or whether an earlier limitation is no longer logically or socially justifiable. In doing so it pays

<sup>71</sup> *Caparo Industries Plc v Dickman* [1990] 2 AC 605, 616 (Lord Bridge).

<sup>72</sup> *Ibid.*

<sup>73</sup> [1978] AC 728.

<sup>74</sup> *Ibid.*, 751–2.

<sup>75</sup> *Caparo v Dickman*, note 71, 617.

<sup>76</sup> [1991] 1 AC 398.

<sup>77</sup> *Ibid.*, 461.

regard to the need for overall coherence. Often there will be a mixture of policy considerations to take into account.

From time to time the courts have looked for some universal formula or yardstick, but the quest has been elusive. And from time to time a court has used an expression in explaining its reasons for reaching a particular decision which has then been squashed and squeezed in other cases where it does not fit so aptly.<sup>78</sup>

A second divergence in methodologies for recognizing duties of care is among common law jurisdictions. If the traditional, situational approach thus prevails in current British jurisprudence, it has yet to triumph everywhere. For example, even after the UK House of Lords jettisoned the *Anns* two-stage approach, the Canadian Supreme Court ruled that the *Anns* approach was ‘well established’ in Canadian common law.<sup>79</sup> While professing to follow Lord Wilberforce’s two-stage approach, the Canadian Court broke it down into three steps. The first *Anns* stage, it said, includes consideration of both foreseeability and proximity,<sup>80</sup> while the second examines ‘whether there exist any residual policy considerations that ought to negative or reduce the scope of the duty or the class of persons to whom it is owed.’<sup>81</sup>

A third difference among common law courts results from variable application of duty of care doctrine according to local conditions. For example, the Supreme Court of India explains:

In the absence of statutory law or established principles of law laid by this Court or High Courts consistent with Indian conditions and circumstances, this Court selectedly applied the common law principles evolved by the courts in England on grounds of justice, equity and good conscience ... Common law principles of tort evolved by the courts in England may be applied in India to the extent of suitability and applicability to the Indian conditions.<sup>82</sup>

In that case, the Indian Court declined to follow English case law imposing a duty of care on local municipalities to inspect trees along public ways. Imposing the same duty in India would not be ‘just and proper’, because ‘conditions in India have not developed to such an extent that a [municipal] Corporation can keep constant vigil by testing the healthy condition of the trees in the public places, road-side, highway frequented by passers-by’.<sup>83</sup>

A fourth divide among common law courts has to do with the very concept of ‘duty of care’ and its role in judicial determinations of negligence. In the UK, Canada and India, recognizing a relevant duty of care is a *sine qua non* of a tort action for negligence. If there is no duty of care, there is no case. Hence the judges wrestle with the question of whether there exists a duty of care. The same approach—recognizing duties of care piecemeal and gradually in particular situations—appears to be taken by the common law courts of at least Australia, Ireland and New Zealand.<sup>84</sup>

<sup>78</sup> *Michael v The Chief Constable*, note 67, paras 102 and 103.

<sup>79</sup> *Odhavji v Woodhouse*, note 34, para 46.

<sup>80</sup> *Ibid*, paras 47–50.

<sup>81</sup> *Ibid*, para 51.

<sup>82</sup> *Rajkot Municipal Corporation v Manjulben Jayantilal Nakum* [1997] 9 SCC 552, slip op. 5.

<sup>83</sup> *Ibid*, slip op. 32–3.

<sup>84</sup> See *Michael v The Chief Constable*, note 67, paras 88–94.

In contrast, albeit subject to variations among the 50 states, the US takes a fundamentally different approach. Rather than recognizing a duty of care situation-by-situation, the default rule in the US, at least in cases of physical harm to persons, is that there is normally a duty of care, subject to exceptions which must be justified in particular situations.<sup>85</sup> Thus, the American Law Institute's *Second Restatement of Torts* provides that '[i]n general, anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act.'<sup>86</sup> The *Second Restatement of Torts* further states:

Conduct which is negligent in character does not result in liability unless there is a duty owed by the actor to the other not to be negligent. Normally, where there is an affirmative act which affects the interests of another, there is a duty not to be negligent with respect to the doing of the act.<sup>87</sup>

In practice this seemingly stark difference from the duty of care approach of other common law countries may be less than meets the eye. As scholars of American tort law have noted, '[c]ourts say and do things that seem wildly inconsistent, sometimes proclaiming the existence of a general duty of reasonable care and then, often in the same case, engaging in a full-scale inquiry into whether the defendant owed the plaintiff a duty'.<sup>88</sup>

Moreover, in cases of economic harm, the California Supreme Court, whose lead has often been followed by other states in the US, does not seem to start from the proposition that a general duty of care normally exists.<sup>89</sup> Instead, as in the UK and other common law countries, the California Court requires that a duty of care must be justified in each situation. For purposes of recognizing duties of care in a leading case involving economic harm, the Court identified the following as relevant factors:

the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.<sup>90</sup>

Subsequent California cases, in evaluating possible exceptions to the default rule of a duty of care, added the following factors: the extent of the burden to the defendant, the consequences to the community of imposing a duty of care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved,<sup>91</sup> as well as the social utility of the defendant's conduct from which the injury arose.<sup>92</sup>

Although phrased differently, these factors overlap considerably with the criteria cited in influential recent decisions of the UK House of Lords (and, following its establishment in 2009, the UK Supreme Court).<sup>93</sup> In *Caparo Industries Plc v*

<sup>85</sup> W Jonathan Cardi and Michael D Green, 'Duty Wars' (2008) 81 *Southern California Law Review* 671, 677.

<sup>86</sup> American Law Institute, *Restatement of the Law Second, Torts* § 302 comment a (1965).

<sup>87</sup> *Ibid*, Chapter 12, scope note to topic 4. Although the point is debatable, the Restatement (Third) may be read to similar effect. Cardi and Green, note 85, 693–4.

<sup>88</sup> Cardi and Green, *ibid*, 671.

<sup>89</sup> *Ibid*, 671–7, 673–8.

<sup>90</sup> *Bikanja v Irving* 320 P 2d 16, 19 (Cal 1958).

<sup>91</sup> *Rowland v Christian* 69 Cal 2d 108, 113 (1968).

<sup>92</sup> *Parsons v Crown Disposal Co* 15 Cal 4th 456, 473–4, 476 (1997).

<sup>93</sup> UK Supreme Court, 'History', <https://www.supremecourt.uk/about/history.html> (accessed 1 February 2016).

*Dickman*, Lord Bridge straddled the divide between the general principle and the situational approach to recognizing duties of care. In so doing, he identified—even while partially disavowing as decisional criteria—the three factors of foreseeability, proximity, and what is fair, just and reasonable:

What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of ‘proximity’ or ‘neighbourhood’ and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other. But ... the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope.<sup>94</sup>

This passage was quoted with apparent approval by the majority opinion in the UK Supreme Court’s 2015 decision in the *Michael* case, which contains the Court’s most recent analysis of the methodology for recognizing duties of care.<sup>95</sup> Together with Lord Toulson’s opinion in *Michael* quoted above,<sup>96</sup> the formulation by Lord Bridge may thus be taken to describe the Court’s current approach.

The resulting congruence between the UK factors—or ‘labels’—and the California criteria is notable. The UK ‘foreseeability’ matches the California ‘foreseeability of harm’. The UK ‘proximity’ brings in the California factors of ‘the extent to which the transaction was intended to affect the plaintiff’ and ‘the closeness of the connection between the defendant’s conduct and the injury suffered’. The UK ‘fair, just and reasonable’ would cover, among other California criteria: ‘the degree of certainty that the plaintiff suffered injury’; ‘the moral blame attached to the defendant’s conduct, and the policy of preventing future harm’; the extent of the burden to the defendant; the consequences to the community of imposing a duty of care with resulting liability for breach; the availability, cost, and prevalence of insurance for the risk involved; and the social utility of the defendant’s conduct from which the injury arose.

The superficially different UK and California criteria, then, may turn out to be simply different ways of packaging the same factors. Or perhaps not: much could turn on how the various factors are interpreted and the relative weight they are given in an overall assessment of whether to recognize a duty of care.

Yet another way of delineating similar factors is that of the Canadian Supreme Court. In lieu of Lord Bridge’s third factor of ‘fair, just and reasonable’, the Canadian Court, expanding on *Anns*, adds the third criterion of ‘public policy’ to foreseeability and proximity. As in *Anns*, public policy plays only a negative role: a Canadian court should consider ‘the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally. At this stage of the analysis, the question to be asked

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<sup>94</sup> *Caparo v Dickman*, note 71, 617–18.

<sup>95</sup> *Michael v The Chief Constable*, note 67, para 106 (Lord Toulson, joined by four other Lords).

<sup>96</sup> Note 78.

is whether there exist broad policy considerations that would make the imposition of a duty of care unwise'.<sup>97</sup>

This formulation is less than felicitous. To the extent public policy bears on a private tort suit, why should it be only a one-way street? If there exist public policy considerations in favour of recognizing a duty of care, why should they not also be considered? Lord Bridge's neutral phrasing—whether a duty of care is fair, just and reasonable—has the merit of not stacking the deck.<sup>98</sup> On the other hand, the Canadian reference to 'public policy', like the California criteria, makes explicit that the evaluation is not limited to the impacts on the parties in the litigation, but takes in societal concerns as well.

At least one other important factor—the interest of victims in access to an effective remedy—has come into play in some cases and should be considered in the assessment of what is fair, just and reasonable, both to the parties and in terms of broader public policy. For example, in *Donoghue v Stevenson*,<sup>99</sup> in which the lead opinion by Lord Atkin has been lauded by subsequent cases as 'celebrated',<sup>100</sup> and a 'landmark',<sup>101</sup> Lord Atkin was concerned for the victim's practical access to an effective judicial remedy. If the consumer could not sue the manufacturer of a negligently defective product, he noted, 'not only would the consumer have no remedy against the manufacturer, he would have none against anyone else, for in the circumstances alleged there would be no evidence of negligence against anyone other than the manufacturer ...'<sup>102</sup>

In *Donoghue*, both Lord Atkin and Lord Macmillan cited approvingly the 'illuminating' opinion of US Supreme Court Justice Benjamin Cardozo, rendered when he was chief judge of the highest court in the state of New York, in *MacPherson v Buick Motor Company*.<sup>103</sup> In that case, the plaintiff had bought a negligently manufactured car from a dealer. But according to the defendant manufacturer, only the dealer had a tort remedy against the manufacturer. Brandeis observed acridly:

The dealer was ... the one person of whom it might be said with some ... certainty that by him the car would not be used. Yet the defendant would have us say that he was the one person whom it [the defendant company] was under a legal duty to protect. The law does not lead us to so inconsequent a conclusion.<sup>104</sup>

How might all these factors bear on a common law court's recognition of a business duty of care to exercise human rights due diligence? It would be imprudent to suggest that the outcome will be formulaically predictable. Most of the factors in the case law are open to subjective interpretation. The outcome may turn on aspects such as the jurisdiction

<sup>97</sup> *Odhavji Estate v Woodhouse*, note 34, para 51.

<sup>98</sup> Not all the formulations in UK cases are thus neutral. In *Barrett v Enfield London Borough Council* [2001] 2 AC 550, 559, Lord Browne-Wilkinson opined: 'In English law the decision as to whether it is fair, just and reasonable to impose a liability in negligence on a particular class of would-be defendants depends on weighing in the balance the total detriment to the public interest in all cases from holding such class liable in negligence as against the total loss to all would-be plaintiffs if they are not to have a cause of action in respect of the loss they have individually suffered.'

<sup>99</sup> *Donoghue v Stevenson*, note 33.

<sup>100</sup> *Hedley Byrne and Company Ltd v Heller & Partners Ltd* (1964) AC 465, 524 (Lord Devlin).

<sup>101</sup> *The Home Office v The Dorset Yacht Company* [1970] UKHL 2, 28 (Lord Diplock).

<sup>102</sup> *Donoghue v Stevenson*, note 33, 582–3.

<sup>103</sup> 217 NY 382 (1916).

<sup>104</sup> *Ibid.*, 385.

where a case is brought, whether the facts are compelling, or the orientations of the judges. But as outlined in the next section, a good case can be made that in any common law jurisdiction, under any of their methodologies and criteria, the time is ripe for courts to recognize a business duty of care to exercise human rights due diligence.

#### IV. APPLYING THE COMMON LAW CRITERIA TO A BUSINESS DUTY OF CARE TO EXERCISE HUMAN RIGHTS DUE DILIGENCE

As noted in the previous section, in recognizing new duties of care, common law courts tend to follow two approaches, which need not be entirely inconsistent: the ‘traditional’ approach of ‘examining the decided cases [in similar situations] to see how far the law has gone and where it has refrained from going’,<sup>105</sup> and the more recent approach of identifying factors of general application. In arguing for a business duty of care to exercise human rights due diligence, this section considers both approaches. However, before doing that, I briefly discuss the general context within which international human rights law influences tort law in domestic jurisdictions.

##### A. International Human Rights Norms and Common Law Torts

The impact of international human rights norms, outside a business context, on the development of tort law is well known. As the UK Supreme Court recently acknowledged, there ‘are certainly areas where the [European] Convention [on Human Rights] has had an influence on the common law’.<sup>106</sup> That does not mean, however, that the existence of an internationally recognized human right calls for ‘instant manufacture of a corresponding common law right where none exists’.<sup>107</sup> There is no ‘simple, universally applicable answer’.<sup>108</sup> However, ‘one would ordinarily be surprised if conduct which violated a fundamental right or freedom of the individual did not find a reflection in a body of law ordinarily as sensitive to human needs as the common law’.<sup>109</sup>

The House of Lords and UK Supreme Court have addressed whether international human rights norms give rise to new common law duties of care, mainly in cases where police allegedly failed to fulfill the state’s duties under the European Convention on Human Rights to protect citizens from serious threats of harm.<sup>110</sup> But those decisions turned on factors not present in the business context. The Lords reasoned that since the Human Rights Act already afforded a statutory remedy for violations of Convention rights by public officials, there was no need to fashion a common law remedy.<sup>111</sup> In contrast, there is no generally applicable statutory remedy in common law countries for business failures to exercise human rights due diligence.

<sup>105</sup> *Michael v The Chief Constable*, note 67, para 102.

<sup>106</sup> *Ibid*, para 124 (Lord Toulson).

<sup>107</sup> *Chief Constable of the Hertfordshire Police v Van Colle* [2009] 1 AC 225, para 58 (Lord Bingham).

<sup>108</sup> *Ibid*.

<sup>109</sup> *Ibid*.

<sup>110</sup> See, e.g., *Chief Constable v Van Colle*, note 107; *Michael v The Chief Constable*, note 67.

<sup>111</sup> *Chief Constable v Van Colle*, note 107, paras 82 (Lord Hope) and 136 (Lord Brown); *Michael v The Chief Constable*, note 67, paras 127–8 (Lord Toulson).

In the police context, the Lords also saw the purposes of common law rights and Convention rights as different: ‘Whereas civil actions are designed essentially to compensate claimants for losses, Convention claims are intended to uphold minimum human rights standards and to vindicate those rights’.<sup>112</sup> Again, the business context is different. International norms on the business responsibility to respect human rights affirmatively call on states to compensate claimants and on business to cooperate in ensuring compensation.<sup>113</sup> The compensatory purposes of the common law and international norms in the business context are congruent.

In short, the precedents on the influence of international human rights norms on tort law are consistent with a future judicial recognition of a common law duty of care of business to exercise human rights due diligence.

### **B. Duties of Care in Recent Common Law Cases Involving Business and Human Rights**

As noted at the outset, no court has yet definitively recognized a business duty of care to exercise human rights due diligence. In fact, there was no basis in widely accepted international human rights norms for such a duty until quite recently.

In contemplating an incremental extension of the common law, at least three recent cases merit consideration. Each addresses the direct responsibility of a parent company for its own acts or omissions related to activities of its subsidiaries. In *Chandler v Cape*,<sup>114</sup> a former employee of a parent company’s domestic subsidiary died from asbestosis caused by allegedly negligent conduct by the parent. The issue was whether the parent company had a duty of care toward an employee of its subsidiary. Applying the ‘three-part *Caparo* test’ of foreseeability, proximity and fairness,<sup>115</sup> the English Court of Appeal held that:

in appropriate circumstances the law may impose responsibility on a parent company for the health and safety of its subsidiary’s employees. Those circumstances include a situation where, as in the present case, (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.<sup>116</sup>

If one were to view *Chandler* as the outer limit of the common law, it would then be a step too far to impose on a parent company a duty to exercise due diligence with regard to the human rights impacts of its subsidiaries. The four *Chandler* criteria are narrowly constraining. However, *Chandler* is of course not an end, but only a beginning, of the common law on parent company duties of care. Plainly the *Chandler* criteria were tailored to the particular facts of the case. The judgment does not even mention human rights.

<sup>112</sup> *Michael v The Chief Constable*, note 67, para 127 (Lord Toulson), citing Lord Brown in *Van Colle*.

<sup>113</sup> Guiding Principles, note 1, Principles 22, 25 and 26.

<sup>114</sup> [2012] EWCA Civ 525.

<sup>115</sup> *Ibid*, para 63.

<sup>116</sup> *Ibid*, para 80.

And even if a due diligence argument had been presented, the Court could not have imposed any duty reflecting recent international norms, because the facts of the case related to the early 1960s. Far from weighing against a new common law duty of care, *Chandler* shows, based on what are now widely accepted international norms, the potential of direct parent company liability to evolve.

A second case, *Akpan v Royal Dutch Shell*,<sup>117</sup> was brought in a Dutch district court, against both a Dutch parent company (Shell) and its Nigerian subsidiary, by a Nigerian farmer and fisherman whose land, water, health and livelihood were allegedly injured by a negligent, toxic oil spill. Although the Netherlands is not a common law jurisdiction, the Dutch court applied Nigerian common law under choice of law rules. The court considered that post-independence English precedents, while not binding on Nigerian courts, do 'have persuasive authority and are therefore frequently followed in Nigerian case law.'<sup>118</sup> Applying the three *Caparo* 'criteria', namely foreseeability, proximity, and 'fair, just and reasonable',<sup>119</sup> the court ruled that Shell's subsidiary owed a duty of care to its neighbour and had been negligent in not properly securing a wellhead.<sup>120</sup>

With regard to the parent company Shell, the district court considered the four *Chandler* criteria for the duty of care to employees of a subsidiary. It rejected their application by analogy to Shell. Neither the proximity nor the fairness prongs of *Caparo* justified recognizing a parent company's duty of care, not to an employee of a domestic subsidiary as in *Chandler*, but to a neighbouring property owner of a foreign subsidiary. The court explained that:

this latter relationship is not nearly as close, so that the requirement of proximity will be fulfilled less readily. The duty of care of a parent company in respect of the employees of a subsidiary that operates in the same country further only comprises a relatively limited group of people, whereas a possible duty of care of a parent company of an international group of oil companies in respect of the people living in the vicinity of oil pipelines and oil facilities of (sub-) subsidiaries would create a duty of care in respect of a virtually unlimited group of people in many countries. ... [I]t is far less quickly fair, just and reasonable than it was in *Chandler v Cape* to assume that such a duty of care on the part of [Shell] exists.<sup>121</sup>

Nor were proximity or fairness shown by the 'general fact' that Shell made prevention of environmental damage by its subsidiaries the 'main focus of its policy' and that Shell was 'to some extent' involved in its subsidiary's policy.<sup>122</sup>

The district court in *Akpan* thus considered only the *Chandler* criteria and the 'general fact' of Shell's preventive policy. It did not address a duty of care based on human rights due diligence. (As far as one can tell from the opinion, no such claim was presented.) In any case, one would not expect a non-common law court, hard pressed to apply the common law under choice of law rules, to extend the common law to recognize a new duty of care. The district court ruling in *Akpan* does not remotely suggest that the

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<sup>117</sup> District Court of The Hague, C/09/337050/HA ZA 09-1580 (30 January 2013), reversed in part on appeal (18 December 2015), as noted in text below.

<sup>118</sup> *Ibid*, para 3.22.

<sup>119</sup> *Ibid*, para 3.23.

<sup>120</sup> *Ibid*, paras 4.44–4.46.

<sup>121</sup> *Ibid*, para 3.29.

<sup>122</sup> *Ibid*, para 3.33.

common law has considered and rejected a business duty of care to exercise human rights due diligence.

On 18 December 2015, as this article was in preparation, the Court of Appeals in The Hague reportedly overturned the district court decision in part, ruling that Dutch courts have jurisdiction to allow not only Mr. Akpan, but three other farmers and Friends of the Earth Netherlands, to sue Shell in The Hague and to obtain access to internal Shell documents.<sup>123</sup>

By contrast with *Chandler* and *Akpan*, the third case comes quite close to addressing the duty of care advocated here. In *Choe v Hudbay Minerals Inc.*,<sup>124</sup> a Canadian court declined to dismiss, and allowed to proceed to trial, a suit brought against a Canadian parent company by Guatemalans who alleged that security personnel of the company's Guatemalan subsidiary had beaten, raped, shot and killed Guatemalans in the course of forced removals related to a mining project in Guatemala. Amnesty International Canada brought to the court's attention recent international norms, including the Guiding Principles and the OECD Guidelines.<sup>125</sup> Amnesty argued for a duty of care where a parent company is 'alleged to have knowledge of risks to others posed by a subsidiary and has a degree of control over its response to those risks'.<sup>126</sup> In evaluating the proposed duty of care, the court applied the three Canadian criteria (foreseeability, proximity and public policy) for recognizing 'novel' duties of care.<sup>127</sup> It did so against a procedural standard that the case could not be dismissed unless it were 'plain and obvious' that the criteria were not met.<sup>128</sup> On that standard, the court found sufficient grounds to allow the case to go forward.<sup>129</sup>

*Hudbay* should not be viewed as precedent for judicial recognition of a business duty of care to exercise human rights due diligence. It was only a preliminary ruling by a lower court against a standard that the claim could not be dismissed unless its insufficiency was 'plain and obvious'. The court did not articulate the duty of care precisely as proposed here—the company's duty to exercise human rights due diligence as defined in the Guiding Principles. In addition, the case was complicated by the direct involvement of the parent company in aspects of the subsidiary's activities,<sup>130</sup> so that the claim was not based solely on lack of due diligence.

Nevertheless, on the first occasion that a common law court was presented with a business duty of care based on the new, widely accepted international norms, the court allowed the case to proceed. This is the sort of incremental step on which the common law sometimes builds. It leaves the door open for courts to entertain a business duty of care to exercise human rights due diligence in common law tort suits for negligence.

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<sup>123</sup> See Friends of the Earth, 'Outcome Appeal against Shell: Victory for the Environment and the Nigerian People' (18 December 2015), <http://foecanada.org/en/2015/12/outcome-appeal-against-shell-victory-for-the-environment-and-the-nigerian-people/> (accessed 1 February 2016). Because this judgment is very recent and in the Dutch language, there was not enough time to analyze it for this article.

<sup>124</sup> [2013] 2013 ONSC 1414 (Ontario Superior Court).

<sup>125</sup> *Ibid.*, paras 32–9.

<sup>126</sup> *Ibid.*, para 38.

<sup>127</sup> *Ibid.*, paras 56–7.

<sup>128</sup> *Ibid.*, para 55.

<sup>129</sup> *Ibid.*, para 75.

<sup>130</sup> *Ibid.*, paras 60–1.

### C. A 'Factors' Approach

Space does not permit full analysis of a business duty of care to exercise human rights due diligence under a 'factors' approach. In any event common law methodology suggests that such an analysis not be done in the abstract, but should take into account the facts of particular cases.

Nonetheless a few general observations can be made with regard to the factors that British and Canadian courts consider in recognizing new duties of care, namely the *Caparo* factors of (1) foreseeability; (2) proximity; and (3) 'fair, just and reasonable'; supplemented by (4) the Canadian 'public policy' factor.<sup>131</sup> The word 'factor' is used here, in lieu of 'criteria' or 'tests', because the courts acknowledge that these factors resist precise definition and are sometimes more conclusory than explanatory.<sup>132</sup>

#### 1. Foreseeability

The foreseeability factor is satisfied by the very concept of a duty of care based on the business responsibility to exercise due diligence to anticipate and mitigate foreseeable human rights risks. Principle 18 of the Guiding Principles enjoins: 'In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved ...' In other words, business should make reasonable efforts to foresee human rights risks. Moreover, the commentary on Principle 18 adds that the purpose of human rights impact assessments, as an element of due diligence, is to 'understand the specific impacts on specific people, given a specific context of operations'. A common law duty of care based on this exercise of due diligence would thus be owed, by definition, to reasonably foreseeable classes of victims, for reasonably foreseeable classes of injuries.

#### 2. Proximity

Principle 18 also helps to establish proximity. Proximity does not refer merely to geography, but rather, in Lord Atkin's celebrated phrase, to persons:

who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question ... [T]his is the sense in which nearness of "proximity" was intended ...<sup>133</sup>

As described in Principle 18 and its commentary, human rights due diligence fits this definition of 'proximity'. Human rights impact assessments are intended, in part, to identify those classes of persons 'who are so closely and directly affected' by prospective or ongoing business activity that a company 'ought reasonably to have them in contemplation as being so affected' when it is 'directing [its] mind to the acts or omissions' in question.

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<sup>131</sup> California and other US factors are not addressed here, because it is assumed that they fit within one or the other of the British and Canadian factors.

<sup>132</sup> See text at note 94.

<sup>133</sup> *Donoghue v Stevenson*, note 33, 581 (Lord Atkin).

Under a due diligence standard, business does not owe a duty of care to the entire world. Rather, its duty is owed to those classes of persons whom a reasonable exercise of due diligence identifies as likely to be at risk from the business activity. The limit on a company's duty of care is thus comparable to the limit on an auditor's duty of care in *Caparo*. The auditor owed a duty of care to the company he audited and for whose business purposes he knowingly prepared the audit. He did not owe a duty of care to third parties whose purposes in using the audit he did not have in mind in preparing it.<sup>134</sup>

### 3. Fair, Just and Reasonable

The fairness factor will of course vary with the facts of each case and is especially difficult to define in the abstract. In general, however, fairness relates in part to foreseeability and proximity. The more foreseeable the risk, and the more proximate the business relationship to the persons affected, the fairer it seems to impose on the business a duty of care toward the persons foreseeably and proximately affected.

### 4. Public Policy

Recognizing a business duty of care in a tort case implicates both substantive and remedial policies. The substantive policy is that business has a duty to act with care. The remedial policy is that if it fails to do so, it should cooperate in remediation, including payment of compensation to persons injured as a result.

If there were no international norms, common law courts evaluating new duties of care for business would have to make both the substantive and remedial policy judgments on a clean slate. But the Guiding Principles have already made the substantive policy judgment in a way that is widely accepted, not only among common law countries, but globally.<sup>135</sup> Principle 17 directs: 'In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence'.

The Principles likewise shape remedial policy. Principle 25 requires states to ensure 'access to effective remedy' through 'judicial, administrative, legislative or other appropriate means'. Where states do provide judicial remedies, Principle 26 requires them to take steps to 'ensure the[ir] effectiveness'. The commentary recognizes that there are 'situations where judicial recourse is an essential part of accessing remedy'.

In common law countries, the usual mechanism for compensating victims of negligently inflicted harm is judicial: a lawsuit for the tort of negligence. Where the legislature has not provided some other effective remedy, Principle 26 thus implies a policy judgment that common law courts should recognize and enforce a business duty of care.

In short, much of the 'public policy' analysis has already been done by the Guiding Principles. Courts need not reinvent the wheel. In given cases, of course, other public policies may come into play. If so, a common law court may need to balance conflicting public policies. But only strong policies should suffice to overcome the global consensus reflected in the Guiding Principles, which should be treated as presumptive common law norms.

<sup>134</sup> *Caparo v Dickman*, note 71, 660–2 (Lord Jauncey of Tullichettle).

<sup>135</sup> Text at notes 9–17.

## V. OBJECTIONS AND RESERVATIONS TO A BUSINESS DUTY OF CARE

Objections to a judicially recognized business duty of care might come from those who think it does not go far enough, as well as from those who believe it goes too far.

Professor Skinner thinks it does not go far enough. She agrees that a 'due diligence approach would be better than what currently exists and would be a step in the right direction'.<sup>136</sup> However, she criticizes the due diligence approach for unclear standards; for creating a risk that parent companies would not really monitor subsidiaries and would resort to superficially checking off boxes; and for letting parent companies off the hook where they engage in due diligence, but their foreign subsidiary violates human rights anyway and cannot be brought to justice in corrupt foreign courts.<sup>137</sup> She acknowledges that tort suits against parent companies for violating their own duties of care have 'promise', but only in 'certain, limited situations'.<sup>138</sup>

Professor Skinner's concerns should not be ignored. But they do not amount to sufficient reasons for courts to refrain from recognizing a business duty of care to exercise due diligence. Most fundamentally, the argument that currently recognized duties of care do not encompass human rights due diligence overlooks the dynamic nature of the common law. If *Chandler* did not consider a human rights due diligence approach, *Hudbay* did. If *Hudbay* was only a preliminary ruling, the next case might rule on the merits of a duty of care. As judges and litigators grapple with the issue, there may be steps forward and steps back. That is the way the common law develops.

Do due diligence standards lack precision? Yes, but no more than the factors of proximity and fairness that common law courts regularly consider in evaluating new duties of care. Might some parent companies simply go through the motions of monitoring their subsidiaries? Yes, but that is why the common law duty of care must be based, not merely on feigning due diligence, but on its *reasonable* exercise.

Will some foreign subsidiaries still violate human rights and enjoy impunity in corrupt local courts? Yes, but likely fewer will escape untouched, and no duty of care can be asked to cure all ills. The questions we should ask are: whether a business duty of care to exercise human rights due diligence will lead to (1) fewer human rights violations and (2) more relief for victims when violations do occur. To both questions, the answer is almost certainly yes.

Not that tort suits are a panacea. Even with good substantive rules and ample remedial orders, in the real world lawsuits for torts are expensive and beset by a range of legal and practical hurdles and limitations.<sup>139</sup> But even without a new duty of care, they have already provided redress to many thousands of victims of corporate negligence.<sup>140</sup>

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<sup>136</sup> Skinner, note 6, 1828.

<sup>137</sup> *Ibid*, 1829–31.

<sup>138</sup> *Ibid*, 1838–9.

<sup>139</sup> See generally Paul Hoffman and Beth Stephens, 'International Human Rights Cases Under State Law and in State Courts' (2013) 3 *University of California Irvine Law Review* 9, 17–20; Skinner, note 29, text at notes 149–413; Roger P Alford, 'The Future of Human Rights Litigation After Kiobel' (2014) 89 *Notre Dame Law Review* 1749, 1761–72; Richard Meeran, 'Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States' (2011) 3 *City University of Hong Kong Law Review* 1; Amnesty International, note 2.

<sup>140</sup> See generally Meeran, note 139.

They can do much more if a business duty of care to exercise human rights due diligence comes to be recognized.

Lawyers for companies can of course be expected in most cases to object to any innovation, including a new duty of care, which might expose their clients to greater liabilities. Among other arguments, for example, the lawyers for the defendant company in *Hudbay* laboured, albeit unsuccessfully, to persuade the judge that the case against the parent company was a disguised effort to pierce the corporate veil, and that recognition of any new duty of care should be left to parliament, not the courts.<sup>141</sup> In fact, the duty of care claim was based on the parent company's own acts, and common law courts often act when parliaments have not. Still, as the case moves forward, such arguments might yet prevail. But even if that were to happen, more cases will be brought, whether in Canada or somewhere else in the wide world of the common law. It is too soon to predict their outcomes.

## VI. CONCLUSION

This article has sought to outline the case for a business duty of care to exercise human rights due diligence, enforceable by common law tort suits for negligence. Widely accepted international human rights norms now enjoin business to exercise human rights due diligence, while calling on states to afford judicial remedies for business-related violations. Not only the social expectations embodied in the norms, but also the objective conditions—the often seriously negative impacts of business on human rights—make it ripe for courts to incorporate the international norms into a new common law duty of care.

Current remedies are not adequate. An array of normative, procedural and practical hurdles continues to impede access to effective remedies. There is a compelling need to make the rights of victims real and effective. At present, all too frequently, their rights remain only theoretical. Yet the common law has long been inspired by the words of William Blackstone over two centuries ago: 'It is a settled and invariable principle in the laws of England, that every right when with-held must have a remedy, and every injury its proper redress.'<sup>142</sup> As common law courts consider the proposed new business duty of care to exercise human rights due diligence, they would do well to bear in mind this wisdom of Blackstone.

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<sup>141</sup> *Choe v Hudbay*, note 124, paras 17 and 72.

<sup>142</sup> William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765) 23.