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and Human Rights on Transnational Human  
Rights Litigation

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# The Impact of the ‘Ruggie Framework’ and the United Nations Guiding Principles on Business and Human Rights on Transnational Human Rights Litigation

Astrid Sanders \*

**Abstract:** This paper explores the impact of the Ruggie ‘Protect, Respect and Remedy’ framework and UN Guiding Principles on Business and Human Rights on transnational human rights litigation. It considers the impact to date, and the possible impact the Ruggie Framework and UN Guiding Principles could have on a widely predicted increase in the number of state law negligence claims against transnational corporations in the US after the decision of the Supreme Court in *Kiobel v. Royal Dutch Petroleum* limiting the jurisdictional reach of the US Alien Tort Statute 1789.

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## 1. INTRODUCTION

In 2008, the Special Representative of the Secretary-General to the United Nations on the issue of human rights and transnational corporations and other business enterprises (hereafter ‘SRSG’ or ‘Ruggie’) proposed a new ‘policy and conceptual framework’ to ‘anchor the business and human rights debate’.<sup>1</sup> The 2008 framework was the ‘Protect, Respect and Remedy Framework’ or ‘Ruggie Framework’, and was subsequently ‘operationalized’ in the United Nations Guiding Principles on Business and Human Rights (‘Guiding Principles’) from 2011.<sup>2</sup> Both the Ruggie Framework and Guiding Principles were quickly universally or nearly universally accepted by all relevant actors: Governments, the business community and – arguably, to a lesser extent – civil society.<sup>3</sup> Since then, the Ruggie Framework and Guiding Principles have become undoubtedly ‘the’ focal point in the business and human rights debate.<sup>4</sup>

The purpose of this paper is to assess the impact of the Ruggie Framework and Guiding Principles on transnational human rights litigation. ‘Transnational human rights litigation’, in essence, refers to legal claims brought against ‘transnational corporations’ for human rights harms, typically by workers or communities from so-called ‘host’ states (where there is a subsidiary or supplier in a transnational corporate group) but in the courts of so-called ‘home’ states (where

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<sup>1</sup> John Ruggie, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: ‘Protect, Respect and Remedy: a Framework for Business and Human Rights’, A/HRC/8/5, 7 April 2008, and specifically p.1.

<sup>2</sup> Ibid; and John Ruggie, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’, A/HRC/17/31, 21 March 2011. (On the language of ‘operationalization’: see John Ruggie, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: ‘Business and Human Rights: Towards Operationalizing the “Protect, Respect and Remedy” Framework’, A/HRC/11/13, 22 April 2009, para. 1).

<sup>3</sup> Ruggie, ‘Towards Operationalizing the “Protect, Respect and Remedy” Framework’, pp. 3-4; Ruggie, ‘Guiding Principles on Business and Human Rights’, pp. 4-5; John Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: W. W. Norton and Company, 2013) pp. 104-106 and pp. 119-124. For an overview of the reception of the Ruggie Framework and Guiding Principles, including of the more critical attitude by some NGOs, see e.g. James Harrison, ‘An Evaluation of the Institutionalisation of Corporate Human Rights Due Diligence’, Legal Studies Research Paper 2012-18, University of Warwick School of Law, at pp. 3-4. For more critical academic evaluation of the Guiding Principles, see Radu Mares (ed), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Leiden: Martin Nijhoff Publishers, 2012) and Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Businesses: Beyond the Corporate Responsibility to Respect* (Cambridge: Cambridge University Press, 2013).

<sup>4</sup> As indeed desired by Ruggie: ‘but those things must cohere and become cumulative’ (Ruggie, Framework, para. 7, and para. 107); John Ruggie, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: ‘Business and Human Rights: Further Steps towards the Operationalization of the “Protect, Respect and Remedy” Framework’, A/HRC/14/27, 9 April 2010, para. 5; Ruggie, Guiding Principles, para. 5.

the parent company or 'core' company in a transnational corporate group is based).<sup>5</sup>

Ruggie himself refers to transnational human rights litigation, albeit briefly, at various points in his various reports to the UN Human Rights Council. In those references, he notes that although most transnational human rights litigation to date has taken place under the Alien Tort Statute 1789 in the US ('ATS'),<sup>6</sup> there have also been notable domestic civil claims against transnational corporations, as well as favourable developments for finding companies criminally liable domestically, both in the US and beyond.<sup>7</sup> An important question for this paper is whether the Ruggie Framework and Guiding Principles have either or both: firstly, affected the way in which plaintiffs plead cases and/or, secondly, influenced judgments by domestic courts. With the ubiquity of the Ruggie Framework and Guiding Principles, one might expect the answer to both to be yes.

A related discussion would be the impact on transnational human rights litigation of legislative developments subsequent to the Ruggie Framework and Guiding Principles. For example, a recent report sponsored by a coalition of NGOs concludes that that 'some states' have taken 'regressive steps [with regard to the third pillar of the Ruggie Framework and Guiding Principles] since the adoption of the UNGPs, rather than work positively to ensure that effective remedy is accessible'.<sup>8</sup> However, even though states are referred to in the plural, in reality, the focus of that sentiment would seem to be towards the United Kingdom and in particular the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The latter Act changes the rules on recovery of costs in civil cases, and has been described as possibly a 'real disincentive' to 'legitimate business-related human rights claims' in the UK by the SRSG himself.<sup>9</sup>

The UK is mentioned at this point, as the focus of this paper will be on judicial decisions in both the United States of America and the UK. This is

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<sup>5</sup> For the most complete overview of this type of litigation to date, see Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Oxford: Hart Publishing 2004). Specifically, these are claims against particular companies within, or linked to a, transnational corporate group, rather than against a 'transnational corporation' per se: see Ruggie, Framework, para. 12; Ruggie, Further steps, para. 106.

<sup>6</sup> 28 USCA § 1350.

<sup>7</sup> John Ruggie, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: 'Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts', A/HRC/4/035, 9 February 2007; Ruggie, Framework, para. 90; John Ruggie, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: 'Clarifying the Concepts of "Sphere of Influence and Complicity"', A/HRC/8/16, 15 May 2008, pp. 9-16; Ruggie, Further Steps, para. 75.

<sup>8</sup> Gwynne Skinner, Robert McCorquodale, Olivier de Schutter and Andie Lambe, 'The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business' (ICAR, CORE and ECCJ, 2013), p.1. For further details on the changes made, see pp. 52-53 (see also Richard Meeran, 'Tort Litigation Against Multinational Corporations for Violations of Human Rights: An Overview of the Position Outside the United States' (2011) 3 *City University of Hong Kong Law Review* 1, 18-19; Michael D. Goldhaber, 'Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard' (2013) 3 *UC Irvine Law Review*, 127, 133-4).

<sup>9</sup> John Ruggie, Letter to UK Minister of Justice, Mr Jonathan Djanogly MP (16 May 2011). Available at <http://www.theguardian.com/law/2011/jun/16/united-nations-legal-aid-cuts-trafigura> (accessed 1 December 2013).

because, to date, the majority of transnational human rights litigation has occurred in these two jurisdictions, although obviously the greater majority of cases have occurred in the US.<sup>10</sup> However, a viewpoint has developed in the academic literature in recent times that the UK may have as much, or even more, potential as a site for transnational human rights litigation than the US. This is due to recent judicial decisions in the UK or which affect the UK, so that if a company is ‘domiciled’ in the UK, courts in the UK must take jurisdiction over a claim and cannot dismiss a case for *forum non conveniens* (FNC).<sup>11</sup> In addition, in a recent opinion, the English Court of Appeal confirmed the liability at trial of a parent company under the tort of negligence to the employee of a subsidiary.<sup>12</sup> In comparison, in the US, two successive decisions by the Supreme Court have limited the scope of the ATS, with a third decision more recently still declining personal jurisdiction in *Daimler AG v. Bauman*.<sup>13</sup> Although this introduction has noted recent legislative developments, particularly in the UK, it should however be noted that the focus of this paper is the actual and possible impact of the Guiding Principles specifically on judicial decisions.

Principle 11 of the Guiding Principles tells business enterprises to ‘respect human rights’, no matter – according to GP 14, the ‘size, sector, operational context, ownership and structure’ of the business enterprise. The ‘corporate responsibility to respect’ is expressed in slightly different ways throughout the SRSG’s reports to the Human Rights Council. According to GP 11, ‘this means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved’. In the earlier reports, Ruggie similarly defines the corporate responsibility to respect rights as ‘essentially [...] not to infringe on the rights of others’, but adds that this means, ‘put simply, to do no harm’.<sup>14</sup> In the 2009 and 2010 reports, Ruggie summarises the corporate responsibility as ‘acting with due diligence to avoid infringing on the rights of others’.<sup>15</sup> The difference with the Guiding Principles is that, for the first time,

<sup>10</sup> E.g. Skinner et al, ‘The Third Pillar’, p.15. On the increasing potential (or perhaps not) of continental European jurisdictions as forums for transnational human rights litigation, see e.g. Jan Wouters and Cedric Ryngaert, ‘Litigation for Overseas Corporate Human Rights Abuses in the European Union: The Challenge of Jurisdiction’ (2009) 40 *The George Washington International Law Review* 939; Goldhaber, ‘Corporate Human Rights Litigation’; Skinner et al, ‘The Third Pillar’.

<sup>11</sup> This is the effect of the decision by the European Court of Justice in Case 281/02 *Owusu v. Jackson* [2005] ECR I-1383, interpreting Article 2 of Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2000 No. L12/1, 16 January 2001. (See also the novel claim in *Vava v. Anglo-American South African Ltd* that a foreign subsidiary was ‘domiciled’ in the UK (described as ‘arguable’ by the High Court in [2012] EWHC 1969 (QB), [2012] 2 CLC 684; rejected subsequently at [2013] EWHC 2131 (QB)).

<sup>12</sup> *Chandler v. Cape Plc* [2012] EWCA Civ 525, [2012] 1 WLR 3111.

<sup>13</sup> *Sosa v. Alvarez-Machain* 542 US 692 (2004) (holding that any new norms should be established with such specificity and universality as the three original 18th century paradigms); *Kiobel v. Royal Dutch Petroleum* 133 S. Ct 1659 (2013); *Bauman v. Daimlerchrysler* 134 S. Ct 746 (2014). The controversial decision by the Ninth Circuit, which was reversed by the Supreme Court, is 644 F 3d 909 (2011)).

<sup>14</sup> Ruggie, Framework, para. 24; Ruggie, Clarifying, para. 3.

<sup>15</sup> Ruggie, Operationalizing, para.2; Ruggie, Further steps, para. 1. (See also Introduction to the Guiding Principles at para. 6).

Ruggie identifies a hierarchy and different consequences if a business enterprise either 'causes', 'contributes' or is 'directly linked' to adverse impacts, and also clarifies, again for the first time, that business enterprises have a responsibility to 'remediate' in the first two situations.<sup>16</sup>

However, from the very first articulation of Ruggie's new framework, Ruggie explains that the way for business enterprises to 'discharge' the responsibility to respect is through 'due diligence'.<sup>17</sup> Due diligence, according to the SRSG, 'describes the steps a company must take to become aware of, prevent and address adverse human rights impacts'.<sup>18</sup> Ruggie in various reports for the UN Human Rights Council, and from Principles 16 to 24 of the Guiding Principles out of a total of only 31 principles, amplifies on his meaning of 'due diligence'.

It is normally assumed that Ruggie's concept of due diligence draws on due diligence as applied in the context of corporate and securities law. However, this paper will explore an alternative, which is whether there might also be a parallel with 'ordinary' tort law. The word 'ordinary' is used here to indicate that the paper is referring to common law tort, municipal tort, plain 'garden variety' tort and/or state tort law, as opposed to the more complicated understanding of 'tort' (if that word is even appropriate) as a violation of the 'law of nations' under the ATS.<sup>19</sup> Indeed, this paper considers whether there might be a parallel not only between 'due diligence' in the Ruggie Framework and Guiding Principles and domestic tort laws in the US and UK, but moreover also between the very concept of the 'corporate responsibility to respect', as 'put simply, [a duty] to do no harm', and tort laws in the US and UK.

That these are legitimate and valid questions to ask is undoubted. Before the decision of the US Supreme Court in *Kiobel v. Royal Dutch Petroleum*, Ruggie himself issued a brief, posing a series of - yet unanswered - questions about the relationship between the corporate responsibility to respect and transnational human rights litigation.<sup>20</sup> If, as Ruggie wrote, *Kiobel* was the 'ideal case for starting the conversation', the aim of this paper is to carry on that conversation, exploring the possible overlap between the corporate responsibility and state or domestic tort laws.<sup>21</sup> Indeed, this question may not have seemed as pressing to a US audience before the *Kiobel* decision. However, since *Kiobel*, the US academy seems

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<sup>16</sup> GPs 13 and 19 (Ruggie had mentioned 'remediation' previously, but only very briefly in the context of the corporate responsibility to respect, and without mentioning the afore-mentioned distinction).

<sup>17</sup> Ruggie, Framework, para. 56.

<sup>18</sup> Ibid.

<sup>19</sup> The word 'tort' arguably does not give a complete picture, when US courts under the ATS tend to use international criminal law concepts rather than equivalent concepts in domestic tort law when deciding 'ancillary' (*Doe I v. Unocal* 395 F 3d 932 (9<sup>th</sup> Cir. 2002) at 963) matters of liability. (See the difference between judgments in the same case in, e.g., *Doe I v. Unocal* (but vacated 403 F 3d 708 (9<sup>th</sup> Cir. 2005)) and *Khulumani v. Barclays National Bank* 504 F 3d 254 (2<sup>nd</sup> Cir. 2007)).

<sup>20</sup> John Ruggie, 'An Issues Brief: *Kiobel* and Corporate Social Responsibility' (4 September 2012). Available at [http://www.hks.harvard.edu/m-rcbg/CSRI/KIOBEL\\_AND\\_CORPORATE\\_SOCIAL\\_RESPONSIBILITY%20\(3\).pdf](http://www.hks.harvard.edu/m-rcbg/CSRI/KIOBEL_AND_CORPORATE_SOCIAL_RESPONSIBILITY%20(3).pdf) (accessed 1 December 2013).

<sup>21</sup> Ibid.

universally to agree there will be henceforth more state tort law claims against transnational corporations.<sup>22</sup>

The structure of this paper will be as follows. The paper will begin by providing an overview of the Ruggie Framework and Guiding Principles and in particular of the corporate responsibility to respect human rights. It will then explore the similarities and differences between the corporate responsibility to respect and the tort of negligence in the US and UK. The paper will then proceed to explore the consequences if there are found to be similarities between the corporate responsibility to respect under the Ruggie Framework and Guiding Principles and ‘ordinary’ tort laws.

## 2. THE RUGGIE FRAMEWORK AND UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

The then Secretary-General of the United Nations, Kofi Annan, appointed Ruggie as Special Representative in 2005, after the breakdown of the ‘Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights’ (which infamously would have imposed new direct legal obligations on transnational corporations and other business enterprises) approved by the Sub-Commission of the then UN Commission on Human Rights.<sup>23</sup> This story is well known.<sup>24</sup> Where the ‘Norms’ created division and controversy, Ruggie managed to achieve consensus and support. On the other hand, it should be noted that the latter is, however, sometimes used as a criticism of Ruggie, implying that the only way he managed to achieve consensus in this diverse area was by resorting to, in effect, the lowest common denominator and minimalism.<sup>25</sup>

Ruggie was SRSG from 2005 to 2011. His mandate can be summarised as having consisted of three phases: the first phase, from 2005 to 2007, was the ‘mapping’ stage; the second stage, in 2008, was the initial ‘recommendation’ stage, and the third stage, from 2008 to 2011, was the ‘operationalization’ stage.<sup>26</sup>

<sup>22</sup> See, for example, the special issue of the *UC Irvine Law Review* in 2013 (volume 3).

<sup>23</sup> UN Doc. E/CN.4/Sub.2/2003/12/Rev. 2 (2003); ‘approved’ by Sub-Commission in Resolution 2003/16, 13 August 2003, contained in UN Doc. E/CN.4/2004/2, E/CN.4/Sub.2/2003/43 (and rejection by Commission at Decision 2004/116, 22 April 2004, contained in UN Doc. E/CN.4/2004/L.11/Add.7). Appointment of SRSG: UN Doc. E/CN.4/RES/2005/69, 20 April 2005. More recently, calls for a new treaty on business and human rights have again resurfaced at the United Nations level, with the Government of Ecuador in September 2013, issuing a ‘statement’ at the 24<sup>th</sup> Session of the Human Rights Council, reportedly supported by 80 other countries and over 100 NGOs, to ‘work towards the elaboration of a legally binding instrument’ (General Debate – Item 3).

<sup>24</sup> Ruggie’s thoughts about the Norms are contained in John Ruggie, Interim Report of the SRSG on the Issue of Human Rights and TNCs and other Business Enterprises, UN Doc. E/CN.4/2006/97 (2006).

<sup>25</sup> David Bilchitz, ‘The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?’ (2010) 12 *SUR – International Journal on Human Rights* 199.

<sup>26</sup> Ruggie, Guiding Principles, paras. 4-5 (introduction).



Alternatively, as expressed by Harrison, the second stage answered the 'what' question and the third stage answered the 'how' question: firstly, 'what states and business enterprises need to do to ensure business respect for human rights' and, secondly and subsequently, 'how to move from the conceptual framework of responsibilities to "practical, positive results on the ground"'.<sup>27</sup> The position of the SRSG on the issue of human rights responsibilities of transnational corporations and other business enterprises has been succeeded by a new UN Working Group on Business and Human Rights, at least for a period of three years.<sup>28</sup> The mandate of the Working Group is, amongst others, to 'promote the effective and comprehensive dissemination and implementation of the Guiding Principles'.<sup>29</sup> It consists of five members, who are 'independent experts', and has just hosted the second annual Forum on Business and Human Rights at the UN in Geneva.<sup>30</sup>

There are three parts, or 'pillars' in Ruggie's words, to the framework and Guiding Principles. The first pillar is the 'state duty to protect', which includes the state's legal obligations to 'protect against human rights abuses within their territory and/or jurisdiction by third parties, including business enterprises'.<sup>31</sup> This 'requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication'.<sup>32</sup> Human rights experts have described this duty as imposing a standard of conduct, rather than requiring a particular result.<sup>33</sup> The second pillar is the 'corporate responsibility to respect human rights' and will be discussed in more detail below. The third pillar is 'effective access to remedies', both judicial and non-judicial.<sup>34</sup> Ruggie recognises there are a 'patchwork of mechanisms' for possible remedy, both judicial and non-judicial, and state based and non-state based, but they remain 'incomplete and flawed. It must be improved in its parts and as a whole'.<sup>35</sup> The result of this patchwork and gaps is that some of the most deserving possible recipients, who have suffered the more serious or systematic human rights violations, may be left without the possibility of a remedy, whether that remedy be an 'apology, restitution, rehabilitation, financial or non-financial compensation' or otherwise.<sup>36</sup> Ruggie has consistently emphasised that each of the pillars is different but important in their own right, and only when they are pursued together will real

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<sup>27</sup> Harrison, 'An Evaluation', p. 3.

<sup>28</sup> UN. Doc A/HRC/17/4. (Ruggie's recommendations for 'follow-up to the mandate' (11 February 2011) can be found at <http://www.business-humanrights.org/media/documents/ruggie/ruggie-special-mandate-follow-up-11-feb-2011.pdf> (accessed 1 December 2013)).

<sup>29</sup> Ibid.

<sup>30</sup> The latest report of the WG is available at UN.Doc A/23/32 (14 March 2013).

<sup>31</sup> GP 1.

<sup>32</sup> Ibid.

<sup>33</sup> For example, Jonathan Bonnitcha and Robert McCorquodale, 'Is the Concept of 'Due Diligence' in the Guiding Principles Coherent?' (available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2208588](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2208588) (accessed 1 December 2013)): 'in these circumstances, a State's obligation is not to prevent third parties from committing wrongful acts, but to satisfy a certain standard of conduct in attempting to prevent the commission of wrongful acts', at p. 7.

<sup>34</sup> GPs 25-31.

<sup>35</sup> Ruggie, Framework, para. 87.

<sup>36</sup> Commentary to GP 25; Ruggie, *Just Business*, p. 196 (on 'many victims [...]').



progress be made either actually to prevent or to prevent the appearance of corporate human rights abuses and to achieve ‘sustainable progress’.<sup>37</sup>

The ‘corporate responsibility to respect human rights’ is the second pillar and has already been mentioned in the introduction to this paper. GP 11 states this ‘means that [business enterprises] should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved’. As stated above, in the earlier iterations of the corporate responsibility to respect, Ruggie summarised it as ‘not to infringe on the rights of others – put simply, to do no harm’.<sup>38</sup> The subsequent Guiding Principles distinguish between the situations where a business enterprise ‘causes’, ‘contributes’ or is ‘directly linked’ to adverse human rights impacts.<sup>39</sup>

According to the SRSG’s commentary to GP 19, ‘where a business enterprise causes or may cause an adverse human rights impact, it should take the necessary steps to cease or prevent the impact’. Where instead a business enterprise ‘contributes or may contribute to an adverse human rights impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible’. Finally, where a business enterprise is only ‘directly linked’ to an adverse human rights impact through its ‘business relationships’, the business enterprise should exercise leverage to prevent or mitigate the adverse impact if it has leverage, should consider if it can increase its leverage, take into account the severity of the human rights impact when deciding how to act, and possibly consider terminating the relationship with the other entity. As well as deciding what will be ‘appropriate action’, whether a business enterprise causes, contributes or is merely directly linked to rights violations also affects the question of remediation, as introduced with the Guiding Principles. GP 22 states that business enterprises should remediate victims when they have caused or contributed to harms, but not when there is only a ‘direct link’ via business relationships to harm.

Many commentators have drawn attention to the choice of language in the second pillar being the word ‘responsibility’, as opposed to the word ‘duty’ being selected for the first pillar.<sup>40</sup> This is normally taken to indicate that the SRSG intended the ‘corporate responsibility to respect’ to be extra-legal or non-legal. The corporate responsibility to respect can be taken to be extra-legal or non-legal in two different ways. Firstly, Ruggie emphasises that his framework and Guiding Principles are not intended to create new legal obligations for business enterprises at the international level: otherwise the new framework would replicate the

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<sup>37</sup> Ruggie, Framework, para. 9; Ruggie, Operationalizing, para 2; Ruggie, Further steps, para. 123; Ruggie, Guiding Principles, para. 6 (introduction) and General Principles. The appearance of corporate human rights abuses can be damaging: see discussion of reputational effects (Further steps, paras. 26).

<sup>38</sup> Ruggie, Framework, para. 24; Ruggie, Clarifying, para. 3.

<sup>39</sup> GPs 13 and 19.

<sup>40</sup> Ruggie himself picks up on this distinction in Further Steps at para. 55.

'excesses' of the Norms.<sup>41</sup> Secondly, the corporate responsibility reflects the social expectations of companies (the company's 'social license to operate').<sup>42</sup> As identified by Ruggie, society's expectations of companies might be more demanding of companies than their legal obligations.<sup>43</sup>

However, even if the corporate responsibility to respect was primarily intended to be extra-legal or non-legal, that does not mean that business enterprises do not have any legal obligations to respect human rights. At the very least, they have obligations placed upon them in domestic laws, which may reflect 'elements' of the corporate responsibility to respect human rights, even if the language of human rights is not explicitly used.<sup>44</sup> A specific example, where human rights language is not expressly used but statutory instruments still reflect principles of human rights, would be anti-discrimination laws in the US and UK which require employers not to discriminate against workers on prohibited grounds and in particular types of way.<sup>45</sup> To this end, Ruggie in his 2010 report emphasises that the corporate responsibility to respect is 'not a law-free zone'.<sup>46</sup> Nor does the extra-legal sense of the corporate responsibility to respect mean that Ruggie would necessarily be adverse to domestic courts referring to his framework and using his framework to develop common law, as the 'general principles' of the Guiding Principles state that 'nothing in these GPs should be read as [...] limiting or undermining any legal obligations' (albeit that clause continues 'a State may have undertaken or be subject to under international law with regard to human rights'). It might also be noted that, for these purposes, in his various reports as the SRSG, Ruggie notes developments at the domestic level, both judicial and non-judicial, potentially increasing the civil - and possibly even criminal - liability of businesses for human rights abuses at home and abroad, without expressing dissatisfaction at those developments.<sup>47</sup>

The other criticism that tends to be made of the SRSG's 'corporate responsibility to respect' is that it is predominantly negative.<sup>48</sup> It will be remembered that GP 11 is expressed as an instruction not to 'infringe on the rights of others' and that, in the earlier articulations of the framework, Ruggie memorably summarised the corporate responsibility to respect as 'put simply, to

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<sup>41</sup> General Principles in Guiding Principles. The word 'excesses' is used to describe the Norms in Ruggie, Interim Report at para. 59.

<sup>42</sup> Ruggie, Framework, para. 54; Ruggie, Clarifying, para. 54; Ruggie, Operationalizing, paras. 46 and 48.

<sup>43</sup> Ruggie, Framework, para. 54; Ruggie, Operationalizing, para. 46.

<sup>44</sup> Ruggie, Further steps, para. 66.

<sup>45</sup> For example, Title VII of the Civil Rights Act 1964 in the US and the Equality Act 2010 in the UK, which protect against, inter alia, direct and indirect discrimination, on prohibited grounds. GP 12 states that corporations should respect, 'at a minimum', the human rights expressed in the International Bill of Human Rights and, if not already covered, the ILO's four 'core' labour rights or principles.

<sup>46</sup> Ruggie, Further steps, para. 66.

<sup>47</sup> Ruggie, Mapping, para. 90; Ruggie, Clarifying, pp. 9-16; Ruggie, Further steps, para. 75. Interestingly, note also Ruggie's subsequent proposals for a *new 'international legal instrument'*, (emphasis added) 'clarifying standards [...] where business enterprises cause or contribute to such abuses' (Ruggie, Follow-Up, pp. 4-5); discussed also in Ruggie, *Just Business*, p. 192 and pp. 200-201.

<sup>48</sup> Bilchitz describes the "negative" core of the responsibility to respect' ('An Adequate Rubric', 2006).

do no harm'.<sup>49</sup> It is generally accepted that states have legal obligations to respect (refrain from interfering), to protect (prevent violations by third parties) and to fulfil (take positive measures towards the full realization of rights) when it comes to human rights.<sup>50</sup> The description of the corporate responsibility as an obligation of 'respect' and/or as negative is problematic for some human rights commentators, because they perceive this to represent a contraction of current international law.<sup>51</sup> They believe that corporations, at international law, already owe legal obligations to respect and to protect human rights (as defined above),<sup>52</sup> or even owe legal obligations to respect, protect and also – within limits - to fulfil human rights.<sup>53</sup>

There is not scope in this paper to enter into that highly contested and complicated debate, but what this paper would note is that it could be argued that Ruggie's concept of corporate responsibility conflates the duty to respect and protect as used to describe a state's obligation (although, as described above, the corporate responsibility to respect is defined by societal expectations unlike the state's obligation to protect and respect which is a legal obligation at the international level).<sup>54</sup> This is because Ruggie makes clear that businesses should be concerned not just with their own acts and omissions, but should also seek to prevent or mitigate adverse human rights impacts by third parties with whom they have a 'business relationship'.<sup>55</sup> Moreover, for the sake of completeness, it should also be noted that Ruggie himself has refuted the notion that the corporate responsibility to respect is entirely negative. Firstly, in his 2008 report, he states the corporate responsibility 'is not merely a passive responsibility for firms but may entail positive steps - for example, a workplace anti-discrimination policy might require the company to adopt specific recruitment and training programmes'.<sup>56</sup> Secondly, subsequently, in response to a query by stakeholders that the 'responsibility to respect is a mere analogue to a "negative duty"', Ruggie would seem to answer that it is 'clear' that the corporate responsibility to respect human

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<sup>49</sup> Ruggie, Framework, para. 24; Ruggie, Clarifying, para. 3.

<sup>50</sup> Including in the Guiding Principles at General Principles (a).

<sup>51</sup> See, e.g., Jernej Letnar Čerňič, 'Two Steps Forward, One Step Back: The 2010 UN Report by the UN Special Representative on Business and Human Rights' (2010) 11 *German Law Journal* 1264.

<sup>52</sup> As suggested by, for example, Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006), pp. 230-233.

<sup>53</sup> As suggested by, for example, Bilchitz in 'An Adequate Rubric', at 200 and 208-215. See, more generally, Steven R. Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 *Yale Law Journal* 443; Nicola Jägers, *Corporate Human Rights Obligations: In Search of Accountability* (Antwerp: Intersentia, 2002); David Kinley and Junko Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) 44 *Virginia Journal of International Law* 931.

<sup>54</sup> As noted by Bilchitz in 'An Adequate Rubric', 206-207.

<sup>55</sup> Ruggie, Framework, paras. 25, 57, 73-81; Ruggie, Clarifying, paras. 4, 19, 22-23, 26-72; Ruggie, Operationalizing, paras. 50-51, 75, 85; Ruggie, Further steps, paras. 58, 74; GPs 13 and 19. 'Discharging the responsibility to respect requires [...] [in respect of] their activities and relationships': Ruggie, Operationalizing, para. 85 (and, similarly, Ruggie, Clarifying, para. 23).

<sup>56</sup> Ruggie, Framework, para. 55.

rights requires positive acts.<sup>57</sup> Interestingly, he identifies human rights due diligence and company grievance mechanisms as 'by definition [...] positive acts.'<sup>58</sup>

As mentioned above, Ruggie has consistently explained that the way a company can 'discharge' the corporate responsibility to respect is through 'due diligence'. In his 2008 report, Ruggie poses the questions, 'how do companies know they respect human rights? Do they have systems in place enabling them to support the claim with any degree of confidence?'<sup>59</sup> He answers, 'most do not' and, crucially, 'what is required is due diligence'.<sup>60</sup> Human rights due diligence, according to the SRSG, is the way 'a company [can] know and show that it is meeting its responsibility to respect rights'.<sup>61</sup> Knowing and showing is contrasted with naming and shaming.<sup>62</sup> Ruggie refutes the suggestion that knowing and showing will lead to a risk of greater litigation against transnational corporations (because, for example, due diligence requires business enterprises to acknowledge potential or actual human rights abuses, which could 'provide external parties with information they would not otherwise have had to use against the company'). Instead, knowing and showing, if 'done properly', will placate those who might otherwise begin legal claims or public campaigns ('done properly, human rights due diligence should precisely create opportunities to mitigate risks and engage meaningfully with stakeholders').<sup>63</sup> Human rights due diligence, for Ruggie, will only increase the risk of litigation, if companies publicly misrepresent what they find in their due diligence or if they gain knowledge of possible human rights violations and do not act on that knowledge.<sup>64</sup> In neither of the latter two situations, moreover, is a company carrying out human rights due diligence 'properly', as the whole 'point of human rights due diligence is to learn about risks that the company would then take action to mitigate, and not to ignore or misrepresent the findings.'<sup>65</sup>

Ruggie has included human rights due diligence since his first articulation of the 'protect, respect and remedy' framework. In its first articulation, Ruggie

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<sup>57</sup> Ruggie, *Further Steps*, para. 59.

<sup>58</sup> *Ibid.* (The use of the word 'positive acts' by Ruggie might be thought to indicate a difference from tort laws, if positive duties are taken to be synonymous with exceptions to the general rule of no liability for omissions in tort law (thus, potentially, Ruggie routinely requires something, when it is only exceptionally required in tort laws). However, the US Third Restatement of Torts on Physical and Emotional Harm takes a wide view of 'acts' at section three, section seven and the scope note to chapter seven, and in most of the cases to date, the allegation has been that the business enterprise has somehow 'created a risk of harm' (Third Restatement, section 3) even if the business enterprise has not been the primary wrongdoer, by, for example, asking security services for help, by contracting with a risky supplier, by devising a relevant policy but not implementing it, and so forth).

<sup>59</sup> Ruggie, *Framework*, para. 26.

<sup>60</sup> *Ibid.* See also Ruggie, *Just Business*, p. 99.

<sup>61</sup> Ruggie, *Further steps*, paras. 80 and 83.

<sup>62</sup> *Ibid.*

<sup>63</sup> Ruggie, *Operationalizing*, paras. 80-83.

<sup>64</sup> *Ibid.*, para. 82. ('Moreover, recent experience shows that other social actors are quite capable of concluding and stating publicly that a company facing criticism has undertaken good faith efforts to avoid human rights harm, and that transparency in acknowledging inadvertent problems can work in its favour.' para. 83).

<sup>65</sup> *Ibid.*

explains that it ‘describes the steps a company must take to become aware of, prevent and address adverse human rights impacts’.<sup>66</sup> The Guiding Principles provide a more sophisticated definition of due diligence as whereby business enterprises ‘identify, prevent, mitigate and account for how they address their adverse human rights impacts’.<sup>67</sup> Again, since the SRSG’s first articulation of due diligence in the 2008 report, Ruggie notes that due diligence will vary according to the country context, the company’s own activities and the company’s relationships.<sup>68</sup> It is stated to be ‘inductive and fact-based’.<sup>69</sup> Ruggie in 2008 also identifies four key aspects to human rights due diligence: a human rights policy, human rights impact assessments, integration of the human rights policy throughout the enterprise and, finally, tracking and monitoring.<sup>70</sup> The reference to human rights due diligence varying with the context, remains in the Guiding Principles, as does reference to the core elements of human rights due diligence.<sup>71</sup> The main difference is that, in the Guiding Principles, as foreshadowed by the 2010 report, (which observes differences between financial due diligence and human rights due diligence, and which will be significant below),<sup>72</sup> there is more emphasis on stakeholder involvement throughout the human rights due diligence process and more emphasis on transparency or communication of impacts.<sup>73</sup>

### 3. TYPES OF ‘DUE DILIGENCE’

It is normally assumed that Ruggie’s concept of ‘human rights due diligence’ is taken from due diligence as applied in the financial or corporate context. According to Sherman III and Kehr, ‘due diligence is a familiar business tool, designed to enable companies to reduce and risk liability. It requires companies to ask tough questions about the risks of major transactions, projects, and ongoing operations.’<sup>74</sup> The same authors refer to due diligence ‘processes’ ‘such as[...] the internal controls derived from COSO (the Committee of Sponsoring Organizations of the Treadway Commission), as embodied in Section 404 of the Sarbanes Oxley Act, and the enterprise wide risk management processes set forth in the UK Turnbull Report’.<sup>75</sup> Similar to other commentators, they note the

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<sup>66</sup> Ruggie, Framework, para. 56.

<sup>67</sup> GP 17.

<sup>68</sup> Ruggie, Framework, para. 57 (and Ruggie, Clarifying, paras. 19-23; Ruggie, Operationalizing, para. 50; Ruggie, Further steps, para. 58).

<sup>69</sup> Ibid.

<sup>70</sup> Ibid, paras. 59-64 (and Ruggie, Further steps, para. 83).

<sup>71</sup> GPs 14-23.

<sup>72</sup> Ruggie, Further steps, paras. 84-85; see also Ruggie, *Just Business*, pp. 99-100.

<sup>73</sup> GPs 16, 18, 20 and 21.

<sup>74</sup> John F. Sherman III and Amy Lehr, ‘Human Rights Due Diligence: Is It Too Risky?’ Working Paper No. 55, Corporate Social Responsibility Initiative (Cambridge, MA: Harvard University, 2010), p. 3.

<sup>75</sup> Ibid 4-5.

similarity of the process of due diligence suggested by Ruggie and as contained in corporate governance laws.<sup>76</sup> The obligation in both is 'collection and utilization of information, risk assessment, reasonable decision-making procedures, monitoring, reporting, and adjustments in corporate policy when and where necessary', as detailed in the human rights context in the Guiding Principles from Principles 17 to 24.<sup>77</sup>

Indeed, Ruggie himself encourages commentators to make this analogy. As early as the 2008 report, Ruggie notes that companies typically already have 'comparable processes', as required by domestic laws in many countries, to 'assess and manage financial related risks' and repeatedly discusses whether human rights due diligence should ideally be 'free-standing' or instead merely incorporated within 'broader enterprise risk-management systems'.<sup>78</sup> As well, in his subsequent monograph, Ruggie specifically identifies that he '[drew] on these established practices' of 'transactional due diligence' by companies to formulate his concept of human rights due diligence.<sup>79</sup>

There are, however, three caveats, which suggest that the overlap, although strong, is not complete. Firstly, Ruggie stresses that human rights due diligence is 'ongoing'.<sup>80</sup> It is different from 'transactional' due diligence, which may only be required on a one-off basis before a particular transaction, such as a merger or acquisition, is carried out.<sup>81</sup> Ruggie describes human rights due diligence instead as a 'comprehensive, proactive attempt to uncover human rights risks, actual and potential, over the entire life cycle of a project or business activity'.<sup>82</sup>

Secondly, more obviously in his later reports to the UN Human Rights Council, Ruggie notes some important differences between commercial due diligence and human rights due diligence. As noted above, human rights due diligence, in addition, requires 'engagement and dialogue' with, and 'transparency and accountability' to 'affected individuals and communities'.<sup>83</sup> Ruggie describes 'human rights risk management' as different from 'commercial, technical and even political risk management' in that it involves rights-holders. Therefore, it is an inherently dialogical process that involves engagement and communication, not simply calculating probabilities.<sup>84</sup>

Thirdly, another way in which human rights due diligence is different from normal corporate due diligence is that Ruggie rejects the suggestion made,

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<sup>76</sup> Ibid 4. On the analogy between corporate due diligence and Ruggie's concept, see also, e.g. Tineke Lambooy, 'Corporate Due Diligence as a Tool to Respect Human Rights' (2010) 28 *Netherlands Quarterly of Human Rights* 404 and Bonnitcha and McCorquodale, 'Concept of Due Diligence'.

<sup>77</sup> Lucien J. Dhooge, 'Due Diligence as a Defense to Corporate Liability Pursuant to the ATS' (2008) 22 *Emory International Law Review* 455, 470-471.

<sup>78</sup> Ruggie, Framework, para. 56; Ruggie, Operationalizing, paras. 26, 77-81; Ruggie, Further steps, para. 81, Ruggie, Guiding Principles, commentary to GP 17.

<sup>79</sup> Ruggie, *Just Business*, p. 99.

<sup>80</sup> Ruggie, Operationalizing, para. 71; Ruggie, Further steps, para. 84; GP 17(c).

<sup>81</sup> Ruggie, *Just Business*, p. 99.

<sup>82</sup> Ruggie, Operationalizing, para. 71.

<sup>83</sup> Ruggie, Further steps, paras. 84-85; (see also Ruggie, *Just Business*, pp. 99-100).

<sup>84</sup> Ibid.

academically, that carrying out human rights due diligence should be a defence to claims under the ATS in the same way that commercial due diligence provides a defence against mismanagement claims by shareholders. In an article for the *Emory International Law Review*, Dhooze had argued that the normal ‘business judgment rule’ ought to apply, so that ‘transnational corporations would be shielded from liability for decisions and actions [under the ATS] that ultimately resulted in human rights abuses as long as the decision-making process included a due diligence element designed to identify and avoid such abuses’.<sup>85</sup> Ruggie’s response was that ‘the Special Representative would not support proposals that conducting human rights due diligence, by itself, should automatically and fully absolve a company from ATS or similar liability’.<sup>86</sup> The authors Sherman III and Lehr were referred to above. Bonnitcha and McCorquodale have observed that Sherman III was one of the lawyers who worked on Ruggie’s team.<sup>87</sup> Albeit not writing on the SRSG’s behalf, Sherman III (and Lehr), have explained more fully why Dhooze’s argument should be rejected. Interestingly, ATS claims are stated to be ‘very [or markedly] different from claims made by investors that the company mismanaged the business, resulting in financial loss’ as, notably, ‘compared to investors, the victims of human rights abuses are far more vulnerable, and the harm is more permanent and shocking to the conscience’.<sup>88</sup>

Nor is the overlap between corporate due diligence and human rights due diligence necessarily exclusive. On the one hand, some commentators have explored the view that there is an analogy with ‘due diligence’ as required by states when they are required to prevent against or respond to human rights violations by third parties.<sup>89</sup> The language of due diligence was used, for example, by the Inter-American Court of Human Rights in this sense in the *Velasquez Rodriguez* case.<sup>90</sup> On the other hand, others authors have noted a possible analogy with negligence law in domestic jurisdictions, albeit with one exception, they have not developed that other possible analogy in detail. For example, Sherman III and Lehr suggest that ‘it is not inconceivable that human rights due diligence may be cited by a court as a standard of care in a negligence case’.<sup>91</sup> Bonnitcha and McCorquodale, as another example, quote Hanquin for the proposition that ‘due diligence’ is often thought to have its origins in the English common law tort of negligence.<sup>92</sup> Van Dam, finally, states that ‘carrying out [Ruggie’s] ‘due diligence is

<sup>85</sup> Dhooze, ‘Due Diligence as a Defense’.

<sup>86</sup> Ruggie, *Further steps*, para. 86.

<sup>87</sup> Bonnitcha and McCorquodale, ‘Concept of Due Diligence’, p. 12.

<sup>88</sup> Sherman III and Lehr, ‘Human Rights Due Diligence’, p. 18.

<sup>89</sup> E.g. Lambooy, ‘Corporate Due Diligence’ and also Bonnitcha and McCorquodale, ‘Concept of Due Diligence’ p. 14 (and pp. 5-8).

<sup>90</sup> Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988).

<sup>91</sup> Sherman III and Lehr, ‘Human Rights Due Diligence’, p. 12.

<sup>92</sup> ‘Concept of Due Diligence’, p. 4: citing Xue Hanquin, *Transboundary Damage in International Law* (Cambridge: Cambridge University Press, 2003), p. 162.



akin to acting as a reasonable man (company) in order to avoid damage who can be foreseeably affected by the company's activities'.<sup>93</sup>

Mares is the one author who has discussed in more detail whether there is a possible overlap between negligence laws and Ruggie's concept of corporate responsibility.<sup>94</sup> However, Mares approaches this question from a different angle to this author. Mares perceives that the Ruggie Framework and Guiding Principles are lacking in a conceptual basis and that, if there is an analogy with negligence laws, negligence laws can provide the Ruggie Framework and Guiding Principles with missing legitimacy.<sup>95</sup> However, for this author, the legitimacy of the Ruggie Framework and Guiding Principles is, more simply, found in the universal or near universal acceptance of, firstly, the Ruggie Framework and then the Guiding Principles, by all relevant actors.<sup>96</sup> Rather than negligence laws providing the Ruggie Framework and Guiding Principles with legitimacy, this author starts from the opposite position that the Ruggie Framework and Guiding Principles may be able to add legitimacy, or provide support for plaintiffs bringing negligence claims in state or domestic laws against transnational corporations for alleged corporate-related human rights abuses overseas.

#### 4. SIMILARITIES AND DIFFERENCES WITH THE TORT OF NEGLIGENCE

There are indeed similarities between the tort of negligence and the 'corporate responsibility to respect' as conceptualised by Ruggie. References in the reports of the SRSG variously to avoiding 'infringing on the rights of others', to 'doing no harm', 'acting with due diligence' (which sounds remarkably like an instruction to act with reasonable care), a balancing approach, and references to the ordinary or reasonable person are all obviously familiar to the tort of negligence.

GP 11 tells business enterprises they should avoid infringing on the rights of others, whereas in earlier reports, Ruggie stated that the corporate responsibility to respect 'in essence means to act with due diligence to avoid infringing on the rights of others'.<sup>97</sup> Similarly, in the seminal case of *Donoghue v. Stevenson* in the UK, the House of Lords defined the tort of negligence as 'the rule that you are to love your neighbour becomes in law, you must not injure your neighbour [...] You must take reasonable care to avoid acts and omissions which you can reasonably foresee would be likely to injure your neighbour' (and, of course, 'neighbour' is

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<sup>93</sup> Cees Van Dam, Call for Evidence: Business and Human Rights (memorandum submitted to UK Human Rights Joint Committee, May 2009), p.1.

<sup>94</sup> Radu Mares, 'A Gap in the Corporate Responsibility to Respect Human Rights' (2011) 36 *Monash Uni Law Rev* 33 and 'The Development of the 'Responsibility to Respect: Why the Core Company Should Act When Affiliates Infringe Human Rights' in Mares, *UN Guiding Principles*.

<sup>95</sup> Mares, 'A Gap'.

<sup>96</sup> C.f. possible developments more recently at UN Human Rights Council, noted at fn. 23.

<sup>97</sup> Ruggie, Framework, para. 24; Ruggie, Clarifying, para. 3.

not meant in a literal sense). Neighbours, for Lord Atkin, are ‘persons who are so closely and directly affected by my acts that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts and omissions which are called in question’.<sup>98</sup> Stakeholders, as defined by Ruggie, would surely fall within this category.

Ruggie, at times, again refers to the corporate responsibility to respect as ‘to act with due diligence’ and also refers to due diligence as taking ‘reasonable steps [...] to become aware of, prevent and address adverse impacts’.<sup>99</sup> Similarly, the definition of negligence in the new US Third Restatement of Torts on Physical and Emotional Harm (hereafter ‘Third Restatement’), at section three, is that ‘a person acts negligently if the person does not exercise reasonable care under all the circumstances’.

Ruggie provides a definition of due diligence in his 2008 and 2009 reports which measures due diligence against the behaviour reasonably expected from or ordinarily exercised by a person (who seeks to satisfy a legal requirement or to discharge an obligation).<sup>100</sup> Similarly, the commentary to section three of the Third Restatement goes on to state that the standard of behaviour expected in negligence cases is the standard of the ‘reasonable person’. English negligence law is also replete with references to the ‘reasonable person’ or ‘ordinary person’ when deciding if there has been a breach of duty, although in the English cases that person is sometimes more specifically, and more characteristically, referred to as the ‘man on the Clapham omnibus’ or ‘woman on the [London] underground’.<sup>101</sup>

Whilst discussing the breach of duty analysis, GP 19 in addition seems to incorporate a type of ‘balancing approach’ which, of course, is the approach taken at the breach stage in negligence cases in both the US and UK.<sup>102</sup> ‘Appropriate action’, according to GP 19, will depend on, amongst others, the ‘severity of the abuse’. Severity of harm is also relevant to the first stage of the balancing approach in negligence cases, as the first stage is to consider the magnitude of the risk, which is a composite term for the probability of harm occurring and the likely severity of harm.<sup>103</sup> Then, the second stage in the balancing approach in negligence cases is to consider the ‘burden of precautions’ to eliminate or reduce

<sup>98</sup> [1932] AC 562, 580. Lord Atkin referred positively to US cases, describing *MacPherson v Buick Motor Co* 217 NY 382 (1916) as ‘illuminating’ at 598. Similarly, Lord MacMillan, for the majority, also referred to US cases, at 617-618. (However, c.f. dissenting opinion of Lord Buckmaster at 576).

<sup>99</sup> Ruggie, Clarifying, para. 23; Ruggie, Operationalizing, para. 2; Ruggie, Further steps, para. 1.

<sup>100</sup> Ruggie, Framework, fn. 22; Ruggie, Operationalizing, para. 71.

<sup>101</sup> ‘Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do’, in *Blyth v. Birmingham Waterworks Co* 156 ER 1047 (1856). (On the ‘Clapham omnibus’, see the ‘classical’ statement in *Bolam v. Friern Hospital Management Committee* [1957] 1 WLR 582, 586; updated to ‘underground’ in [2002] ACD 70).

<sup>102</sup> Third Restatement, s. 3 and comment c (on US) and Reporters’ Note, comment d (on English law).

<sup>103</sup> Third Restatement, s. 3, comment d.

the risk of harm, and ultimately to weigh these two factors against each other.<sup>104</sup> Even if the burden of precautions is regarded as purely economic which, however, the commentary to the Third Restatement would suggest is not the case, the financial cost of precautions is at least partly relevant for Ruggie as the commentary to GP 19 states that a relevant factor is 'how crucial', presumably economically, 'the relationship is to the enterprise'.<sup>105</sup> The commentary to the Third Restatement, moreover, expresses the idea that the 'balancing approach' in negligence cases means looking at the advantages versus disadvantages of conduct, which is exactly the same sort of exercise that the commentary to GP 19 recommends.

It might, finally, be argued that the Guiding Principles have increased the similarity of the Ruggie Framework to negligence law. Before the Guiding Principles, the SRSG's reports had mentioned that business enterprises should 'address adverse impacts' but did not specify in detail what action should be taken. 'Remediation' was briefly mentioned, however, more so in the context of the third pillar, when discussing company grievance mechanisms.<sup>106</sup> By GP 22's emphasis on 'remediation' and, moreover, under the second pillar, can only increase the similarities with tort laws, as one of the primary purposes of tort laws as a whole is surely to provide compensation to victims of tortious conduct.<sup>107</sup>

As conventionally understood, the tort of negligence involves fault-based liability. Bonnitcha and McCorquodale, therefore, would seem to question the analogy drawn thus far in this paper between negligence law and Ruggie's corporate responsibility to respect. They suggest that fault is only relevant, in the Guiding Principles, with regard to a business enterprise's responsibility for adverse human rights impacts caused by third parties (when there is a 'business relationship' between the third party and the business enterprise in question).<sup>108</sup> They state that, in comparison, liability in the Guiding Principles is strict when it comes to the business enterprise's own adverse human rights impacts.<sup>109</sup> They draw upon a difference in language in the two clauses of GP 13. GP 13(a) states that business enterprises 'should avoid causing or contributing to adverse human rights impacts through their own activities', rather than business enterprises should take reasonable care to avoid causing or contributing to adverse human rights impacts through their own activities. By contrast, GP 13(b) states that business enterprises should 'seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations [...] even if they have not

<sup>104</sup> Third Restatement, s. 3 and *ibid.* 'In every case of a foreseeable risk, it is a matter of balancing the risk against the measures necessary to eliminate it', in *Latimer v. AEC* [1952] 2 QB 701, 711).

<sup>105</sup> 'The burden of precautions can take a wide variety of forms' (*ibid.*). See also *Bolton v. Stone* [1951] AC 850, 867 (but c.f. economic accounts, as discussed at Reporters' Note, comment d).

<sup>106</sup> Ruggie, Framework, para. 82; Ruggie, Further steps, para. 83 and 92.

<sup>107</sup> Meeran, 'Tort Litigation', 3. More generally, see Glanville Williams, 'The Aims of the Law of Tort' [1951] *Current Legal Problems* 137 and Tony Honoré, 'The Morality of Tort Law' in David G. Owen (ed), *Philosophical Foundations of Tort Law* (Oxford: Clarendon Press, 1995), p. 75.

<sup>108</sup> Bonnitcha and McCorquodale, 'Concept of Due Diligence', pp. 9-14.

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

contributed to those impacts’, which would imply that ‘trying’ and, therefore, fault is relevant for a business enterprise’s responsibility for third party impacts.

However, even if strictly speaking this is true of the wording in GP 13, this is not true of the earlier reports that predate the Guiding Principles. As noted above, the earlier reports refer repeatedly to ‘acting with due diligence to avoid infringing on the rights of others’ and discuss the ‘reasonable steps’ companies are required to take.<sup>110</sup> If the Guiding Principles were intended to signify arguably such a radical change, surely this would have been indicated either in the foreword or in the commentary. The commentary, in fact, to GP 13 is comparatively short, and mentions nothing about the presence or absence of a fault standard. Moreover, and surely decisively, Ruggie’s own introduction to the Guiding Principles again defines the corporate responsibility to respect as business enterprises should ‘act with due diligence’ to avoid infringing on the rights of others.<sup>111</sup>

Another argument that might be voiced against the negligence analogy would be the general rule that parties are only responsible for their own behaviour in the tort of negligence and are not responsible for the behaviour of third parties.<sup>112</sup> Against this, the Ruggie Framework and Guiding Principles tell business enterprises that they should intervene when they have not caused or contributed to adverse impacts, to try to prevent or mitigate adverse impacts caused by third parties (as elaborated in the commentary to GP 19).

On the other hand, the principle of remediation in GP 22 only applies when the business enterprise causes or contributes to adverse impacts. However, even here, similarities between the tort of negligence, on the one hand, and the Ruggie Framework and Guiding Principles, on the other hand, may be apparent upon closer inspection. Namely, there are significant exceptions to the general rule against liability for acts of third parties, both in the US and UK. McIvor summarises these exceptions as falling within two different groups: firstly, when there is a relationship of protection (between the claimant and defendant) and, secondly, separately, when there is a relationship of control (of the defendant over a third party).<sup>113</sup> In the UK, Lord Goff usefully noted the list of exceptions judicially in *Smith v. Littlewoods Organisation*, whereas in the US, the list of exceptions is contained in the Third Restatement at chapter seven on affirmative duties.<sup>114</sup> Thus, similar to the Ruggie Framework and Guiding Principles, defendants can be held liable (if they have not acted with reasonable care) even if they have not caused or contributed to the harm but in negligence, if, for example, they have a ‘special relationship’ with the claimant, if there is an ‘assumption of responsibility’ by the defendant, if they have a ‘special relationship’ with the third

<sup>110</sup> Ruggie, Clarifying, para. 23; Ruggie, Operationalizing, para. 2; Ruggie, Further steps, para. 1.

<sup>111</sup> Para. 6.

<sup>112</sup> E.g. ‘it is well recognised that there is no general duty of care to prevent third parties from causing such damage’, in *Smith v. Littlewoods Organisation* [1987] AC 241, 270 (Lord Goff).

<sup>113</sup> Claire McIvor, *Third Party Liability in Tort* (Oxford: Hart Publishing, 2006), p. 12.

<sup>114</sup> [1987] AC 241, 272.

party, if the defendant's prior conduct creates a continuing risk of physical harm, and if the defendant is responsible for a state of danger or for property that may be exploited by a third party or used by a third party to cause damage, amongst others.<sup>115</sup>

The question thus becomes if the exceptions to the 'no liability for the acts of third parties' rule in negligence laws are as extensive as the responsibility Ruggie places upon business enterprises for the acts of third parties. Firstly, significantly, in the Guiding Principles, it is conceded that, as a matter of practicality, business enterprises do not have to seek to prevent or mitigate adverse human rights impacts by all third parties with whom the business enterprise has a business relationship. According to the commentary to GP 17, where business enterprises have 'large numbers of entities in their value chains' they should 'identify general areas where the risk of adverse human rights impacts is most significant, whether due to certain suppliers' or clients' operating context, the particular operations, products or services involved, or relevant considerations, and prioritize these for human rights due diligence'.<sup>116</sup> Thus, the difference between the Guiding Principles and the tort of negligence is that the selection of which third party a business enterprise will be liable for depends in the Guiding Principles on where adverse impacts are likely to be most serious, whereas under the tort of negligence, it will depend on the closeness of the relationship between the business enterprise and either affected individuals or with offending entities.

On the other hand, the selection may still possibly be similar under both. Ruggie in 2008 identified that 'the required actions regarding the human rights impact of a subsidiary may differ from those taken in response to potential or actual impacts of suppliers several layers removed'.<sup>117</sup> Similarly, in negligence laws, when looking at the second type of special relationship based on the defendant's control over the entity posing risks, it is more likely that there will be this type of special relationship between a parent company and the first layer of companies, as the parent company's level of control over companies in the corporate group may become more attenuated with each layer. However, it is not beyond the realms of possibility that the first type of special relationship in negligence laws, based on the relationship between the defendant and claimant and specifically the claimant's weakness or vulnerability vis-à-vis the defendant, will be satisfied beyond the first layer of companies if, for example, a parent company assumes for itself control of human rights matters for the whole corporate group.<sup>118</sup> The parent company might develop a group-wide human rights policy and take an active role in

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<sup>115</sup> Ibid, and Third Restatement, s. 39 (duty based on prior conduct creating a risk of harm), s. 40 (duty based on special relationship with another), s. 41 (duty to third parties based on special relationship with person posing risks). (See also possibly Third Restatement, chapter 10).

<sup>116</sup> And GP 24.

<sup>117</sup> Ruggie, Clarifying, para. 24.

<sup>118</sup> As potentially encouraged by Ruggie in an earlier draft of the commentary to GP 12 (equivalent but different sentiment expressed in now GP 14): 'A corporate group may consider itself to be a single business enterprise, in which case the responsibility to respect human rights attaches to the group as a whole and encompasses both the corporate parent and its subsidiaries and affiliates [...]'.<sup>119</sup>

ensuring the implementation of that policy, in the same way that in the English case law, parent companies have taken the lead on health and safety for the corporate group.<sup>119</sup> Even though US courts to date have not accepted this argument, it is not inconceivable that the parent company in this situation could owe a duty of care in tort, albeit a narrower duty, based on its voluntary assumption of responsibility, to employees of suppliers lower down the chain (especially if there is, for example, a group-wide human rights officer).<sup>120</sup>

Even if there is not a significant difference between responsibility for third parties in negligence laws and under the Ruggie Framework; there is, however, another way in which the Ruggie Framework and Guiding Principles diverge from negligence laws. As noted above, as prefaced by the 2010 report, the Guiding Principles emphasise the importance of stakeholder involvement throughout the ‘life cycle’ of due diligence<sup>121</sup> GP 18 tells business enterprises they should ‘involve meaningful consultation with potentially affected groups and other relevant stakeholders’ when gauging human rights risks and GP 20 advises them to ‘draw on feedback’ from those directly affected when ‘[verifying] whether adverse impacts are being addressed’. In comparison, this sort of input is not normally required or expected by courts in negligence cases, either when asking if there has been a breach or in formulating remedies. However, arguably, if it were, this would increase the empowerment or voice function of tort, which some commentators suggest is or should be a goal of tort laws.<sup>122</sup>

To draw together these similarities, it is helpful to think of a timeline. The Ruggie Framework and Guiding Principles instruct business enterprises how they should act generally. If harm does not arise, then the tort of negligence will not be relevant, beyond the deterrent function of tort. It is only if ‘harm’ subsequently arises, which Ruggie himself concedes will inevitably happen on some occasions,<sup>123</sup> that the tort of negligence may be relevant (as the so-called ‘gist’ of negligence is damage).<sup>124</sup> If a claim is brought in negligence, a court will look backwards at the defendant’s behaviour leading up to the harm and, as will be argued below, might henceforth assess whether there has been a tortious lack of reasonable care exercised, with reference to the standards set in the Ruggie Framework and UN Guiding Principles.

<sup>119</sup> *Connelly v. RTZ Corp* [1998] AC 854; *Lubbe v. Cape* [2000] 1 WLR 1545; *Chandler v. Cape*.

<sup>120</sup> *Doe v. Wal-Mart* 572 F 3d 677 (9<sup>th</sup> Cir. 2009). The English Court of Appeal in *Chandler* confirmed that the parent company *was* liable in negligence to the employee of a subsidiary, but the duty was more limited (para. 66). The facts of that case included that there was a group-wide medical advisor.

<sup>121</sup> Ruggie, *Further Steps*, paras, 84-85.

<sup>122</sup> E.g. Allen Linden, ‘Tort Law as Ombudsman’ (1973) 51 *Canadian Bar Review* 155 (and ‘Reconsidering Tort Law as Ombudsman’ in Freda M. Steel and Sandra Rodgers-Magnet (eds), *Issues in Tort Law* (Toronto: Carswell, 1983); Perry Ronen, ‘Empowerment and Tort Law’ (2009) 76 *Tennessee Law Review* 959.

<sup>123</sup> Ruggie, *Framework*, para. 26; Ruggie, *Guiding Principles*, para 6 (intro); Ruggie, *Just Business*, p. 102.

<sup>124</sup> *Gregg v. Scott* [2005] UKHL 2, [2005] 2 AC 176, paras. 99 and 193 (for practical application, see *Rothwell v. Chemical and Insulating Co* [2007] UKHL 39, [2008] 1 AC 281). Third Restatement, s. 4.

## 5. RELEVANCE OF THE TORT OF NEGLIGENCE

As noted above, the majority of transnational human rights litigation against transnational corporations to date has taken place in the US and UK, although numerically the number of cases brought in the US dwarfs the number of cases brought in the UK.<sup>125</sup> In the UK, and indeed in other common law jurisdictions without a statutory equivalent of the ATS, cases have been brought in 'ordinary' tort law instead.<sup>126</sup> Indeed, even in the US, it has been common to pair an ATS claim against a business enterprise for corporate-related human rights harms with state common law tort claims (in previous cases, such as for the torts of battery, assault, false imprisonment, intentional or negligent infliction of emotional distress, negligence, negligent hiring and negligent supervision).<sup>127</sup> Hence, if there is an overlap between the Ruggie Framework and Guiding Principles and the tort of negligence, this could be very significant for the future of transnational human rights litigation outside the US but also, especially after recent developments, in the US as well.

Interestingly, Goldhaber has recently argued that transnational human rights litigation has, in fact, been more successful in the UK than in the US.<sup>128</sup> He bases this on a higher proportion of litigants receiving a 'payout' in the UK than in the US and on the rates of settlements being proportionally higher in the UK. According to Goldhaber, 80 per cent of 'UK business human rights disputes litigated to a full conclusion have resulted in a payout' in comparison to '9.5 per cent' for 'US corporate alien tort suits': in other words, a difference of 70 per cent.<sup>129</sup> Goldhaber also compares the highest rates of settlement in each jurisdiction: reportedly, \$30 million in the US *Unocal* settlement in contrast with £30 million in the UK *Trafigura* agreement ('equivalent to \$48 million US').<sup>130</sup>

On the other hand, as Goldhaber himself concedes, there have only been a handful of transnational human rights claims in the UK and there may not be many more such new claims in the future after very recent legislative reforms, referred to here in the introduction, that change the rules on recovery of costs in

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<sup>125</sup> Drimmer notes there have been 180 alien tort disputes filed against business entities (according to Goldhaber, 'Corporate Human Rights', 128), in comparison to 5-10 negligence claims in the UK. In comparison, Ruggie refers to 'more than fifty cases' under the ATS in Further steps, para. 75.

<sup>126</sup> The UK Human Rights Joint Committee did not favour the adoption of an ATS equivalent in the UK (Any of our business? Human Rights and the UK Private Sector, HL 66/ HC 401, para. 300). However, on attempts to create a new Canadian equivalent of the ATS, see Bill C-323 (introduced as of 16 October 2013: available at <http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&Bill=C323&Parl=41&Ses=2> (accessed 1 December 2013).

<sup>127</sup> Paul Hoffmann and Beth Stephens, 'International Human Rights Cases Under State Law and in State Courts' (2013) 3 *UC Irvine Law Review* 9, 15-17. Notable examples include *Wina v. Royal Dutch Petroleum* 226 F 3d 88 (2<sup>nd</sup> Cir. 2000); *Doe v. Unocal* 2002 WL 33944506 (Cal. Super. Ct. 2002); *Bowoto v. Chevron* 621 F 3d 1116 (9<sup>th</sup> Cir 2010) (discussing previous jury trial); *Doe v. Exxon Mobil* 654 F 3d 11 (DC Cir. 2011) (and 527 Fed Appx 7 (DC Cir. 2013); *Sarei v. Rio Tinto* 671 F 3d 736 (9<sup>th</sup> Cir. 2011) (but 722 F 3d 1109 (9<sup>th</sup> Cir 2013)).

<sup>128</sup> Goldhaber, 'Corporate Human Rights'. (See also Meeran, 'Tort Litigation').

<sup>129</sup> Ibid 131 and 136.

<sup>130</sup> Ibid 129-131 and 136.



civil cases.<sup>131</sup> Goldhaber states that only five cases have been litigated to completion to date in the UK whereas one of the partners at the only law firm in the UK to have pursued these claims wrote in 2011 that there had been eight such cases at that point (some still ongoing).<sup>132</sup> That same partner also referred to the relative simplicity of ‘ordinary’ domestic tort complaints by contrast with claims under the ATS and to ‘more favourable rules of jurisdiction’ across the EU, for example, preventing an English court considering the doctrine of FNC (as above) even in transnational cases when the defendant is ‘domiciled’ in the UK.<sup>133</sup>

One recent very important development in the UK was the case of *Chandler v. Cape* in 2012.<sup>134</sup> As acknowledged by the English Court of Appeal, ‘this is one of the first cases in which an employee has established at trial liability to him on the part of his employer’s parent company, and thus this appeal is of some importance not only to the parties but to other cases’.<sup>135</sup> Thus, unlike many of the judgments to date in transnational human rights litigation in both the US and UK, this was not a judgment in preliminary proceedings or on procedural matters: it was a judgment on the merits.<sup>136</sup> Arden LJ confirmed the parent company, on these facts, was directly liable (thus unlike much of the ATS litigation, not alleging secondary liability) for its own acts and omissions in respect of health and safety matters with regards to the employee of a subsidiary, and set out broader guidance as to when it will be apt to recognise this parent company responsibility.<sup>137</sup> Although the case was not transnational, as both the subsidiary and parent company were both based in the UK, the broader guidance is not geographically limited and could potentially be applicable to relationships between parent companies and subsidiaries abroad in transnational corporate groups. Indeed, in two of the previous cases in the UK that were truly ‘transnational’ which settled or were time-barred (*Connelly v. RTZ Corporation* and *Lubbe and others v. Cape*), the facts as alleged would appear definitely to meet and satisfy Arden LJ’s guidance in *Chandler*.<sup>138</sup>

<sup>131</sup> Above (n. 8).

<sup>132</sup> Goldhaber, ‘Corporate Human Rights’, 136; Meeran, ‘Tort Litigation’, 4. The UK cases are *Connelly*; *Lubbe*; *Ngcobo v. Thor Chemicals* [1995] WL 1082070; *Sithole v. Thor Chemicals* 2000 WL 1421183; *Guerrero v. Monterrico Metals* [2009] EWHC 2475 (QB); *Motto v. Trafigura* [2012] 1 WLR 657; *Bodo Community v. RDS*; (unreported); *Vava* (plus *Chandler* as will be described below).

<sup>133</sup> Above (n. 11). In *Daimlerchrysler* (n. 13), Justice Ginsburg referred to the concept of domicile used ‘in the European Union’ (at [12]), which would facially seem to be similar to the ‘exemplar bases *Goodyear* identified’ that were described earlier in the judgment (at [10]). Justice Sotomayor observed that FNC would be available, as another ‘judicial doctrine available to mitigate any resulting unfairness’, at 771.

<sup>134</sup> [2012] EWCA Civ 525, [2012] 1 WLR 3111.

<sup>135</sup> Para. 2.

<sup>136</sup> Joseph, *Transnational Human Rights Litigation*, pp. 73 and 145. Exceptions in the US include *Bowoto* and *Romero v. Drummond* 552 F 3d 1303 (11th Cir. 2008) (discussing previous jury trial): however, both were trial verdicts for the defendant, after consideration by a jury.

<sup>137</sup> Para. 80 (and paras. 72-80).

<sup>138</sup> E.g. *Connelly* (HL) 864 and *Lubbe* (HL) 1550-1551. As these were decisions on preliminary issues (specifically on whether or not to grant a stay for FNC), ‘[we] are not at present in any position to form a judgment’ ‘on the strength of the plaintiff’s claim’ (*Connelly* (HL) 871).

Common law tort is not, however, only of interest outside the US. After the US Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum*, there seems to be consensus among the US academy that there will henceforth be a renewed focus on state common law tort claims as a vehicle for transnational human rights litigation in the US.<sup>139</sup> The US Supreme Court in *Kiobel*, in sum, found that the normal presumption against the extraterritorial application of domestic statutes also applies to the ATS.<sup>140</sup> An exception would seem to have been stated by the majority, where claims 'touch and concern' the US sufficiently to displace the presumption.<sup>141</sup> However, in the subsequent case law, albeit mostly only at federal District Court level so far, arguments that the 'touch and concern' exception is met have tended to be rejected and, moreover, confusion expressed judicially about the 'touch and concern' exception.<sup>142</sup>

Thus, based on the current US jurisprudence at least, it seems very unlikely that ATS claims in transnational human rights litigation, where the adverse human rights impacts have occurred abroad,<sup>143</sup> will be allowed to proceed, leaving common law state claims as the most promising option for affected individuals and groups. It should, however, also be noted that some commentators have pointed to the disadvantages of state common law claims. These include the idea that expressing human rights violations as 'garden variety torts' downgrades the nature of the wrong,<sup>144</sup> and concerns that state courts are not as well equipped as federal courts to receive these claims.<sup>145</sup> This goes back to Neuborne's well-known critique of state courts that they have less 'technical competence', a different 'psychological set' and are subject to 'majoritarian pressure'.<sup>146</sup>

## 6. POSSIBLE IMPACT OF THE RUGGIE FRAMEWORK AND GUIDING PRINCIPLES ON NEGLIGENCE CLAIMS

In transnational human rights litigation in the US and UK against transnational corporations subsequent to the Ruggie Framework and Guiding Principles, it would appear that there have only been two fleeting references to the SRSG in

<sup>139</sup> Above (n. 22).

<sup>140</sup> 133 S. Ct 1659 (2013).

<sup>141</sup> 1669 (for completeness, it should be noted that the 'minority' expressed a wider view at 1671).

<sup>142</sup> E.g. *Mohammadi v. Iran* 947 F Supp 2d 48 (DDC. 2013) (description of 'high bar' at 17); *Al-Shimari v CACI* 2013 WL 3229720 (ED Va. 2013); *Giraldo v. Drummond* 2013 WL 3873960 (ND Ala. 2013) (no 'road map' on touch and concern question, at 5, and description of *Kiobel* as 'seismic shift' at 1). For rare appellate court authority thus far, and following the same trend, see *Balintolo v. Daimler AG* 727 F 3d 174 (2<sup>nd</sup> Cir 2013) (and 'if all the relevant conduct occurred abroad, that is simply the end of the matter under *Kiobel*'). Cases allowed to proceed: *Sexual Minorities Uganda v. Lively* 2013 WL 4130756 (D Mass. 2013); *Mwani v. Laden* 947 F Supp 2d 1 (DDC 2013).

<sup>143</sup> *Balintolo* (ibid); *Ben-Haim v. Neeman* 2013 WL 5878913 (3<sup>rd</sup> Cir. 2013) at 2.

<sup>144</sup> *Xuncax v. Gramajo* 886 F Supp 162 (D Mass. 1995), 183.

<sup>145</sup> E.g. Austen L. Parrish, 'State Court International Human Rights Litigation: A Concerning Trend?' (2013) 3 *UC Irvine Law Review* 25.

<sup>146</sup> Burt Neuborne, 'The Myth of Parity' 1976 (90) *Harvard Law Review* 1105, 1118-1128. C.f. theorists arguing state courts may, in fact, be preferable (see citations in fn. 2 of Parrish, ibid).

judgments.<sup>147</sup> This might be considered surprising, given the ubiquity of the Ruggie Framework and Guiding Principles and, for example, the fact that the UK ‘National Contact Point’ under the OECD Guidelines for Multinational Enterprises, notably before the most recent revision of the OECD Guidelines that now do refer to the SRSG, voluntarily chose to incorporate the Ruggie Framework in its decisions, even though the complaints turned on, at that time, autonomous provisions of the OECD Guidelines.<sup>148</sup>

There are a number of possible ways in which the Ruggie Framework and Guiding Principles could impact on negligence claims. Firstly, in the UK where the duty of care question tends to be the main issue in these cases, the Ruggie Framework and Guiding Principles might inspire a broader formulation of the duty of care as, for example, by adapting GP 11, a ‘duty to act with due diligence to avoid infringing on the human rights of others where infringements result in harm’. In the salient English cases to date, the duty of care has been formulated more narrowly.<sup>149</sup> However, this may simply reflect that the parent companies, in these instances, had developed a group-wide policy specifically on health and safety rather than on human rights generally. The Ruggie Framework and Guiding Principles might inspire parent companies in the future also to develop group-wide human rights policies.<sup>150</sup> Moreover, if the International Commission of Jurists is correct to state that the tort of negligence reflects societal expectations, it might be suggested that it is appropriate with the ‘near universal’ social acceptance of the corporate responsibility to respect in the Guiding Principles, for the duty of care in tort to be expressed in this broader manner.<sup>151</sup>

In comparison, in the US, where the Third Restatement effectively states a presumption of duty at section seven (although there are some that argue that the Third Restatement does not ‘restate’ negligence laws, but rather rewrites negligence laws), the Ruggie Framework and Guiding Principles could perhaps help plaintiffs to avoid a finding of no duty for all similarly placed plaintiffs in the future.<sup>152</sup> Section seven provides that a finding of no duty can be made where there is a ‘countervailing principle or policy’ that ‘warrants denying liability or limiting liability in a particular class of cases’. But, the Ruggie Framework and

<sup>147</sup> *Doe v. Nestle* 748 F Supp 2d 1057 (CD Cal. 2010) at 1141 and fn. 67; *Doe VIII v. Exxon Mobil* 654 F 3d 11 (DC Cir. 2011) at para. 4 (and fn. 9).

<sup>148</sup> E.g. Final Statement by the UK NCP: Afrimex (UK) Ltd, URN 08/129, 28 August 2008 at paras. 41, 64, 77; Final Statement by the UK NCP: Vedanta Resources, URN 09/1373, 25 September 2009 at paras. 76-78. The OECD Guidelines for Multinational Enterprises were revised, (including new reference to Ruggie) in 2011, in parts of the General Policies and a new chapter IV on Human Rights.

<sup>149</sup> *Connelly v. RTZ Corp* [1999] CLC 533 (QB), 536-537; *Lubbe* (HL) 1551; *Chandler*, para. 1. Described as credible in *Connelly* (QB) 538 and, of course, accepted in *Chandler*.

<sup>150</sup> Above (n. 118).

<sup>151</sup> ICJ, Corporate Complicity and Legal Accountability: Vol. 3, Civil Remedies (Geneva: 2008) at 16. Description of ‘near universal’ by Ruggie in Operationalizing, paras. 46-47; *Just Business*, p. 92.

<sup>152</sup> Notably, John C.P. Goldberg and Benjamin C. Zipursky, ‘The Restatement (Third) and the Place of Duty in Negligence Law’ (2001) 54 *Vanderbilt Law Review* 657. In practice, s. 7 ‘adopted’ in *Thompson v. Kaczinski* 774 NW 2d 829 (Iowa Supr. 2009) but, e.g., rejected in *Riedl v. ICI Americas* 968 A 2d 17 (Del Supr. 2009).

Guiding Principles state a 'policy or principle' that business enterprises should not be immune from human rights based claims, especially when affected individuals cannot access judicial remedy elsewhere.

Secondly, the Ruggie Framework and Guiding Principles might affect the question of whether there has been a breach of duty. The question of whether there has been breach is influenced by the standards of the 'reasonable person', which is in turn influenced by societal standards.<sup>153</sup> Ruggie's corporate responsibility to respect, as noted above, is based exactly on society's expectations of companies.<sup>154</sup> Therefore, if a business enterprise fails to act with the due diligence required under the Ruggie Framework and Guiding Principles and harm has resulted, there may be a good argument that the business enterprise has failed to meet the standard of care required.

Thirdly, conversely, if a business enterprise has acted with the due diligence required under the Ruggie Framework and Guiding Principles, this should help business enterprises to defend against a negligence claim if harm were nevertheless to arise. As discussed above, the Guiding Principles require business enterprises to take into account the same sort of factors that a court will take into account when deciding if there has been a breach of duty.<sup>155</sup> Admittedly, a court and business enterprise could reach different conclusions on how to balance the various factors, but Ruggie's seeming advice to business enterprises to keep a stronger focus on possible adverse human rights impacts above other factors will likely ensure that courts, which may place more emphasis on the cost of precautions, will be unlikely to find negligence.<sup>156</sup>

Finally, the benefit of the Ruggie Framework and Guiding Principles, from the perspective of those affected by corporate-related human rights abuses, might be to increase the potential scope of common law negligence claims. In the salient English cases to date, with the exception of more recent claims of environmental wrongdoing by transnational corporations,<sup>157</sup> the focus has tended narrowly to be complaints about health and safety violations, at the workplace of a subsidiary.<sup>158</sup> This narrow focus in the case law in practice is problematic because, as identified by Ruggie in his survey in 2008 into the scope and patterns of alleged corporate-related human rights abuse, not all or even the majority of complaints fall into this fact pattern.<sup>159</sup> Moreover, other types of human rights wrongs might lead to harm recognised as 'damage' in tort laws, but are not necessarily being litigated currently. However, the Ruggie Framework and Guiding Principles clarify the 'near universal' expectation that business enterprises have the responsibility to respect

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<sup>153</sup> ICJ, *Corporate Complicity*, 16.

<sup>154</sup> Ruggie, *Framework*, para. 54; Ruggie, *Clarifying*, para. 54; Ruggie, *Operationalizing*, paras. 46 and 48.

<sup>155</sup> Above text at n. 105.

<sup>156</sup> Commentary to GP 19.

<sup>157</sup> *Guerrero; Trafigura; Bodo; Vava*.

<sup>158</sup> *Connelly; Ngcobo; Sitole; Lubbe*; (albeit not transnational) *Chandler*.

<sup>159</sup> John Ruggie, Report of the Special Representative of the Secretary-General on the issue of transnational corporations and other business enterprises: addendum: a survey of the scope and patterns of alleged corporate-related human rights abuse, A/HRC/8/5/Add.2, 23 May 2008.

all human rights and clarify that the corporate responsibility to respect extends at least partly to the value chain.<sup>160</sup> Thus, one might expect a more varied fact pattern in transnational human rights litigation in the future, which is long overdue if there is no other possibility of access to an effective remedy.

## 7. CONCLUSION

With one exception, other authors have only briefly noted the possible analogy between the ‘corporate responsibility to respect’ in the second pillar of the Ruggie Framework and Guiding Principles and the tort of negligence in domestic jurisdictions. This paper has developed the analogy in detail, with focus on the US and UK, and has concluded that the similarities are more significant than any differences. Transnational human rights litigation in the UK already consists of mostly common law negligence complaints against transnational corporations. It is, however, likely that the number of state common law tort complaints against transnational corporations will increase in the US too after the Supreme Court’s decision in *Kiobel v. Royal Dutch Petroleum* in April 2013.<sup>161</sup> However, as ATS claims are refocused into state law tort complaints, it is also likely that the very forceful attacks previously directed by certain groups towards the ATS will henceforth be turned into attacks on the legitimacy of state law tort complaints against companies for human rights abuses abroad.<sup>162</sup> Perhaps one of the legacies of Ruggie Framework and Guiding Principles, given the clear similarities between the corporate responsibility to respect in the second pillar and the tort of negligence, will be to help shield state common tort law claims from these criticisms when they inevitably come.<sup>163</sup>

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<sup>160</sup> Above text at n. 116.

<sup>161</sup> 133 S. Ct 1659 (2013).

<sup>162</sup> See description of attacks on ‘second wave’ of ATS in, e.g., Michael Koebele, *Corporate Responsibility Under the ATS* (Leiden: Martinus Nijhoff Publishers, 2009), pp. 11-13.

<sup>163</sup> Subsequent to the writing of this paper, the UN Human Rights Council adopted two resolutions on business and human rights, on 26 June 2014 and 27 June 2014: ‘Elaboration of an internationally legally binding instrument on Transnational Corporations and Other Business Enterprises with respect to human rights’, A/HRC/26/L.22/Rev. 1, drafted by Ecuador and South Africa, and ‘Human Rights and transnational corporations and other business enterprises’, A/HRC/26/L.1, led by Norway.