

**DEFINING THE LIMITS OF CORPORATE
RESPONSIBILITIES AGAINST THE CONCEPT OF
LEGAL POSITIVE OBLIGATIONS**

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ABSTRACT

There is currently a widespread societal expectation for businesses to respect and support human rights. The apparent simplicity of this expectation contrasts sharply against the difficulty of specifying with precision the boundaries of corporate social responsibilities (CSR). This Article argues that the basis of these difficulties is the uncertainty regarding the responsibility of a business for the actions of third parties. In contrast, the responsibility for abuses caused by a corporation's own actions is less controversial and is grounded in tort laws. As made apparent by numerous CSR front-page stories, responsibility may also arise from a company's culpable omission to monitor and influence its business partners. This Article draws attention to the importance of better understanding the inherent tensions affecting positive obligations to act. The analysis herein reviews existing CSR literature and its reliance on the concept of "complicity," and draws on various bodies of law—particularly the law of negligence and international human-rights law (IHRL)—to enrich discussions with the authoritative reasoning of courts that have dealt previously with similar issues.

I. INTRODUCTION

Eight years after U.N. Secretary General Kofi Annan's Global Compact (GC)¹ urged businesses to respect and support human rights, there continues to be a good deal of mystery about the limits of corporate responsibility. Even those within the GC's own ranks have noted, when talking about these issues, that "[w]hat sounds completely unproblematic on the surface acquires a complexity on closer inspection that should not be underestimated"² and that "[a]mazingly simple in concept, the [GC] principles can be agonisingly complex to execute."³ The U.N. High Commissioner for Human Rights (UNHCHR)—both the prime U.N. body that addresses human rights and a participant in the GC—observed that "there are gaps in understanding the nature and scope of the human rights responsibilities of business."⁴ Following

1. U.N. Global Compact, Overview of the U.N. Global Compact, www.unglobalcompact.org/AbouttheGC (last visited July 18, 2009).

2. KLAUS M. LEISINGER, ON CORPORATE RESPONSIBILITY FOR HUMAN RIGHTS 7 (2006), available at http://www.unglobalcompact.org/docs/issues_doc/human_rights/corpresfor_hr_kl.pdf.

3. GEORG KELL, U.N. GLOBAL COMPACT, THE GLOBAL COMPACT: ORIGINS, OPERATIONS, PROGRESS, CHALLENGES 47 (2003) available at <http://www.greenleaf-publishing.com/content/pdfs/jcc11kell.pdf>.

4. UN Econ. & Soc. Council [ECOSOC], Sub-Comm'n on the Promotion and Protection of Human Rights, *Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to*

the failure of the U.N. Sub-Commission on the Promotion and Protection of Human Rights' Norms⁵ to gain traction with the U.N. Member States, the organization established the post of Secretary General's Special Representative for business and human rights to, among other things, clarify the implications of concepts such as "complicity" and "sphere of influence."⁶

The international corporate-social-responsibility (CSR) movement gained prominence in the 1990s, fueled by numerous revelations of unscrupulous business practices.⁷ These reported abuses in the workplace and in the surrounding communities created shocking accounts of businesses perpetuating and profiting from grave violations of human rights.⁸ When investigators linked international businesses to these abuses, critics questioned the very fairness of economic globalization.⁹ In these instances, it was primarily companies based in developed countries that critics accused of complicity and saw as the primary beneficiaries of an economic model drawing on, or at least indifferent to, breaches of human rights in the developing world.¹⁰

Proactive business executives participating in CSR discussions have recognized the open-endedness of social expectations and have asked for clarification of CSR's outer limits.¹¹ This clarifica-

Human Rights, summary, U.N. Doc. E/CN.4/2005/91 (Feb. 15, 2005) [hereinafter *UNHCHR Report*].

5. U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on the Promotion and Protection of Human Rights, *Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/38/Rev.2 (Aug. 26, 2003) [hereinafter *U.N. Norms*].

6. See Comm'n on Human Rights, *Human Rights and Transnational Corporations and Other Business Enterprises*, ¶ 1(c), U.N. Doc. E/CN.4/2005/L.87 (Apr. 15, 2005).

7. For a comprehensive view rich in both facts and analysis, see DAVID VOGEL, *THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY* (2005).

8. See, for example, the allegations made in lawsuits before U.S. courts under the Alien Tort Claims Act catalogued at Business & Human Rights Resource Centre, <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/AlienTortClaimsActUSA> (last visited July 18, 2009). For an early detailed report on business and human rights, see HUMAN RIGHTS WATCH, *THE PRICE OF OIL, CORPORATE RESPONSIBILITY AND HUMAN RIGHTS VIOLATIONS IN NIGERIA'S OIL PRODUCING COMMUNITIES* (1999), available at <http://www.hrw.org/legacy/reports/1999/nigeria/nigeria0199.pdf>.

9. See, for example, Kofi Annan's address to the World Economic Forum in 1999 that led to the formation of the U.N. Global Compact. Press Release, Secretary-General, Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, in Address to World Economic Forum in Davos, U.N. Doc. SG/SM/6881 (Feb. 1, 1999).

10. See NAOMI KLEIN, *NO LOGO: NO SPACE, NO CHOICE, NO JOBS* 325-43 (2000).

11. See, for example, the training module of the U.N. Global Compact, Human Rights and Business Learning Tool, Module 2.2: Establishing Boundaries of Corporate Responsibility, <http://www.unssc.org/web/hrb/Default2.asp> (last visited July 18, 2009).

tion is especially important for large and influential business groups, particularly multinational enterprises (MNEs) given their large size, impacts, and influence. In this context, the question of liability for the conduct of third parties needs to be more carefully isolated and discussed in CSR circles. Ultimately, a deeper understanding of this issue can impact both the legitimacy (legitimate existence in the first place) and the scope (boundaries) of responsibilities.

There are various degrees of difficulty in clarifying the legitimacy and scope of corporate responsibilities. When a company commits abuses through its own actions and with full knowledge of the risks involved, the difficulty in ascertaining responsibility is minimal and a determination of culpability may be made from the existing criminal and civil negligence laws. Equally uncontroversial are instances when a business actively assists, with full knowledge, a third party that inflicts harms.¹² Here, the principle of attributing responsibility is clear (complicity or aiding and abetting), though defining the precise contours of liability may raise difficulties.

Still, there can be other situations, and most intractable situations in CSR are arguably of this nature, that plunge assessors into grey areas of law. First, a company might act in a manner that facilitates third parties to commit abuses, but the company may not have knowledge of what is happening. Should the company really have known and expanded resources to diligently acquire information? How does this situation change if the same company possesses only limited knowledge that could nevertheless indicate that abuses might be underway? Were knowledge to exist, what should the company do with it so as to prevent or remedy the abuses?

Second, how should a company be treated if that company does not act, and therefore does not assist actively as in the previous situation, but instead remains passive and continues conducting business as usual while the third parties (its business partners) inflict harm? Again, what is the difference if the company remains passive with full knowledge about the practices of its partners or possesses only limited knowledge and does not conduct any inquiry about clearly worrisome signs (indications of abuse)? So there are difficult questions about responsibility in these situations: how does it vary as one moves along the continuums of action-inaction and knowledge-ignorance? Once information about the effects of one's own conduct (action or omission to act) exists, what is the

12. See *infra* Part III.

responsibility to prevent or remedy the harm that the third party produced? In cases such as these, the legitimacy of imposing responsibility on the company as well as defining its boundaries are both bound to be controversial.

This Article strives to clarify corporate responsibilities in several ways: responsibility for what, of whom, and how to clarify. Responsibility “for what” will isolate omissions as opposed to commissions, and will discuss the legitimacy and scope of responsibility for inaction. Responsibility “of whom” separates responsibility of business groups as opposed to single entities; particular attention will go to the parent company in MNEs. As to the question of “how to increase clarity” regarding corporate responsibilities, this Article will bring new insights into the CSR discussions by using jurisprudence. So far, management science¹³ and business ethics¹⁴ have informed thinking on corporate responsibility.

Responsibility “for what” draws attention to the various types of culpable omissions—failure to acquire information and, when knowledge exists, failure to act diligently to prevent and repair harm—that are present at the core of the majority of difficult CSR cases.¹⁵ Although rarely identified explicitly in CSR analysis, the very issue of culpable omissions seems the thorniest for those trying to clarify the scope of corporate responsibilities. An inquiry into “legitimacy aspects” of positive obligations asks whether a parent company should expand its resources to monitor and influence its business partners. By reference to what authorities/grounds can such demands for positive obligations be made?

The scope of positive responsibilities for third parties’ misconduct must be better defined too. This is necessary in order to maintain the legitimacy—and thus the very existence—of these

13. See, e.g., CORPORATE SOCIAL RESPONSIBILITY: READINGS AND CASES IN A GLOBAL CONTEXT (Andrew Crane et al. eds., 2007); R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH 38-40 (1984).

14. See, e.g., RONALD R. SIMS, ETHICS AND CORPORATE SOCIAL RESPONSIBILITY: WHY GIANTS FALL (2003); R. Edward Freeman, *The Politics of Stakeholder Theory: Some Future Directions*, 4:4 BUS. ETHICS Q. 409 (1994).

15. As was rightly observed:

To date, much of the public criticism of multinational corporations in the context of human rights has focused on companies that are perceived to be associated with gross and systematic violations of rights. . . . In most cases, it is the silence or *failure to act* on the part of companies that brings censure rather than their *active involvement* in the violations.

U.N. GLOBAL COMPACT & OFFICE OF THE U.N. HIGH COMM’R FOR HUMAN RIGHTS, EMBEDDING HUMAN RIGHTS INTO BUSINESS PRACTICE 15-16 (2004) (emphasis added), available at http://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/embedding.pdf [hereinafter EMBEDDING HUMAN RIGHTS].

responsibilities, as well as to facilitate their implementation in practice by making them more manageable. The analysis below examines how CSR, the law of negligence, and IHRL define the limits of these responsibilities. There are a number of restrictions to be considered here: limitations *ratione personae* identify the third parties whose misconduct might be attributed to the controlling entity; limitations *ratione materiae* identify the issues or areas of human rights where the company might exercise diligence; and other limitations ask how much *diligent effort* should be made.

Analyzing the responsibility “of whom” recognizes that understanding responsibility in relation to these omissions is key to clarifying the boundaries of responsibility of specific business actors such as MNEs and the parent companies therein. At a very basic level, the social expectation is that parent companies should do something about their business partners rather than insulating themselves from responsibility.¹⁶ Blame tends to be allocated upward along the transnational business chain, for example parent companies for the acts of subsidiaries, buyer companies for the acts of suppliers, large subsidiaries for the acts of joint-venture partners and suppliers. Both a parent sitting at the top of a business group and small and medium enterprises (SMEs) can fail to act, and culpably so. At the same time, liability for omissions inherently rests on a contestable basis if compared with liability for commissions.¹⁷ When analysis moves from SMEs to parent, complexity and controversy surrounding culpable omissions are magnified as various factors intervene: causation becomes more indirect, proximity becomes more remote, territorial boundaries result in separate jurisdictions regulating different parts of the corporate group, fairness and common morality get diluted due to the same territorial lines, and finally public-policy priorities are articulated differently when the costs and benefits of imposing liability on the parent company accrue to different jurisdictions. CSR literature could

16. See ORGANISATION FOR ECON. CO-OPERATION AND DEV. [OECD], OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES, pt. I, tit. II, ¶ 10 (2000) [hereinafter OECD GUIDELINES]. With regard to the sweatshop scandals of the mid-1990s,

[t]he public was reluctant to accept efforts to localize blame to a particular subsidiary, plant, or contractor, and it expected MNEs to operate as coordinated and controlled entities that took care of their reputation problems everywhere “When it comes to legitimacy, public perception appears to be of one entity that is to blame and . . . needs to make a significant organization-wide effort to solve its problems.”

Jean J. Boddewyn, *The Internationalization of the Public-Affairs Function in U.S. Multinational Enterprises Organization and Management*, 46 BUS. & SOC'Y 136, 153 (2007) (citation omitted).

17. See *infra* Part III.A.

acknowledge the special situation of parent companies more clearly; instead, it tends to treat the nature of responsibility of all these actors monolithically, be they parent companies, affiliates, or SMEs.¹⁸

As to “how to clarify” corporate responsibilities through scholarly means, this Article seeks to establish that the legal picture is far more complex than legalistic defenses based on limited liability that companies will raise to absolve themselves of responsibility. Namely, companies argue that they are legally separate from their partners, and therefore free from attribution of their partners’ wrongdoing. This formalist stance, its economic efficiency benefits notwithstanding,¹⁹ has been criticized for ignoring the economic integration of business groups²⁰ and for remaining oblivious to considerations of justice.²¹ This Article, however, does not aim to criticize the law on this point, nor does it argue for the outright abolition of limited liability. Rather, the point is that there are other legal principles running counter to limited liability, and CSR arguments can be enriched by drawing on competing legal principles which are more in tune with evolving societal expectations. Furthermore, in addition to established legal principles, there are grey areas in law. The complexity of defining liability for omissions is not specific to CSR discussions but has plagued jurisprudence for

18. For example, the International Commission of Jurists (ICJ) expressly referred to the responsibility of parent companies as follows:

Throughout its research and consultation process, the Panel has been struck by the ever-increasing complexity of modern business structures. . . . In this context, there are a number of reasons why it may be important to consider the involvement of a parent company in the conduct of its subsidiary, when allegations of complicity in gross human rights abuses arise. For example, when a subsidiary company is involved in human rights abuses, it may be the case that the parent company tolerated or was indifferent to the course of conduct taken; or the subsidiary may act with the full knowledge, approval or even direction of the parent company.

INT’L COMM’N OF JURISTS, 3 CORPORATE COMPLICITY & LEGAL ACCOUNTABILITY: CIVIL REMEDIES 45-46 (2008) [hereinafter CIVIL REMEDIES].

19. See FRANK EASTERBROOK & DANIEL FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 55 (1991). Blumberg notes that the efficiency of limited liability increases with the size of the entity. See generally PHILLIP BLUMBERG, *MULTINATIONAL CHALLENGE TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY* (1993). This efficiency is obtained by permitting an efficient division of labor between different agents (employees, shareholders, lenders, suppliers), reducing monitoring costs within the firm, promoting a stock market in which shares reflect the value of firms, and allowing for efficient diversification and investors’ spreading risk. See generally *id.*

20. See PETER MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW* 328 (Blackwell Publishers 1995) (1996); see generally BLUMBERG, *supra* note 19.

21. See generally KURT A. STRASSER, *Piercing the Veil in Corporate Groups*, 37 CONN. L. REV. 637, 656-61 (2005).

a long time.²² In this respect, courts have been asked to perform complex balancing tasks involving numerous factors to arrive at a finding of liability for negligence.²³ The purpose of the inquiry herein is not to create a nearly comprehensive list of factors that courts or lawmakers deem relevant when determining liability for omissions, but rather to draw attention to the careful balancing act courts perform in cases of culpable omissions.

This Article will highlight the flexibility of key terms used in jurisprudence, the importance of circumstances that generate a heavily fact-based analysis, and the importance of identifying factors that will be weighed in a delicate balancing exercise. This analysis will dispel unwarranted expectations that clarity is achievable solely through principled, deductive reasoning and also orient CSR research to areas where consequential contributions can be made. This Article examines how international “soft” law instruments dedicated to CSR, as well as CSR writings, have analyzed these issues. Beyond CSR, the analysis will examine certain national laws of negligence, which are directly applicable to private businesses,²⁴ complicity provisions, as well as IHRL—all of which have pondered the complexities of positive obligations.

II. CORPORATE-SOCIAL-RESPONSIBILITY INSTRUMENTS AND LITERATURE

A. *Legitimacy of Positive Obligations*

It is important to determine whether prominent international soft-law instruments²⁵ conceive corporate responsibilities narrowly,

22. See *infra* Parts III-IV.

23. See *infra* Parts III-IV.

24. ALLENS ARTHUR ROBINSON, BRIEF ON CORPORATIONS AND HUMAN RIGHTS IN THE ASIA-PACIFIC REGION (2006).

[T]ort law, in which a corporation can be held responsible for an act which causes harm to another person, whether intentionally or not . . . is particularly relevant as it is a means by which corporations may be held accountable in the absence of express human rights law obligations.

Id. ¶ 78.

25. Reference is made herein only to instruments covering comprehensively corporate responsibilities. As the corporate social responsibility (CSR) movement has evolved, a number of governmental and non-governmental instruments are available now specifying responsible steps that multinational enterprises (MNEs) can take in discrete areas. See, e.g., ORGANISATION FOR ECON. CO-OPERATION & DEV. [OECD], OECD'S RISK AWARENESS TOOL FOR MULTINATIONAL ENTERPRISES IN WEAK GOVERNANCE ZONES (2006); INTERNATIONAL ALERT, CONFLICT SENSITIVE BUSINESS PRACTICES: GUIDANCE FOR EXTRACTIVE INDUSTRIES (2005). See also BUSINESS AND HUMAN RIGHTS: A COMPILATION OF DOCUMENTS (Radu Mares ed., 2004) [hereinafter BUSINESS AND HUMAN RIGHTS]; Jane Nelson, *Operating in Insecure Environments* (Corporate Soc. Responsibility Initiative, Working Paper No. 25, 2006), avail-

or if they envisage cases where culpable omissions of controlling companies allow third parties to inflict human-rights abuses unhindered. This Article discusses two important instruments from the 1970s—the Organization for Economic Co-operation and Development (OECD) and International Labor Organization (ILO) initiatives—as well as three more recent initiatives of the United Nations—the Norms,²⁶ the GC,²⁷ and the Special Representative of the Secretary General (SRSG) on the issue of business and human rights.²⁸ Each of these five instruments refers to the controlling company's responsibility to oversee the companies below it within the MNE group. A cursory reading of each reveals that none adopts a narrow understanding of responsibility limited only to a company's own culpable acts; on the contrary, these instruments explicitly cover omissions in two distinct ways.

First, responsibility for blameworthy omissions is obtained by expressly referring to relationships with third parties (for example, subsidiaries, suppliers) that are within the corporate "sphere of influence." The Norms are most explicit here:

Each transnational corporation or other business enterprise shall apply and incorporate these Norms in their contracts or other arrangements and dealings with contractors, subcontractors, suppliers, licensees, distributors, or natural or other legal persons that enter into any agreement with the transnational corporation or business enterprise in order to ensure respect for and implementation of the Norms.²⁹

The OECD Guidelines similarly identify these supply chain relationships, though they relax responsibility so that the OECD merely "[e]ncourage[s], where practicable, business partners, including suppliers and subcontractors, to apply principles of corporate conduct compatible with the Guidelines."³⁰ The GC also refers to responsibility for the conduct of third parties by using the

able at http://www.ksg.harvard.edu/m-rcbg/CSRI/publications/workingpaper_25_nelson.pdf.

26. *U.N. Norms*, *supra* note 5. Though the Norms have not been adopted officially, they are recognized, especially by non-governmental organizations (NGOs), as a useful reference point in an ongoing standard-setting effort

27. See U.N. Global Compact, *supra* note 1.

28. See U.N. Comm'n on Human Rights, *Human Rights Resolution 2005/69: Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc. E/CN.4/RES/2005/69 (Apr. 20, 2005); Special Representative of the Secretary-General on the Issue of Human Rights & Transnat'l Corps. & Other Bus. Enters., *Protect, Respect and Remedy: a Framework for Business and Human Rights*, ¶ 24, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) [hereinafter *Protect, Respect and Remedy*].

29. *U.N. Norms*, *supra* note 5, ¶ 15.

30. OECD GUIDELINES, *supra* note 16, pt. I, tit. II, ¶ 10.

concept of complicity, though this will be discussed more fully below.

Second, these instruments address MNEs—that is, business groups as opposed to individual business entities—directly with calls to “respect” human rights.³¹ With the exception of the GC, each instrument refers to MNEs not only as parent companies, but as groups of companies (more or less economically integrated actors) among which influence and control can be exercised.³² The obligation of a group to respect human rights inherently entails attribution of responsibility to controlling entities for the conduct of third parties (for instance business partners). This attribution of responsibility mirrors the popular perception that allocates blame to the entire group in a manner resembling strict liability.

In 2008, the SRSG on the issue of business and human rights presented his report to the U.N. Human Rights Council.³³ The SRSG’s contribution lies in the conceptual framework, “Protect,

31. The OECD expects MNEs to “[r]espect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.” *Id.* pt. I, tit. II, ¶ 2 (emphasis added). The International Labour Organization (ILO) expects that businesses “should *respect*” the Universal Declaration of Human Rights and internationally recognized labor rights. INT’L LABOUR ORG., TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISES AND SOCIAL POLICY ¶ 8 (2006) [hereinafter ILO, TRIPARTITE DECLARATION]. The Norms hold that: “Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, *respect*, ensure respect of and protect human rights recognized in international as well as national law” *U.N. Norms*, *supra* note 5, ¶ 1 (emphasis added). The Global Compact asks “companies to embrace, support and enact, within their sphere of influence, a set of core values in the areas of human rights, labour standards, the environment, and anti-corruption . . . Principle 1: Businesses should support and *respect* the protection of internationally proclaimed human rights” U.N. Global Compact, The Ten Principles of the U.N. Global Compact, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (last visited July 18, 2009) [hereinafter U.N. Global Compact Ten Principles] (emphasis added).

32. For the OECD, MNEs

usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. . . . [T]he different entities are expected to co-operate and to assist one another to facilitate observance of the Guidelines.

OECD GUIDELINES, *supra* note 16, pt. I, tit. I, ¶ 3. The ILO notes the variety of organizational forms and holds “the expectation that [the various entities in the MNE group] will cooperate and provide assistance to one another as necessary to facilitate observance of the principles laid down in the Declaration.” ILO, TRIPARTITE DECLARATION, *supra* note 31, ¶ 6.

33. *Protect, Respect and Remedy*, *supra* note 28.

Respect and Remedy,”³⁴ in which the corporate responsibility is limited to “respecting” human rights, which “essentially means not [infringing] on the rights of others—put simply, to do no harm [and] is the baseline expectation for all companies in all situations.”³⁵ This corporate responsibility coexists with the state’s duty to protect human rights, which covers situations where private actors such as for-profit entities breach human rights.³⁶ Access to judicial and nonjudicial remedies is the third component meant to ensure that rightholders can access effective grievance mechanisms.³⁷

A detailed analysis of this important conceptual framework and the large amount of documents the SRSG mandate has produced is beyond the scope of this Article. It can be noted, though, that the SRSG explicitly states that corporate responsibility extends to cover the conduct of third parties.³⁸ Through due-diligence efforts, companies have to examine “whether they might contribute to abuse through the relationships connected to their activities, such as with business partners, suppliers, State agencies, and other non-State actors.”³⁹ Furthermore, it is clarified that there is place for positive obligations: “The corporate responsibility to respect . . . ‘doing no harm’ 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.”⁴⁰

In relation to the concept of sphere of influence, the SRSG’s observations are particularly insightful. Ruggie himself promoted this concept in another instrument—the U.N. GC—but that was a nonregulatory instrument meant not to assign responsibility but to encourage businesses to contribute to worthwhile goals and thus alleviate some imbalances of economic globalization.⁴¹ Because the U.N. Norms mistakenly used the concept of “sphere of influence,” Ruggie relegates the concept of “sphere of influence” to a useful metaphor and sees it as totally unsuited as a foundation of

34. *Id.* ¶ 9.

35. *Id.* ¶ 24.

36. *Id.* ¶ 18.

37. *Id.*

38. See *Protect, Respect and Remedy*, *supra* note 28, ¶ 57.

39. *Id.*

40. *Id.* ¶ 55.

41. See Press Release, The Secretary-General, *Secretary-General Proposes Global Compact on Human Rights, Labour, Environment*, in *Address to World Economic Forum in Davos*, U.N. Doc. SG/SM/6881 (Feb. 1, 1999).

the duty to respect. In his relentless attack on the U.N. Norms, Ruggie said:

When it comes to the role companies themselves must play, the main focus in the debate has been on identifying a limited set of rights for which they may bear responsibility. For example, the [U.N. Norms] generated intense discussions about whether its list of rights was too long or too short, and why some rights were included and others not. At the same time, the norms would have extended to companies essentially the entire range of duties that States have, separated only by the undefined concepts of “primary” versus “secondary” obligations and “corporate sphere of influence.” This formula emphasizes precisely the wrong side of the equation: defining a limited list of rights linked to imprecise and expansive responsibilities, rather than defining the specific responsibilities of companies with regard to all rights.⁴²

Besides sphere of influence, complicity is another concept used in the CSR discourse to link businesses to the misconduct of third parties. The general understanding of corporate complicity in CSR circles establishes that both acts and omissions can be culpable and that each therefore can entail responsibility.⁴³ The GC is very concise in its formulation here, with Principal 2 simply asking businesses to “make sure that they are not complicit in human rights abuses.”⁴⁴ A UNHCHR report explains the relations covered by each principle.⁴⁵ The first principle covers the conduct—acts and omissions—of the business entity itself, while the second principle covers the relationship between business entities and third parties.⁴⁶ The report deems the responsibility to “respect” as “comparatively unproblematic,” though the obligation accompanying “support” and “complicity” raise more complex issues.⁴⁷ Regarding complicity, the duty on businesses to act or not act might not always be clear: “Questions arise as to the extent of knowledge that the business entity had or should have had in relation to the human rights abuse and the extent to which it assisted through its acts or *omissions* in the abuse.”⁴⁸ It thus appears that the GC grounds responsibility for third parties’ misconduct, including supply-chain relationships, on Principle 2 and uses complicity as the guiding concept. The question is whether this concept can prop-

42. *Protect, Respect and Remedy*, *supra* note 28, ¶ 51.

43. *See id.* ¶¶ 73, 75.

44. U.N. Global Compact Ten Principles, *supra* note 31.

45. *UNHCHR Report*, *supra* note 4, ¶¶ 28-32.

46. *Id.* ¶ 29.

47. *Id.* ¶¶ 30-31.

48. *Id.* ¶ 34 (emphasis added).

erly account for various CSR situations and serve as solid ground for the duty of oversight discussed in this Article.

The definition of complicity most often encountered in CSR writings and referred to by the GC is as follows: “A company is complicit in human rights abuses if it authorises, *tolerates*, or *knowingly ignores* human rights abuses committed by an entity associated with it, or if the company knowingly provides practical assistance or encouragement that has a substantial effect on the perpetration of human rights abuse.”⁴⁹ The GC identifies four primary situations that give rise to complicity. Interestingly enough, three out of the four (cases 2 through 4 below) involve culpable omissions:

1. When the company *actively assists*, directly or indirectly, in human rights violations committed by others e.g. where a company provides information to a government that it knows will be used to violate human rights;
2. When the company is in a *partnership* with a government and knows, or should have known before agreeing to the partnership, that the government is likely to commit abuses in carrying out its part of the agreement e.g. forced relocation of peoples;
3. When the company *benefits* from human rights violations even if it does not positively assist or cause them e.g. abuses committed by security forces, such as the suppression of a peaceful protest against business activities or the use of repressive measures while guarding company facilities; and
4. When the company is *silent or inactive* in the face of systematic or continuous human rights violations e.g. inaction or acceptance by companies of systematic discrimination in employment law against particular groups.⁵⁰

Human-rights experts Andrew Clapham and Scott Jerbi’s treatment of complicity in a CSR context has been consistently cited in CSR writings.⁵¹ These authors propose that “complicity” should be divided into three categories: direct, indirect (beneficial), and

49. *Embedding Human Rights*, *supra* note 15, at 19 (emphasis added).

50. BUSINESS LEADERS INITIATIVE ON HUMAN RIGHTS & THE GLOBAL COMPACT, A GUIDE FOR INTEGRATING HUMAN RIGHTS INTO BUSINESS MANAGEMENT 9, available at http://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/guide_hr.pdf (last visited July 31, 2009).

51. See, e.g., U.N. Global Compact, Global Compact Principle 2, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/Principle2.html> (last visited July 31, 2009) (adopting Clapham and Jerbi’s division of complicity into three categories); Special Representative of the Secretary-General on the Issue of Human Rights & Transnat’l Corps. & Other Bus. Enters., *Clarifying the Concepts of “Sphere of influence” and “Complicity”*, ¶ 58, U.N. Doc. A/HRC/8/16 (May 15, 2008) (citing Global Compact Principle 2) [hereinafter *Clarifying the Concepts*].

silent.⁵² The authors are explicit that only the first has legal credentials while the last two derive from a sense of moral duty: “The limits of what is meant by complicity tell us a lot about our sense of community and responsibility towards others as well as expectations in the communities of those affected by business practices.”⁵³

The SRSG provides further insight into the discussions of corporate complicity. First it clarifies that “respecting” human rights includes avoiding complicity.⁵⁴ Second, in its framework, complicity is the concept that draws attention to responsibility for third parties’ misconduct: “Complicity refers to indirect involvement by companies in human rights abuses—where the actual harm is committed by another party, including governments and non-State actors.”⁵⁵ Indeed, “avoiding complicity is viewed as an essential ingredient in the due diligence carried out to respect rights because it describes a subset of the indirect ways in which companies can have an adverse effect on rights through their relationships.”⁵⁶ Third, complicity has legal and nonlegal pedigrees.⁵⁷ Complicity is an important benchmark for social actors; claims of complicity are important implications for companies, including via reputational costs, in “the courts of public opinion—comprising employees, communities, consumers, civil society, as well as investors—and occasionally to charges in actual courts.”⁵⁸

Positive responsibilities to assist (avoiding culpable omissions) fall in two categories that need to be distinguished when discussing the limits of CSR. While proponents of corporate accountability have taken an extensive view of responsibility and have taken for granted the legitimacy of their claims, John Ruggie voiced his concerns early on.⁵⁹ He criticized the U.N. Norms because they did not offer a principled basis for attributing human-rights obligations to companies, especially with respect to positive obligations:

Yes, corporations are organs of society, but they are specialized organs, not microcosms of the social whole. Therefore, apart from acts that constitute international crimes or complicity in

52. Andrew Clapham & Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, 24 HASTINGS INT'L & COMP. L. REV. 339, 342 (2001).

53. *Id.* at 349.

54. *Protect, Respect and Remedy*, *supra* note 28, ¶ 73.

55. *Id.*

56. *Clarifying the Concepts*, *supra* note 51, summary.

57. *See Protect, Respect and Remedy*, *supra* note 28, ¶¶ 54, 73, 75.

58. *Id.* ¶ 54.

59. John Ruggie, Special Representative on Transnat'l Corps & Human Rights, *Corporate Responsibility: Comment on FIDH Position Paper* (Mar. 20, 2006), available at http://www.fidh.org/IMG/article_PDF/Comment-on-FIDH-Position-Paper-by.pdf.

crimes—and these matters themselves are not fully settled—the character and limits of corporate obligations ought to reflect their social role, especially when it comes to *positive obligations*. . . .⁶⁰

Furthermore, Ruggie identifies pitfalls of companies going beyond their social role.⁶¹

The basis for the widespread social expectations placed on MNEs is nevertheless quite clear. At the outer boundaries of corporate responsibilities lie two different types of positive obligations. The first one, regarding controlling entities (for example parent companies), addresses the harmful conduct of third parties by exerting whatever influence the controlling entities have as a result of business interactions. The second type of “responsibilities” (if one can speak of a genuine human-rights responsibility in this case, applicable to whatever company within the business group) is to contribute whatever resources and competencies they have to achieve development and poverty-alleviation. It is clear that the first positive obligation seeks to prevent and redress harms linked to corporate operations, while the second responsibility is not a response to harms arising out of corporate activity and is more optional and belongs to charity. The moral force behind the first type of positive responsibility is stronger, and the SRSG’s responsibility to respect human rights covers this situation. Legitimacy here could be argued more easily because, first, corporate operations should at least not harm human rights, and second, whatever influences exist build upon the preexistent commercial links among actors in a corporate group.⁶² As will be discussed in Part III below, these links are similar to relationships recognized in negligence law as a

60. *Id.* at 2-4.

61. *Id.* at 3.

[A]ttributing obligations based on relative influence or capacity would generate endless strategic gaming on the part of governments and companies alike, as well as undermining efforts to build indigenous social capacity and to make governments more responsible to their own citizenry—which is surely the best guarantor of human rights.

Id.; see also Special Representative of the Secretary-General on the Issue of Human Rights & Transnat'l Corps. & Other Bus. Enters., *Interim Report of the Special Representative*, ¶¶ 66-68, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006).

62. Influence cannot be the sole factor leading to responsibility for omissions, but it is a necessary pre-condition. Ruggie criticized overreliance on the idea of “sphere of influence” by saying that “companies cannot be held responsible for the human rights impacts of every entity over which they may have some influence Asking companies to support human rights voluntarily where they have influence is one thing; but attributing responsibility to them on that basis alone is quite another.” *Protect, Respect and Remedy*, *supra* note 28, ¶ 69.

source of positive duties to act and can provide legitimacy to CSR arguments.⁶³

Related to the previous observation, a note on the link between the legitimacy and scope of positive obligations is necessary. Maybe discussing the issue of legitimacy of positive obligations (for the first type of omissions, for instance, failure to prevent partners from inflicting harm) separately from their scope is in itself misleading or at least unproductive. In the end, and with a look at jurisprudence on negligence, both the legitimate existence and the scope of such obligations hinge on the same factors that are balanced to determine the existence and scope of a positive obligation in the particular circumstances of the case.

B. *Boundaries of Corporate Responsibility*

I have argued in the preceding Section that the CSR movement understands corporate responsibility to extend to blameworthy omissions of controlling entities. But what has been written about the limits of these responsibilities? From the four instruments reviewed here, the OECD is explicit regarding limitations *rationae personae*.⁶⁴ Its guidelines note that “[e]stablished or direct business relationships are the major object of this recommendation rather than all individual or *ad hoc* contracts.”⁶⁵ Following the revision of its guidelines in 2000, the OECD countries created National Contact Points, and some of these countries have interpreted the scope of the guidelines restrictively by limiting the National Contact Points’ application to equity relationships while leaving out contract-based relationships.⁶⁶ This interpretation is inconsistent⁶⁷

63. The ICJ notes the following:

Liability can arise under the law of civil remedies, not only for conduct that actively causes damage but also for doing nothing, i.e. for *omissions* or for remaining silent. . . . In both common law and civil law jurisdictions the imposition of such a duty is more likely to arise when a company has a special relationship with the principal perpetrator, the victim, the place where the harm is caused or the means by which the harm is inflicted.

CIVIL REMEDIES, *supra* note 18, at 19 (emphasis added) (citation omitted).

64. See, e.g., OECD GUIDELINES, *supra* note 16, pt. III, ¶ 10.

65. *Id.*

66. See generally ORG. FOR ECON. CO-OPERATION & DEV. (OECD) WATCH, FIVE YEARS ON: A REVIEW OF THE OECD GUIDELINES AND NATIONAL CONTACT POINTS (2005).

67. See also the European Parliament which calls on the Commission and Member States to improve the functioning of National Contact Points regarding the operations and supply chains of European companies worldwide and “calls for a broad interpretation of the definition of investment in the application of the OECD Guidelines to ensure supply-chain issues are covered under implementation procedures” European Parliament Comm. on Employment & Social Affairs, *Report on Corporate Social Responsibility: A New Partnership*, ¶¶ 51, 70, EUR PARL. DOC. A6-0471/2006 (2006).

with the commentary to the guidelines, which identifies relevant factors in judging contractual relationships and explicitly refers to “suppliers, contractors, subcontractors, licensees and other entities with which MNEs enjoy a working relationship” as follows:

It is recognised that there are practical limitations to the ability of enterprises to influence the conduct of their business partners. The extent of these limitations depends on sectoral, enterprise and product characteristics such as the number of suppliers or other business partners, the structure and complexity of the supply chain and the market position of the enterprise *vis-à-vis* its suppliers or other business partners. The influence enterprises may have on their suppliers or business partners is normally restricted to the category of products or services they are sourcing, rather than to the full range of activities of suppliers or business partners. Thus, the scope for influencing business partners and the supply chain is greater in some instances than in others.⁶⁸

The UNHCHR commented on the difficulty of defining CSR boundaries *ratione personae*, which, in contrast to states’ human rights obligations, are not easily defined by reference to territorial limits.⁶⁹ “Defining the boundaries of business responsibility for human rights . . . requires the consideration of other factors such as the size of the company, the relationship with its partners, the nature of its operations, and the proximity of people to its operations.”⁷⁰

Before the SRSG report was published in 2008, the aforementioned instruments mainly contributed to the debate by identifying the areas of human rights standards most relevant to business activities.⁷¹ This task is arguably the easiest part of clarifying positive obligations, particularly when compared to drawing limits regarding actors and the standard of diligence. Indeed, the SRSG found, based on reports of alleged corporate abuses, that the vast majority of human rights can be impacted by business activities in some manner, and

[t]herefore, companies should consider all such rights. It may be useful for operational guidance purposes to map which rights companies have tended to affect most often in particular

68. OECD GUIDELINES, *supra* note 16, pt. III, ¶ 10.

69. See UNHCHR Report, *supra* note 4, ¶ 36.

70. *Id.*

71. The GC is a principle-based instrument and thus necessarily succinct in this respect. The ILO Declaration is the most detailed though it covers only the labor standards area of CSR. Similarly, the Norms were meant to authoritatively define only the human rights aspects of CSR. The OECD covers comprehensively the manifold impacts businesses have in host countries.

sectors or situations. It is also helpful for companies to understand how human rights relate to their management functions—for example, human resources, security of assets and personnel, supply chains, and community engagement. Both means of developing guidance should be pursued, but neither limits the rights companies should take into account.⁷²

Difficulties remain in identifying relevant standards when international standards clash with national ones,⁷³ though the existence of multistakeholder networks makes it more likely to deliver workable solutions. A descriptive account of standards relevant to corporate activities is unnecessary for our purposes here. As Ruggie wrote, while “[i]t may be useful for operational guidance purposes to map which rights companies have tended to affect most often in particular sectors or situations, . . . any attempt to limit internationally recognized rights is inherently problematic.”⁷⁴

The amount of effort required of a company regarding third parties was not easily found in the text of the four instruments preceding the SRSG 2008 report’s publication. Only the commentary of the U.N. Norms expressly states that the standard is to be derived from due diligence: companies “shall have the responsibility to use due diligence in ensuring that their activities do not contribute directly or indirectly to human abuses, and that they do not directly or indirectly benefit from abuses of which they were aware or ought to have been aware.”⁷⁵ Interestingly enough, the U.N. Norms contain no such reference, and the terms used⁷⁶ allude to strict liability (independent of fault) rather than to negligence liability (based on fault). None of the other instruments contain guidance on how to determine the necessary and sufficient amount of diligence to be exercised. Alluding to due diligence is the general concept of “sphere of influence” on which the GC and the U.N. Norms rely to emphasize the limitations of positive obligations.

72. *Protect, Respect and Remedy*, *supra* note 28, ¶ 52 (citations omitted).

73. Examples can be: freedom of association of workers (in China and Vietnam), various types of discrimination in employment (for example against HBV carriers in China), “living wages” in labour-intensive industries, the consent of relocated populations around major infrastructure projects, internet providers and freedom of expression in China, and so forth. The Special Representative for the Secretary General (SRSG) also noted that “[t]here are situations where national laws and international standards conflict. Further guidance for companies needs to be developed, but companies serious about seeking to resolve the dilemma are finding ways to honour the spirit of international standards.” *Id.* ¶ 54, n.39.

74. *Id.* ¶ 52.

75. U.N. Norms, *supra* note 5, ¶ 1, cmt. b.

76. *See id.* ¶ 1.

The image of corporate spheres of influence conceived as concentric circles is now common in CSR literature.⁷⁷ Ruggie, for example, explains the concept as “a series of concentric circles expanding out from a core. At the core are employees, then come suppliers, customers, and other parts of the value chain in the next circle, then surrounding communities, and finally the country of operation and society as a whole.”⁷⁸ Thus in order of priority there are:

1. Core operations. This includes human rights compliance under labour laws and in the direct use of security forces.
2. Business partners. This includes ensuring that all contracts with partners and suppliers are in compliance with human rights and that compliance is subject to independent monitoring and verification.
3. Host communities. This includes stakeholder engagement and consultation, and partnership activities based on equity, transparency and mutual benefit.
4. Advocacy and dialogue with government. This applies to transnational corporations having considerable economic leverage with a government.⁷⁹

The World Economic Forum identified various spheres of corporate influence: core business operations (workplace, marketplace, and supply chain), host communities for those firms with a major physical presence, industry associations, and the public policy realm.⁸⁰ The UNHCHR drew on “proximity” to make sense of the spheres of influence that “tend to include the individuals to whom the company has a certain political, contractual, economic or geographic proximity.”⁸¹

The Danish Institute for Human Rights consulted with Danish companies and made use of four principles—the enabling, causality, severity, and power principles—“as a reliable method of identifying one actor’s responsibility for the actions of another.”⁸² It draws attention to the twin responsibilities to discover violations

77. See, e.g., *Clarifying the Concepts*, *supra* note 51, ¶ 8.

78. BUSINESS & HUMAN RIGHTS SEMINAR, EXPLORING RESPONSIBILITY AND COMPLICITY 33 (2005), available at www.bhrseminar.org/BusinessHumanRightsSeminarReport2005.pdf.

79. RAISING THE BAR, CREATING VALUE WITH THE UN GLOBAL COMPACT 22-23 (Claude Fussler ed., 2004); See generally AMNESTY INT’L & THE PRINCE OF WALES INT’L BUS. LEADERS FORUM, HUMAN RIGHTS: IS IT ANY OF YOUR BUSINESS? (2000), available at <http://www.iblf.org/docs/IsItYourBusiness.pdf>.

80. WORLD ECONOMIC FORUM, GLOBAL CORPORATE CITIZENSHIP: THE LEADERSHIP CHALLENGE FOR CEOs AND BOARDS 7 (2002).

81. *Embedding Human Rights*, *supra* note 15, at 17.

82. MARGARET JUNGK, HUMAN RIGHTS & BUSINESS PROJECT, COMPLICITY IN HUMAN RIGHTS VIOLATIONS: A RESPONSIBLE BUSINESS APPROACH TO SUPPLIERS 2 (2006).

(monitoring) and to correct violations thus uncovered (mitigation).⁸³ The Danish Institute's report still has difficulties when responsibility is not clear-cut (for example, "full responsibility" by completely satisfying one of the four principles).⁸⁴ Thus the original question—what are the limits of the responsibility to take corrective action—cannot be answered decisively, and the discussion is no longer about the limits of CSR but about the mapping of CSR areas:

We suggest that after dealing with the full responsibility categories, violations which fall within two or more partial areas of responsibility should be the next most important area of the company's concern and in this sense categories in the middle of the chart—partial responsibility—are a useful starting point.⁸⁵

A way forward for dealing with partial responsibility is to draw on the legal principles of negligence. In this respect, "the legal doctrines that are most analogous to the concept of sphere of influence are found in the realm of corporate civil liability and, in particular, in the tortious doctrine of duty of care."⁸⁶ The Fédération Internationale des Droits de l'Homme also hints at due-diligence reasoning by referring to procedural steps influential businesses could take:

In principle, sphere of influence should answer the question of how far the positive obligations of businesses should reach. It functions to help us identify regions of influence However, rather than focusing on the boundaries of this influence, it may be more fruitful to identify a set of procedural obligations imposed on corporations which would ensure that they take into account their human rights obligations in planning and executing their activities, including in the selection of their business partners.⁸⁷

The notion of sphere of influence came under strong criticism from the International Chamber of Commerce, which stated that "[n]o one can act outside of one's sphere of activity; no one can produce any result beyond one's sphere of influence. Every action, and every effect of one's actions, are within the 'sphere of activity

83. *See id.* at 12-17.

84. *See id.* at 5.

85. *Id.* at 15.

86. Robinson, *supra* note 24, ¶ 48.

87. Int'l Federation for Human Rights [FIDH], *Comments to the Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises* 9 (Feb. 22, 2006), available at <http://www.fidh.org/IMG/pdf/business442a.pdf>.

and influence' of the actor—by definition.”⁸⁸ This argument overlooks the fact that not only actions to which the comment expressly refers, but also omissions, can be blameworthy, and that both types of culpable conduct are covered by the sphere of influence concept.

The most comprehensive and rigorous conceptual effort on the issue of scope of corporate responsibilities comes from the SRSG. After challenging the usefulness of the “sphere of influence” as a guiding concept, the document proposes the idea of due diligence and continues with observations on that.⁸⁹ Its starting observation—the question of what precise responsibilities companies have in relation to human rights—is a difficult one that has received insufficient attention in CSR documents.⁹⁰ The way towards higher specification is to think in terms of due diligence: “To discharge the responsibility to respect requires due diligence. This concept describes the steps a company must take to become aware of, prevent and address adverse human rights impacts.”⁹¹ The SRSG indicates that “[f]or the substantive content of the due diligence process, companies should look, at a minimum, to the international bill of human rights and the core conventions of the ILO.”⁹² Additionally, these companies should undertake key steps such as adopting human-rights policies, conducting impact assessments, integrating human-rights policies throughout the company’s departments, and tracking performance through monitoring and auditing.⁹³ After giving some helpful advice in due-diligence efforts, the SRSG commented on the nature of the undertaking: “the scope of due diligence to meet the corporate responsibility to respect human rights is not a fixed sphere, nor is it based on influence,”⁹⁴ that “the process inevitably will be inductive and fact-based,” and that “[h]ow far or how deep this [due diligence] process must go will depend on circumstances.”⁹⁵

Where the boundaries of corporate responsibilities lie is a question that surfaces recurrently in CSR discussions. On the one

88. INT’L ORG. OF EMPLOYERS [IOE] & INT’L CHAMBER OF COMMERCE [ICC], JOINT VIEWS OF THE IOE AND ICC ON THE DRAFT “NORMS ON THE RESPONSIBILITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES WITH REGARD TO HUMAN RIGHTS” 25 (2004).

89. *See Protect, Respect and Remedy*, *supra* note 28, ¶ 67.

90. *See id.* ¶ 53.

91. *Id.* ¶ 56.

92. *Id.* ¶ 58.

93. *See id.* ¶¶ 60-64.

94. *Id.* ¶ 72.

95. *Protect, Respect and Remedy*, *supra* note 28, ¶ 57.

hand, important gains have been made. The “spheres of influence” had become the dominant concept in use, at least until 2008 when the SRSG criticized it and proposed “due diligence” instead.⁹⁶ The availability of policy instruments, the adoption of numerous industry-driven codes of conduct and extensive literature have clarified significantly the types of human-rights impacts and standards most relevant to each industry, as well as produced guidelines and standards of due diligence that guide companies willing to implement their CSR commitments.⁹⁷ It has proven difficult, however, to agree, for example, how far down the supply chain the responsibility of the buyer companies goes. In other words, the boundaries around the third parties for which the buyer would have a positive obligation to monitor and influence remain contestable.⁹⁸ Thus, uncertainty remains regarding the amount of effort the controlling entity should put into obtaining and acting upon information of its partners’ conduct. The defensible and acceptable threshold of diligence expected from a responsible business remains a debatable issue.

III. NEGLIGENCE LAW

Negligence laws throughout different jurisdictions share a general principle that the actor whose faulty conduct, whether an act or omission, caused damage is obliged to repair it.⁹⁹ With regard to omission, the principle has been heavily litigated as plaintiffs have sought “to hold others—persons and institutions whose negligence arguably set the stage for the injuries in some way—responsi-

96. *See id.* ¶ 72.

97. *See, e.g.,* BUSINESS AND HUMAN RIGHTS, *supra* note 25 (compiling relevant documents).

98. On the rather distinct issue of social reporting, the Global Reporting Initiative (GRI) has clarified the boundaries of reporting by identifying the business partners on which the reporting organization should collect and disclose information. Such information refers only to significant impacts of entities over which the reporting organization has control, significant influence, or mere influence. Reporting responsibilities vary depending on these boundaries of influence. *See* GLOBAL REPORTING INITIATIVE, GRI BOUNDARY PROTOCOL 7-18 (2005), *available at* <http://www.globalreporting.org/NR/rdonlyres/CE510A00-5F3D-41EA-BE3F-BD89C8425EFF/0/BoundaryProtocol.pdf>

99. For example, the French Civil Code states that “[a]ny act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it.” CODE CIVIL [C. CIV.] art. 1382 (Fr.) (translation available at <http://195.83.177.9/code/liste.phtml?lang=uk&c=22&r=494>). It goes on: “Everyone is liable for the damage he causes not only by his intentional act, but also by his negligent conduct or his imprudence.” *Id.* art. 1383.

ble for the harm caused by such persons.”¹⁰⁰ Liability for omissions is a discrete area in the law of negligence. It is replete with uncertainty where law has recorded an interesting evolution. It can shed light both on the legitimate base of obligations¹⁰¹ as well as on their limits. The arguments in favor of positive responsibilities for parent companies, as proposed by CSR writings, can be enriched by studying how negligence law has dealt with culpable failures to act.¹⁰²

A. *Legitimacy of Positive Obligations*

A good starting point for legal formulations on omissions is the extremely detailed treatment provided by the American Law Institute’s (ALI’s) Restatement of Torts. The ALI explicitly finds that omissions can be a source of liability: “A negligent act or *omission* may be one which involves an unreasonable risk of harm to another through . . . the foreseeable action of the other, a *third person*, an animal, or a force of nature.”¹⁰³ The ALI further notes the following:

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a *special relation exists between the actor and the third person* [tortfeasor] which imposes a duty upon the actor to control the third person’s conduct, or (b) a special relation exists between the actor and the other [injured party] which gives to the other a right to protection.¹⁰⁴

The rule regarding the duty to act for the aid or protection of the plaintiff appeared first in, and is still largely confined to, situations in which there was some special relationship between the parties.¹⁰⁵ Such situations are threefold: where the actor has *control* over third parties committing the abuse (duty to exercise such con-

100. David W. Robertson, *Negligence Liability for Crimes and Intentional Torts Committed by Others*, 67 TUL. L. REV. 135, 136 (1992).

101. For philosophical arguments in favor or against a general duty to rescue (duty to act affirmatively to aid or protect another), see generally Melody J. Stewart, *How Making the Failure to Assist Illegal Fails to Assist: An Observation of Expanding Criminal Omission Liability*, 25 AM. J. CRIM. L. 385 (1998).

102. In law, liability for the conduct of third parties has been allocated either automatically, irrespective of fault (*strict liability*), or when the actor is culpable in some way (failed to do something though it should have) for the conduct of a third party that harms another (*negligence liability*). Only the latter type will be discussed here as the former is not a realistic prospect for CSR situations and cannot assist in thinking of liability for culpable omissions.

103. RESTATEMENT (SECOND) OF TORTS § 302 (1965) (emphasis added).

104. *Id.* § 315 (emphasis added).

105. *See id.* § 302, cmt. a.

trol), where the actor *created a situation of peril* through his own conduct (duty to act to prevent harm), and where the actor has *committed himself* to the performance of an undertaking (duty of reasonable care for the protection of the other).¹⁰⁶ Among the relationships that generate a duty to exercise control are those of a parent and child, a master and servant, a possessor of land or chattels and licensee, and a person in charge of someone who has dangerous propensities.¹⁰⁷

English law, which has recognized the tort of negligence since 1932, takes a similarly cautious, though explicit, attitude towards omissions through the following formulation:

[Y]ou must take reasonable care to avoid acts and *omissions* which you can reasonably foresee would be likely to injure your neighbour[, that is,] persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.¹⁰⁸

Courts have identified a number of relationships that give rise to a duty to act. As the House of Lords summarized, these relationships exist in the following circumstances: where there is a special relationship between claimant and defendant based on an *assumption of responsibility* by the defendant to the claimant; where there is a special relationship between claimant and defendant based on control by the defendant; where the defendant is *responsible for a state of danger* which may be exploited by a third party; and where the defendant is responsible for property which may be used by a third party to cause damage.¹⁰⁹

The Principles of European Tort Law also refer to circumstances when someone has a positive duty to prevent harm committed by a third party, stating as follows:

A duty to act positively to protect others from damage may exist if law so provides, or if the actor *creates or controls a dangerous situation*, or when there is a *special relationship between parties* or when the seriousness of the harm on the one side and the ease of avoiding the damage on the other side point towards such a duty.¹¹⁰

Regarding the latter aspect, it creates an opening through which the moral case for affirmative responsibilities could be made, espe-

106. *See id.* § 314, cmt. a.

107. *See id.* §§ 316-320.

108. *Donoghue v. Stevenson*, [1932] A.C. 562, 580 (emphasis added).

109. *See Smith v. Littlewoods Organisation Ltd.*, [1987] A.C. 241, 272 (H.L.).

110. EUROPEAN GROUP ON TORT LAW, PRINCIPLES OF EUROPEAN TORT LAW art. 4:103 (2005) [hereinafter EUROPEAN TORT] (emphasis added).

cially when contrasting wealthy MNEs with disenfranchised workers and communities in host countries. In itself, this ground for a duty to assist is unlikely to suffice, as there is a slippery slope on which U.S. law has refused to venture. It still requires the existence of a special relationship, otherwise

the actor is not subject to liability if he fails, either intentionally or through inadvertence, to exercise his ability so to control the actions of third persons as to protect another from even the most serious harm. This is true although the actor realizes that he has the ability to control the conduct of a third person, and could do so with only the most trivial of efforts and without any inconvenience to himself.¹¹¹

Through its very detailed Restatement of Torts, the ALI has offered the most detailed presentation on these issues. Even here, however, as in other legal systems, there remains a serious amount of uncertainty regarding which situations or relations will be recognized in law as creating liability for failure to act. There is no precise principle offering guidance, no underlying theory, but rather “simply a compendium of situations in which courts have generally accepted . . . omissions.”¹¹² The law, however, is evolving, as Wayne R. LaFaye noted that “[o]ver the years of the development of tort and criminal law, the trend has been in the direction of creating new situations wherein an affirmative duty to act is imposed. No doubt the trend will continue in the future.”¹¹³ In these circumstances, a promising way to argue in favor of a duty to act is by insisting, as done in tort law, on the existence of special relationships within the corporate group and outside it with workers and communities.

In CSR situations, it is necessary to highlight the preexistent relationship between parties (for instance, controlling entity–affiliate) in order to begin arguing against the parent company for negligence by omission. As the company enters into commercial relationships with third parties that directly cause harms (human-rights abuses), its omissions can create culpability for multiple reasons. First, such entities have entered into a tangible relationship with affiliates that they source from or distribute to in foreign markets. While such relationships do not reach the high threshold of con-

111. RESTATEMENT (SECOND) OF TORTS § 315 cmt. b (1965).

112. Todd S. Aagaard, *A Fresh Look at the Responsible Relation Doctrine*, 96 J. CRIM. L. & CRIMINOLOGY 1245, 1279 (2006).

113. WAYNE R. LAFAVE, 1 SUBSTANTIVE CRIMINAL LAW § 6.2(a) (2d ed. 2003) (citation omitted).

trol demanded by law,¹¹⁴ they are clearly distinguishable from situations involving a complete lack of connection to the perpetrator. Second, legal scholars and plaintiffs have raised fairness considerations before courts of law even in cases of a total absence of a preexistent relationship. The ALI, for example, notes the following:

The result of the rule has been a series of older decisions to the effect that one human being, seeing a fellow man in dire peril, is under no legal obligation to aid him, but may sit on the dock, smoke his cigar, and watch the other drown. Such decisions have been condemned by legal writers as revolting to any moral sense, but thus far they remain the law. It appears inevitable that, sooner or later, such extreme cases of morally outrageous and indefensible conduct will arise that there will be further inroads upon the older rule.¹¹⁵

It appears that negligence law imposes liability for culpable actions (commissions) as well as for failure to act (omissions), though the latter attracts legal liability only in exceptional circumstances. The principle was actually earlier understood in stronger terms, to the effect that negligence law would not impose liability at all for failure to act. For example, in the United States, common law has distinguished between action and inaction, as noted by the ALI:

In the early law one who injured another by a positive affirmative act was held liable without any great regard even for his fault. But the courts were far too much occupied with the more flagrant forms of misbehavior to be greatly concerned with one who merely did nothing, even though another might suffer serious harm because of his omission to act. Hence liability for non-feasance was slow to receive any recognition in the law.¹¹⁶

The laws of negligence have recognized a few exceptions from the general rule that omissions do not entail liability: the exception based on a prior relationship between actor and perpetrator, the exception based on a prior relationship between actor and victim,

114. In his comments on liability of corporate groups, Blumberg notes that the concept of "control" was utilized from the start as the principal foundation for enterprise law, though courts agree now that the mere existence of control is insufficient for intra-group liability. Besides control, other factors are relevant in proving the economic unity of the group and thus arriving at group liability: economic integration, financial interdependence, administrative interdependence (administrative support centralized either in the parent company or in service subsidiaries), overlapping employment structure, common group persona (for example, same name, logo), and so forth. BLUMBERG, *supra* note 19, at 60, 92-99.

115. RESTATEMENT (SECOND) OF TORTS § 314 cmt. c (1965).

116. *Id.*

the prior-conduct exception, and the volunteer exception.¹¹⁷ These exceptions offer a number of grounds from which to argue in the CSR context: the relationships between the parent company and its partners preexisted the actual harm; the creation of a situation of danger followed by passivity when third parties take advantage of that situation to inflict harm; and even the assumption of responsibility reflected in CSR commitments (for example, the MNE commits itself to “respect” human rights). While such CSR arguments cannot satisfy the high thresholds applied in courts of law, they are nevertheless built in the shadow of these legal categories and can derive some legitimacy from it. Likely inseparable from the legitimacy thus acquired is the scope of responsibilities imposed on the parent company. What is expected from the company and what threshold of effort would be satisfactory?

B. *Scope of Positive Obligations*

In cases of omissions, due diligence of a controlling party is expected at two important stages: the preliminary information gathering stage and the primary stage of decision making based on the acquired information. If a company fails to acquire information, it may be charged with negligently or even intentionally remaining ignorant. If a company acquires the information as it should, its conduct, whether by some act or omission, could still be deemed unreasonable and negligent for improperly handling the risks of harm posed by its business partners. This Section insists on the duty to diligently acquire information and form knowledge as omissions to act (exert influence) on remote business partners can be caused by insufficient information. The issue here concerns the responsibilities of a diligent person at this preliminary stage of acquiring information. This is important because, as will be discussed below, there is a legal defense in negligence law available to one who neither knows nor should have known about the risks of harm.¹¹⁸ So what should one know? Beyond that point, what responsibilities may follow from being in possession of information on third parties and thus being able to foresee the consequences of one’s own actions and omissions. Regardless, at this decision-making stage, foresight of consequences is not the only determinant of a duty of care analysis. Indeed, courts have deemed other factors

117. See generally Robertson, *supra* note 100.

118. See *infra* Part III.B.1.

relevant and have weighed them carefully to find liability for negligence.¹¹⁹

1. Acquiring Information: What the “Reasonable Person” Should Know

In order not to be legally negligent, one has to conduct himself/herself reasonably, that is, as the fictional “reasonable man under like circumstances”¹²⁰ or “the reasonable person in the circumstances.”¹²¹ The ALI describes the qualities of the “reasonable man” as “attention, knowledge, intelligence, and judgment which society requires of its members for the protection of their own interests and the interests of others.”¹²² Regarding the knowledge element, the standard is that of “a reasonable man under the circumstances which . . . the actor knows or *has reason to know*.”¹²³ Thus, ignorance of the risks entailed by his conduct is not automatically a defense: one is under a responsibility to investigate when the grasp of circumstances is wanting. According to the ALI, “[i]t is not necessary that the actor should realize that the circumstances surrounding him are such as to make his conduct likely to cause harm to another”:

It is enough that he should realize that his perception of the surrounding circumstances is so imperfect that the safety or danger of his act depends upon circumstances which at the moment he neither does nor can perceive. In such case it is negligent for him to act if a reasonable man would recognize the necessity of making further investigation. If he acts without such investigation, he must, as a reasonable man, realize that his act involves a risk depending upon the character of the unknown surroundings.¹²⁴

The lack of such awareness is due to the “failure to exercise a reasonable level of mental vigilance.”¹²⁵ As it was said, “what is condemnable is not doing something in a blank state of mind, but, rather, letting oneself be in such a state of mind in circumstances that warrant care.”¹²⁶ But then what level of knowledge should the actor acquire? The ALI explains as follows:

119. See *infra* Part III.B.2.

120. RESTATEMENT (SECOND) OF TORTS § 283 (1965).

121. EUROPEAN TORT, *supra* note 110, art. 4:102(1).

122. RESTATEMENT (SECOND) OF TORTS § 283 cmt. b (1965); see also *id.* § 289.

123. *Id.* § 285 cmt. d (emphasis added).

124. *Id.* § 289 cmt. j.

125. Daniel More, *The Boundaries of Negligence*, 4 THEORETICAL INQUIRIES L. 339, 346 (2003).

126. *Id.* (citation omitted).

For the purpose of determining whether the actor should recognize that his conduct involves a risk, he is required to know the qualities and habits of human beings and animals and the qualities, characteristics, and capacities of things and forces in so far as they are *matters of common knowledge at the time and in the community*¹²⁷

Thus envisaged is “the knowledge which is necessary to enable the actor as a reasonable man to recognize the *existence* of a risk and the *extent* thereof, that is, the extent of the chance that harm will be done to the interests of others.”¹²⁸

Omissions are blameworthy even when third parties are committing the abuses. The ALI states that the actor is, under certain circumstances, “bound to anticipate and provide against the negligent or intentional misconduct of a third person.”¹²⁹ One might be expected to have:

[k]nowledge that others may act tortiously or criminally [because a] reasonable man is a standardized human being living in an actual world and not in Utopia. The actor, as a reasonable man, must therefore take life as it is and not as it should be, and must realize the likelihood that third persons may act in a variety of ways, all of which are not only morally but legally wrongful.¹³⁰

Thus:

if the known or knowable peculiarities of even a small percentage of human beings, or of a particular individual or class of individuals, are such as to lead the actor to realize the chance of eccentric and improper action, he is required to take this chance into account if *serious harm to a legally important interest* is likely to result from such eccentric action and his own conduct has not such pre-eminent *social utility* as to justify the serious character of the risk involved therein.¹³¹

Furthermore, the ALI clarifies cases where “the actor has brought into contact or association with the other a person whom the actor knows or *should know* to be peculiarly likely to commit intentional misconduct, under circumstances which afford a peculiar opportunity or temptation for such misconduct.”¹³² The ALI commentary warns that it is not possible to state definite rules regarding necessary precautions as this is a matter of balancing the

127. RESTATEMENT (SECOND) OF TORTS § 290 (1965) (emphasis added).

128. *Id.* § 290 cmt. c (emphasis added).

129. *Id.*

130. *Id.* § 290 cmt. m.

131. *Id.* § 290 cmt. c (emphasis added).

132. *Id.* § 302B, cmt. e (emphasis added).

magnitude of the risk against the utility of the actor's conduct.¹³³ The commentary goes on to identify factors to be considered, such as the following:

the known *character, past conduct, and tendencies of the person* whose intentional conduct causes the harm, the *temptation or opportunity* which the situation may afford him for such misconduct, the *gravity of the harm* which may result, and the *possibility that some other person will assume the responsibility* for preventing the conduct or the harm, together with the *burden of the precautions* which the actor would be required to take.¹³⁴

The ALI expressly states that violations are excused when one "neither knows nor should know of the occasion for compliance."¹³⁵ When one should know because the information was common knowledge or because there were warning signs of a potential problem, however, ignorance is culpable.¹³⁶ Ignorance can exist in different degrees of blameworthiness, ranging from culpable to reckless to willful ignorance.¹³⁷ These standards differ according to the motivation behind the actor's ignorance.¹³⁸ For example, the willfully ignorant actor "must consciously desire to preserve a possible defense from blame or liability in the event that he is apprehended. His failure to gain more information cannot be due to mere laziness, stupidity, or the absence of curiosity."¹³⁹

The mental state of the actor is important when discussing legitimacy.¹⁴⁰ For example, a passive parent company remaining willfully or recklessly ignorant about its business partners' conduct will have a harder time defending its (lack of) actions than if it was simply negligent. The important aspect for this Article's analysis of due diligence is not the motivation behind the act, but the level of risk awareness pointing to the need for further investigation.¹⁴¹

133. *See id.* § 302B cmt. f.

134. *Id.* (emphasis added).

135. *Id.* § 288A.

136. *See id.*

137. *See* Douglas N. Husak & Craig A. Callender, *Willful Ignorance, Knowledge, and the "Equal Culpability" Thesis: A Study of the Deeper Significance of the Principle of Legality*, 1994 Wis. L. REV. 29, 41-42 (1994).

138. *See id.*

139. *Id.*

140. *See supra* Part III.A.

141. As the International Commission of Jurists noted, "the nature of the negligent or intentional conduct in question is and should be immaterial for the purposes of civil liability." CIVIL REMEDIES, *supra* note 18, at 23. This is because:

for the purposes of civil liability in instances of harm to life, liberty, personal bodily or mental integrity, or property, whether or not an actor actually desired to harm someone is largely irrelevant. In such instances a court's inquiry as to whether conduct was intentional or negligent will not focus on whether there was

2. Decision-Making Stage

To avoid charges of negligence, one should recognize the need and responsibility to acquire knowledge commensurate to what a reasonable person would seek under the circumstances. Otherwise, the actor will be unable to foresee the risks potentially created by his conduct. The actor's unreasonable failure to foresee the risks of his conduct represents cognitive deficiency. One scholar, Kenneth W. Simons, said this takes two basic forms: negligent inadvertence, which is when "the actor unreasonably fails to advert to a risk or to an existing fact" and negligent mistake, which is when "the actor forms the unreasonable and incorrect belief that the risk or fact does not exist."¹⁴² In both cases, "the actor is negligent for not forming a belief that he reasonably should have formed."¹⁴³

Culpable ignorance is just one illustration of negligent unreasonable conduct. Moving beyond the information-gathering stage, negligence does not necessarily have to be grounded in inappropriate information or knowledge. "[I]n many standard negligence cases, the actor is quite aware of the relevant risks. In these cases, negligence often takes the form of an unreasonable decision to encounter the risks, a decision reflecting a socially unreasonable weighing of the risks and benefits of one's conduct."¹⁴⁴ At the decision-making level, the parent company can fail in its responsibility to exercise influence on its business partners. This responsibility is known from situations where the company is liable for the misconduct of its agents/employees. Thus, some liability regimes recognize that "firms are not themselves wrongdoers, but are organizations in a position to monitor and influence their own agents."¹⁴⁵ These liability regimes also aim to make the company "separately liable for two distinct wrongs: for its agent's miscon-

a desire to cause harm but rather will consider what a company *knew* about the likelihood that its conduct would cause harm (in the case of intention) or what it should have known (in the case of negligence). . . . [M]ost of the time, when harm is caused to such interests, civil law jurisdictions will not place any emphasis on the distinction between negligence and intention – civil liability can be imposed once it is considered that, at the very least, an actor was negligent, (and the requirements of harm and causation are fulfilled). As a result, in cases of harm to such interests courts in civil law jurisdictions will rarely move to identify whether intention was present.

Id. at 13-14.

142. Kenneth W. Simons, *Dimensions of Negligence in Criminal and Tort Law*, 3 THEORETICAL INQUIRIES L. 283, 288 (2002).

143. *Id.*

144. *Id.* at 299.

145. Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 752 (1997).

duct, and, additionally, for its own failure to discharge its policing duties.”¹⁴⁶

Numerous factors are considered when determining negligent conduct. For example, for the European Group on Tort Law, a finding of negligence

depends, in particular, on the nature and value of the protected interest involved, the dangerousness of the activity, the expertise to be expected of a person carrying it on, the foreseeability of the damage, the relationship of proximity or special reliance between those involved, as well as the availability and the costs of precautionary or alternative methods.¹⁴⁷

The ALI also assesses reasonable conduct against a multitude of factors.¹⁴⁸ It is not the aim of this Article to immerse the reader in the details of each such factor, but to draw attention to their multitude; more important, even, is to grasp the fluidity of some important elements of negligence. Such fluidity introduces uncertainty and unpredictability into the negligence analysis, but also inserts flexibility and adaptability. Reference will be made below to the meaning of “foreseeability,” “proximity,” and the role of public policy in negligence analysis.

i. Foreseeability

It is not negligent to fail to take precautions against an unforeseeable risk; risk of harm must be foreseeable.¹⁴⁹ For the European Group on Tort Law, foreseeability is defined as follows:

the foreseeability of the damage to a reasonable person at the time of the activity, taking into account in particular the closeness in time or space between the damaging activity and its consequence, or the magnitude of the damage in relation to the normal consequences of such an activity¹⁵⁰

Foreseeability of harm was an important factor in negligence deliberations for British courts in the 1970s.¹⁵¹ At the time, the courts were considering making foreseeability a part of the all-

146. *Id.* at 726.

147. EUROPEAN TORT, *supra* note 110, art. 4:102(1).

148. *See* RESTATEMENT (SECOND) OF TORTS § 289-295 (1965) (recognizing existence of risk, what an actor is required to know, unreasonableness, factors considered in determining utility of an actor’s conduct, factors considered in determining magnitude of risk. conduct involving risk of harm to a third person, conduct involving alternative risk to a third person, custom, and emergency).

149. *See id.* § 435.

150. EUROPEAN TORT, *supra* note 110, art. 3:201(a).

151. *See generally* David Howarth, *Many Duties of Care—Or a Duty of Care? Notes from the Underground*, 26 OXFORD J. LEGAL STUD. 449 (2006).

embracing test for negligence liability.¹⁵² The reasoning behind this movement was the contemplation that carelessness may cause damage that would generate a *prima facie* duty of care.¹⁵³ This formula was applied mainly in cases of omissions to prevent a third party to harm another.¹⁵⁴ Commentators refer to

the extraordinary mess the law of negligence fell into in the 1970s as a result of taking *Wagon Mound* foreseeability too seriously That idea had the effect of suggesting that there should be a massive extension of liability into cases involving foreseeable interventions . . . the mere fact that harm to another person was foreseeable somehow created a duty of care¹⁵⁵

The problem with that proposition was that, even if there was a foreseeable risk, liability does not necessarily follow. If there are foreseeable but insubstantial risks, or even where risks are substantial, if the costs, either to the defendants themselves or to others, of reducing the risks to acceptable levels is high, reasonable people will not act.¹⁵⁶

Once the defendant takes the foreseeable risk, the question becomes whether the defendant took reasonable precautions to reduce risk, so as to arrive at an “acceptable risk.”¹⁵⁷ Courts often determine the acceptability of risk in an impressionistic and imprecise way, ultimately based on the decision maker’s view of what constitutes a good society. The idea of reasonableness implies a value judgment about which honest and fair people may legitimately disagree.¹⁵⁸ From a policy perspective, negligence is not about eliminating risk, but about reducing risk to an acceptable level by taking reasonable precautions.

As demonstrated by British jurisprudence, “[t]he question over the extent of liability for inaction [raises] fundamental issues for the nature of civil liability [that an] emphasis upon ‘foreseeability’ alone cannot resolve.”¹⁵⁹ This approach ultimately generated criticism that led to its abolition.¹⁶⁰ The correction made in subse-

152. *Id.* at 457-63.

153. *Id.*

154. *Id.*

155. *Id.* at 458-59.

156. *Id.* at 457-63.

157. Buckley observes that risk is a function of various elements: probability of occurrence, seriousness of effect, utility/value of the activity in which the defendant has engaged, and extent and cost of effective precautions. See R. A. BUCKLEY, *THE MODERN LAW OF NEGLIGENCE* 40-42 (3d ed. 1999).

158. See PETER CANE, *THE ANATOMY OF TORT LAW* 40 (1997).

159. BUCKLEY, *supra* note 157, at 5; see, e.g., *Caparo Indus. PLC v. Dickman*, [1990] 2 A.C. 605, 609 (H.L.).

160. See BUCKLEY, *supra* note 157, at 4-5.

quent case law emphasized the importance of “proximity” and of wider public policy considerations as elements of the duty of care.¹⁶¹

ii. Proximity

Proximity between a plaintiff’s conduct and a defendant’s interests may be physical; it may relate to a preexistent relationship between parties; it may refer to the causal connection between the conduct and the harm it produced; or it may result from an assumed responsibility.¹⁶² Proximity, therefore, surfaces in various contexts, and in each, it is hard to define because it is influenced heavily either by policy considerations or by factual circumstances.¹⁶³

In England, in *Caparo Industries PLC v. Dickman*, Lord Bridge discussed the concept as follows: “there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of ‘proximity’ or ‘neighbourhood.’”¹⁶⁴ Later Lord Nicholls wrote the following in *Stovin v. Wise*¹⁶⁵:

Proximity is a slippery word. Proximity is not legal shorthand for a concept with its own, objectively identifiable characteristics. Proximity is convenient shorthand for a relationship between two parties which makes it fair and reasonable one should owe the other a duty of care. This is only another way of saying that when assessing the requirements of fairness and reasonableness regard must be had to the relationship of the parties.¹⁶⁶

Proximity was the main issue of three English cases involving transnational CSR issues where allegations of both culpable acts and omissions were made.¹⁶⁷ In each, the plaintiffs emphasized the close relationship between the parent company and its subsidiary.¹⁶⁸ A necessary element for courts to find negligence in cases such as these has been particularly close involvement of the parent

161. *Caparo*, [1990] 2 A.C. at 610.

162. See MYFANWY BADGE, TRANSBOUNDARY ACCOUNTABILITY FOR TRANSNATIONAL CORPORATIONS: USING PRIVATE CIVIL CLAIMS 9 (2006), available at http://www.chathamhouse.org.uk/files/3986_ilm_tnc.pdf.

163. See *id.*

164. *Caparo*, [1990] 2 A.C. at 617-18.

165. *Stovin v. Wise*, [1996] A.C. 923 (H.L.) (emphasis added).

166. *Id.* at 932.

167. See *Sithole v. Thor Chemicals Holdings Ltd.*, [1999] EWCA (Civ) 706 (Eng.); *Connelly v. R.T.Z. Corp.* [1998] A.C. 854 (H.L.); *Lubbe v. Cape Plc.*, [2000] 4 All E.R. 268 (H.L.).

168. See *Sithole*, [1990] EWCA (Civ) 706; *Connelly*, [1998] A.C. 854; *Lubbe*, [2000] 4 All E.R. 268.

in the subsidiaries' activities.¹⁶⁹ In all three cases the plaintiffs were expected to show a significant degree of day-to-day involvement by the parent.¹⁷⁰ In *Sithole & Ors v. Thor Chemicals Holdings Ltd.*,¹⁷¹ a case involving mercury-poisoned South African workers, the plaintiffs alleged that the day-to-day supervision of the plant was directed from the United Kingdom and that the mercury levels were monitored from the United Kingdom.¹⁷² In *Connelly v. RTZ Corp.*,¹⁷³ a case involving Namibian uranium miners who developed throat cancer, the parent company devised, or at least advised its subsidiary on, the subsidiary's applicable policy on health, safety, and environmental protection. Its employees then implemented and monitored the development and progress of these policies at the mine.¹⁷⁴ In *Lubbe v. Cape PLC*,¹⁷⁵ a case involving asbestos-related illnesses in South African miners, the plaintiffs claimed that the parent company exercised *de facto* control over the operations of its subsidiary because the decisions about occupational health and safety were made in England rather than in South Africa.¹⁷⁶ As formulated by the House of Lords, the substantive issue of law was as follows:

whether a parent company which is proved to exercise *de facto* control over the operations of a (foreign) subsidiary and which knows, through its directors, that those operations involve risks to the health of workers employed by the subsidiary and/or persons in the vicinity of its factory or other business premises, owes a duty of care to those workers and/or other persons in relation to the control which it exercises over and the advice which it gives to the subsidiary company.¹⁷⁷

Richard Meeran, the lawyer who represented the plaintiffs in each of these cases, noted that “[t]he likelihood is that provided there is sufficient involvement in, control over and knowledge of

169. See *Sithole*, [1990] EWCA (Civ) 706; *Connelly*, [1998] A.C. 854; *Lubbe*, [2000] 4 All E.R. 268.

170. See *Sithole*, [1990] EWCA (Civ) 706; *Connelly*, [1998] A.C. 854; *Lubbe*, [2000] 4 All E.R. 268.

171. *Sithole*, [1990] EWCA (Civ) 706.

172. Jock McCulloch, *Beating the Odds: The Quest for Justice by South African Asbestos Mining Communities*, 103 REV. AFR. POL. ECON. 62, 68 (2005).

173. *Connelly*, [1998] A.C. 854.

174. See *id.*

175. *Lubbe*, [2000] 4 All E.R. 268.

176. McCulloch, *supra* note 172, at 69.

177. OLIVIER DE SCHUTTER, EXTRATERRITORIAL JURISDICTION AS A TOOL FOR IMPROVING THE HUMAN RIGHTS ACCOUNTABILITY OF TRANSNATIONAL CORPORATIONS 42 (2006) available at www.reports-and-materials.org/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf (background paper for seminar by the U.N. Office of the High Commissioner for Human Rights).

the subsidiary operations by the parent there seems to be no reason in principle why the general principles of negligence should not apply so that in certain circumstances such a duty should exist."¹⁷⁸

Courts, therefore, will define strictly the day-to-day control that the parent should exercise over the subsidiary. Only special relationships in which control exists can serve as a basis for liability for omissions. In the case of business groups, it will be difficult to find legal liability as parent companies can deliberately refrain from exercising daily control; once only strategic rather than operational control exists courts will be unable to hold the parent company liable for negligence. As one scholar writes:

[I]nsofar as this serves to limit its potential legal liability, it will be in the interest of the parent company, not to monitor closely the everyday operations of the subsidiary, but on the contrary to abandon broad discretion to the subsidiary as to how to implement the general policies set for the multinational group.¹⁷⁹

In the United States, proximity is discussed in the framework of causation, specifically as "proximate cause."¹⁸⁰ Not only is it necessary for the negligent conduct to be a "*substantial factor* in bringing about the harm,"¹⁸¹ but there should be a "reasonable close *causal connection* between the conduct and the resulting injury."¹⁸² No set formula has been devised to properly decide the question of "proximate cause," though there are some factors to be considered.¹⁸³ One writer, David Fischer, notes that two situations—omissions and multiple sufficient causes—create difficult problems because lawyers frequently think of causation as a "purely factual question, unaffected by policy issues."¹⁸⁴ Fischer goes on to suggest in his article *Causation in Fact in Omission Cases*, that "[c]ourts can solve

178. Richard Meeran, *The Unveiling of Transnational Corporations: A Direct Approach*, in HUMAN RIGHT STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 161, 170 (Michael K. Addo ed., 1999).

179. DE SCHUTTER, *supra* note 177, at 42.

180. See RESTATEMENT (SECOND) OF TORTS § 431 cmts. b-c (1965) (emphasis added).

181. *Id.* § 431.

182. *Sharp v. Fairbanks N. Star Borough*, 569 P.2d 178, 181 (Alaska 1977) (emphasis added).

183. These factors include:

the length of time and distance between the actor's conduct and the result, the likelihood that the actor's conduct will cause that result, the degree to which the manner of occurrence is unexpected, the independence of an intervening cause, the volitional nature of an intervening act, and an intervening actor's comparative causal responsibility.

Paul H. Robinson, *Legality and Discretion in the Distribution of Criminal Sanctions*, 25 HARV. J. ON LEGIS. 393, 441-42 (1988).

184. David A. Fischer, *Causation in Fact in Omission Cases*, 1992 UTAH L. REV. 1335, 1335.

these problems satisfactorily only by reference to policy; pure factual analysis simply does not provide an adequate answer.”¹⁸⁵ Another writer also notes that “the question of causation is not solely a question of mechanical connection, but rather a question of policy on imputing or denying liability.”¹⁸⁶ So “proximate or legal cause rules are explicitly intended to implement policy decisions concerning how far to extend the scope of liability.”¹⁸⁷ Still, it is easy to limit liability, as British courts have done, by finding insufficient proximity between the omission and the harm.¹⁸⁸ So, if judges want to restrict the development of law, they can simply find insufficient proximity and refuse to discuss what is “fair, just and reasonable.”¹⁸⁹

iii. Public-Policy Considerations

Courts weigh public-policy considerations as well as justice considerations when undertaking negligence analyses.¹⁹⁰ English courts, for example, consider whether it is “just, fair and reasonable” to impose duties of care on potentially negligent actors.¹⁹¹ In the CSR context, the protection of stakeholders can be easily framed in terms of fairness. One commentator aptly summarized this point in stating the following:

[T]here is a view that it is not fair and reasonable to allow a company to set up, purchase or control a company operating in a developing country, and potentially to take profits from it whilst enjoying the protection of limited liability, without imposing a duty on the company at least to take reasonable steps to protect the workforce or others foreseeably affected by its operations from foreseeable risks, particularly where those affected are vulnerable due to matters such as lack of education and poverty, and even more so where the local legal system may not be adequate to protect them.¹⁹²

185. *Id.*

186. LAFAVE, *supra* note 113, § 6.2(d).

187. FISCHER, *supra* note 184, at 1335.

188. See VIVIENNE HARWOOD, *PRINCIPLES OF TORT LAW* 36 (3d ed. 1997).

189. *Id.*

190. The ICJ explained that causality between conduct and harm is a question of fact. “Once this is established, legal and policy determinations come into play as to whether the causal connection is sufficiently close to warrant liability, with most legal systems believing that ‘some limitation must be placed upon legal responsibility, because the consequences of an act theoretically stretch into infinity.’” CIVIL REMEDIES, *supra* note 18, at 21-22 (citation omitted).

191. See, e.g., *Caparo Indus. PLC v. Dickman*, [1990] 2 A.C. 605, 618 (H.L.).

192. BADGE, *supra* note 162, at 4.

Judicial policy, however, is a matter of social and economic pragmatism rather than logical application of preexistent legal rules. As the scholars Jonathon Herring and Elaine Palser wrote in *The Duty of Care in Gross Negligence Manslaughter*, “[t]he ‘fair, just and reasonable’ head encompasses the amorphous issues of legal, social and public policy as well as considerations of fairness and justice as between the parties.”¹⁹³ Among the factors influencing judicial policy are the following: constitutional roles (determination of the most appropriate governmental arm to decide the issue, for example, parliament or the courts); whether imposing a duty might lead defendants to give up a socially beneficial activity altogether or to take unnecessary and costly safety precautions; the availability of protection through insurance or contractual arrangements; whether the claimant will be left without a remedy; whether imposition of duty would create inconsistencies with other areas of law; the floodgates argument (a “flood” of suits following a particular decision thus placing too heavy a burden on a particular class of defendants and/or insurance companies); loss allocation (the “deepest pockets” principle pointing to those best able to compensate for harm); and the notion that professionals (for example, doctors, barristers) need protection from the threat of negligence actions which could inhibit their professional skills/judgment.¹⁹⁴ In its comparative study of civil-law remedies, the International Commission of Jurists observed as follows:

[P]olicy considerations will play a substantial part in any decision to impose, or not to impose, civil liability on a company in relation to circumstances where it was allegedly complicit in gross human rights abuses. Such policy considerations will vary significantly from case to case and their impact cannot be definitively quantified in the abstract.¹⁹⁵

Whether the imposition of duty would create inconsistencies with other areas of law was a matter considered expressly by an Australian court.¹⁹⁶ In *James Hardie v. Hall*, that court ruled that “the duty of care argument in this case was in reality an attempt to pierce the corporate veil.”¹⁹⁷ Thus, circumstances surrounding the imposition of positive duties cannot be interpreted so liberally that the principle of limited liability is practically abrogated.

193. Jonathan Herring & Elaine Palser, *The Duty of Care in Gross Negligence Manslaughter*, 2007 CRIM. L. REV. 24, 31.

194. *Id.*; see, e.g., HAPRWOOD, *supra* note 188, at 29-30.

195. CIVIL REMEDIES, *supra* note 18, at 28.

196. See BADGE, *supra* note 162, at 11-12.

197. *Id.* at 12-13.

3. Implications for Corporate Social Responsibility

From this lengthy presentation, it appears that the negligence analysis resonates with many of the points made in CSR debates. CSR arguments can stress the foreseeability of harm likely to happen when a company starts operating in weak governance zones (for example, placing orders with local companies likely to squeeze the workforce into overtime, low pay, hazardous and unhealthy work conditions; building infrastructure that entails displacement of population, pollution and rent-seeking elites). The experience and tools accumulated in CSR already point to some feasible measures a diligent parent company might take.¹⁹⁸ The argument can be made that a reasonable person can foresee such risks, but negligence law shows that negligence cannot be proven merely by this factor. Furthermore, the proximity between the parent company and the abuses perpetuated by its partners is an elastic concept that courts find hard to define and even use to foreclose further controversial inroads into policy and justice argumentation.¹⁹⁹ In CSR situations, most courts would find it easy to dismiss charges of negligence by omission simply because the physical and relational proximity between corporate headquarters and activities in developing countries can be quite remote. Finally, judgments in negligence cases reveal that courts recognize further policy priorities lying beyond the facts of the particular case being litigated.²⁰⁰ Such policy aspects can easily run counter to finding the parent company liable and would, for example, point to the role of host states to adopt measures against companies operating within their jurisdiction rather than holding the parent company liable for failing to supervise. Other policy aspects could point in favor of CSR claims given the lack of remedy for the victims and broader fairness considerations.

The complexity of negligence law makes it clear that—even in courts of law where legal principles are applied and refined for decades—expectations to define clear positive obligations with precise boundaries remain unfulfilled. Flexible legal concepts, applied with the utmost attention to particular factual circumstances with an eye to the broader public-policy considerations of

198. See, for example, the tools devised by the Business Leaders Initiative on Human Rights [BLIHR], Resources and Activities. Bus. Leaders Initiative on Human Rights [BLIHR], BLIHR Legacy Website - Resources and Activities, <http://www.blihr.org/randa.html> (last visited July 18, 2009).

199. See HARDWOOD, *supra* note 188, at 36.

200. See *supra* Part III.B.2.iii.

fairness and justice, may or may not result in a finding of negligence. These complexities put into perspective the recent efforts underway in CSR circles to clarify the boundaries of corporate responsibility.²⁰¹

Liability for omissions is exceptional in law. Courts are bound to interpret exceptions narrowly, though the fact that lawmakers and courts have felt compelled to create such exceptions is important for discussions about the legitimacy of positive corporate obligations. Other forums where business practices are assessed do not have to perform these narrow interpretations and will instead weigh the same factors differently. Still, it remains unlikely that such forums can disregard the factors and concepts identified by courts or sidestep the unavoidable balancing act with a simple trumping exercise.

There is a reference point in the standard of the “reasonable person.” Negligence law inherently lays down a responsibility to acquire information and knowledge to reach the evolving, though not very demanding, standard of reasonability.²⁰² In CSR situations, there is a larger scope for argumentation and hope for progress if the preliminary duty to investigate is isolated as an indispensable element of responsible behavior. If this duty is fulfilled, the actor will be equipped with more information and knowledge, and therefore should be able to foresee risks and adopt preventative measures. The “should have known” standard is at the core of negligence law, though is alien to complicity law, which requires that the accomplice possess knowledge for liability to attach.²⁰³ From this perspective, a negligence analysis, rather than a complicity analysis, provides a solid conceptual foundation and rich precedents on this crucial intermediary step where information is collected and knowledge is formed. The adoption of this negligence standard would reinforce the broader process begun by the CSR movement to get controlling entities to renounce passivity and exert a positive influence in their globalized commercial dealings.²⁰⁴

201. *Clarifying the Concepts*, *supra* note 51, summary.

202. *See supra* Part III.B.1.

203. *See infra* Part V.

204. *See, e.g.*, RADU MARES, THE DYNAMICS OF CORPORATE SOCIAL RESPONSIBILITIES 8-13 (2008).

IV. INTERNATIONAL HUMAN-RIGHTS LAW

A. *Legitimacy of Positive Obligations of States*

Under international law, states are responsible for protecting human rights.²⁰⁵ Can states fail their legal obligations by simply omitting to act? This Section looks mainly at the jurisprudence of the European Court of Human Rights (ECtHR) on positive obligations. A number of studies have recently appeared to reflect new developments in the thinking of the ECtHR regarding positive obligations.²⁰⁶ By creative interpretation, the ECtHR has opened the way for states to be found in breach of the European Convention of Human Rights (ECHR) for both their wrongful actions and their culpable omissions that allow private parties to harm interests protected in the ECHR.

Human-rights treaties use terms such as “secure” or “ensure” when defining states’ obligations.²⁰⁷ For example, the ECHR provides that the High Contracting Parties “shall secure” to everyone within their jurisdiction the rights detailed in the ECHR.²⁰⁸ The International Covenant on Civil and Political Rights (ICCPR) holds that States Parties undertake “to respect and to ensure” the rights provided therein to all individuals within its territory and subject to its jurisdiction.²⁰⁹ Such terms cover both negative and positive obligations. Thus, the Human Rights Committee commented on the aforementioned ICCPR provision as follows:

[T]he positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise

205. Note for example that the U.N. Norms provide that states have the primary responsibility for human rights breaches, even when private actors perpetrate the abuse directly. See *U.N. Norms*, *supra* note 5, ¶ 1.

206. See, e.g., ALASTAIR MOWBRAY, THE DEVELOPMENT OF POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS BY THE EUROPEAN COURT OF HUMAN RIGHTS 1-4 (2004); JEAN-FRANÇOIS AKANDJI-KOMBE, POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS 4 (2007); Cordula Dröge, Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtskonvention (2003), available at www.mphil.de/shared/data/pdf/beitr159.pdf.

207. See, e.g., Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Nov. 4, 1950, 213 U.N.T.S. 221.

208. *Id.*

209. International Covenant on Civil and Political Rights art. 2(1), Dec. 16, 1966, S. TREATY DOC. 95-20, 999 U.N.T.S. 171.

to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise *due diligence to prevent, punish, investigate or redress* the harm caused by such acts by private persons or entities.²¹⁰

There have been numerous instances where states were found noncompliant with their international obligations for failure to take appropriate measure to protect the applicant. For example, the U.N. Committee on the Elimination of Discrimination against Women emphasized that discrimination

is not restricted to action by or on behalf of Governments Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.²¹¹

Similarly, the Inter-American Court of Human Rights held, in a case of disappearance, the following:

An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.²¹²

The Human Rights Committee also found a breach of the ICCPR for failure to take appropriate measures to protect the applicant in two cases referring to the right to personal security and prohibition of torture.²¹³ These are just a few illustrations of a now widely accepted principle.²¹⁴ A closer look at the ECHR clarifies both the considerations that lead to the acceptance of positive obligations as well as the factors entertained in judicial analysis.

The legal basis for positive obligations under the ECHR lies in the specific human rights contained in Articles 2 through 11, read in conjunction with Article 1. The ECtHR has clarified its position

210. U.N. Human Rights Comm., *General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 8, U.N. Doc. CPR/C/21/Rev.1/Add.13 (May 26, 2004) (emphasis added).

211. U.N. Comm. on the Elimination of Discrimination Against Women, *General Recommendation 19: Violence Against Women*, ¶ 9, U.N. Doc. A/47/38 (1992).

212. Velásquez Rodríguez Case, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, at 91, 154 (July 29, 1988).

213. See August Reinisch, *The Changing International Legal Framework for Dealing with Non-State Actors*, in *NON-STATE ACTORS AND HUMAN RIGHTS* 37, 79 n.211 (Philip Alston, ed., 2005).

214. See, for example, the SRSG's analysis of the duty to protect, in *Protect, Respect and Remedy*, *supra* note 28, ¶¶ 27-50.

on positive obligations previously in a case concerning freedom of assembly, “*Ärzte für das Leben*” v. *Austria*.²¹⁵ The plaintiff argued that “the Austrian authorities had disregarded the true meaning of freedom of assembly by having failed to take practical steps to ensure that its demonstrations passed off without any trouble.”²¹⁶ The Austrian Government countered this claim by submitting that Article 11 “did not create any positive obligation to protect demonstrations. Freedom of peaceful assembly—enshrined in Article 12 of the Austrian Basic Law of 1867—was mainly designed to protect the individual from direct interference by the State.”²¹⁷ In ruling on this case, the ECtHR held the following:

Genuine, effective freedom of peaceful assembly cannot . . . be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11 [which] sometimes requires positive measures to be taken, even in the sphere of relations between individuals, if need be²¹⁸

How did the court come to break with a narrow interpretation of the 1950 text of the ECHR? As one scholar notes, the ECtHR has begun regarding teleology (the “*object and purpose*”) as the pre-eminent principle of interpretation of the ECHR.²¹⁹ This shift is coupled with the application of the principle of effective interpretation to deliver human-rights guarantees that are practical and effective for the applicant, and the principle of dynamic (evolutive) interpretation, which takes into account contemporary realities and attitudes rather than the situation prevailing at the drafting of the ECHR.²²⁰ It was noted that “[t]he principle of effectiveness is an instrument of adjustment of law to reality” that has helped to justify the acceptance of both negative obligations and positive ones dealing with states’ wrongful omissions.²²¹ Another scholar wrote about the “progressive character” of the case law in the sphere of positive obligations.²²² Guided by the principles applying in the human-rights field, “foremost among which is the principle of effectiveness,” international monitoring

215. Plattform “Ärzte für das Leben” v. Austria, 139 Eur. Ct. H.R. (ser. A) (1988).

216. *Id.* at 11.

217. *Id.*

218. *Id.* at 12 (emphasis added).

219. MARIUS EMBERLAND, *THE HUMAN RIGHTS OF COMPANIES: EXPLORING THE STRUCTURE OF ECHR PROTECTION* 6 (2006).

220. *See id.*

221. Dröge, *supra* note 206, at 386-87.

222. *See* AKANDJI-KOMBE, *supra* note 206, at 5.

bodies pay closer attention to advance the identification, delimitation, and scope of positive obligations.²²³

The ECtHR has interpreted the ECHR to ensure “not rights that are theoretical or illusory but rights that are practical and effective.”²²⁴ The emphasis on considerations of effectiveness has helped the law to evolve from its conservative beginnings that had made wrongful conduct by omission legally acceptable. In the course of this evolution, the ECtHR has had to overcome the misguided and entrenched understandings that only negative obligations for states to refrain from infringing rights can be derived from the ECHR’s rights. The same force behind the human rights idea that shifted legal thinking in IHRL can be seen in the present CSR context.

Companies might not have the type and scope of authority that governments have within their jurisdiction, but these companies still have influence or control over their business partners. If corporate groups are to have any obligation whatsoever regarding human rights, culpable omissions will have to be covered. When a MNE is expected to respect human rights in its operations, the controlling companies in the group cannot simply argue they are responsible only for their own acts. In CSR, as in IHRL, a narrow application of responsibility for harms caused by a company’s own actions will be less defensible; where influence over third parties committing abuses exists, omission to exercise authority may become culpable in itself. The next question is how broad the liability of states for omissions has become. The nuanced reasoning of the ECtHR in defining the scope of the newly recognized positive obligations of states can inform CSR thinking as well.

B. *Scope of Positive Obligations*

The ECtHR has distinguished between the negative and positive obligations that are attached to the ECHR’s rights. In deciding on the existence and scope of positive obligations, however, the ECtHR will have to

proceed with a degree of circumspection that is rarely found in the framework of a review of negative obligations, and will seek in particular not to “impose an impossible or disproportionate burden on the authorities.” As a result, states enjoy a margin of

223. *Id.*

224. *See, e.g.,* *Artico v. Italy*, 37 Eur. Ct. H.R. (ser. A) 1, 16 (1980).

appreciation here which, although varying from one case to another, is necessarily wider.²²⁵

The ECtHR has developed the “fair balance” method for reviewing compliance with positive obligations through which “a just balance between the protection of the general interest of the community and the respect due to fundamental human rights” has to be found.²²⁶ The ECtHR assesses the appropriateness of the state’s conduct by examining several factors, such as the importance of the public interest at stake, the state’s margin of appreciation, the practice of other states parties with regard to the question at issue, the importance of the right at issue, the protection of the rights of third parties, and so forth.²²⁷ One commentator noted, “It will be observed that this examination comprises a good deal of mystery, which accounts for the variability of the European Court’s decisions, constantly veering between boldness and restraint.”²²⁸

In addressing Article 2’s right to life, the ECtHR identified two positive discrete obligations: to prevent violations and, when a person has been killed or disappeared in life-threatening circumstances, to investigate causes and circumstances.²²⁹ Regarding the obligation to prevent risk to life from materializing, the ECtHR cautiously proceeded as follows:

For the Court, and bearing in mind the *difficulties involved in policing modern societies*, the *unpredictability of human conduct* and the operational choices which must be made in terms of *priorities and resources*, such an obligation must be interpreted in a way which does not impose an *impossible or disproportionate burden* on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising.²³⁰

Furthermore,

it must be established to its satisfaction that the authorities *knew or ought to have known* at the time of the existence of a *real and immediate risk* to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.²³¹

225. AKANDJI-KOMBE, *supra* note 206, at 18 (citations omitted).

226. Case “Relating to Certain Aspects of the Law on the Use of Languages in Education in Belgium”, 5 Eur. Ct. H.R. (ser. A) 32 (1967) (also known as the “The Belgian Linguistic Case”).

227. See AKANDJI-KOMBE, *supra* note 206, at 19.

228. *Id.* at 19-20 (citations omitted).

229. See *Osman v. United Kingdom*, 1998-VIII Eur. Ct. H.R. 3124, 3159-60.

230. *Id.* at 3159 (emphasis added).

231. *Id.* at 3160 (emphasis added).

The level of due diligence reasonably expected from the government was set rather high as the ECtHR rejected the government's view of the following:

[T]he failure to perceive the risk to life in the circumstances known at the time or to take preventative measures to avoid that risk must be tantamount to gross negligence or willful disregard of the duty to protect life Such a rigid standard must be considered incompatible with the requirements of Article 1²³²

The ECtHR emphasized that whether the state did "all that could be reasonably expected of them to avoid [the risk] can only be answered in the *light of all the circumstances of any particular case.*"²³³

Regarding the obligation to diligently investigate causes and circumstances when a person has been killed or has disappeared under life-threatening circumstances, the ECtHR wrote the following:

The nature and degree of scrutiny that satisfies the minimum threshold of the investigation's effectiveness depends on the circumstances of the particular case. It must be assessed on the basis of all relevant facts and with regard to the practical realities of investigation work. It is not possible to reduce the variety of situations which might occur to a bare check list of acts of investigation or other simplified criteria.²³⁴

Nevertheless, the ECHR did identify some characteristics of an effective investigation that must be met: independence of investigators from those involved, and a prompt, speedy, thorough, and transparent investigation ("a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory, maintain public confidence in the authorities' adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts").²³⁵

The ECHR has thus clarified that states have an obligation beyond simply refraining from infringing upon human rights.

Both the existence of positive obligations and compliance with them are determined by striking a "[f]air balance . . . between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the

232. *Id.*

233. *Id.* (emphasis added).

234. MOWBRAY, *supra* note 206, at 30.

235. *Nachova v. Bulgaria*, App. Nos. 43577/98 & 43579/98, ¶ 111 (Feb. 26, 2004), available at <http://www.unhcr.org/refworld/type,CASELAW,,BGR,414d89254,0.html>.

[ECHR].”²³⁶ So, there are no bright-line rules, and the ECtHR expressly wrote that given the aforementioned factors, “[t]he scope of this obligation will inevitably vary.”²³⁷

One writer noted that the importance given to the principle of effectiveness defies an application of the ECHR that is based on deduction from concepts and formal categorizations.²³⁸ Thus, the scope of states’ obligations under the ECHR cannot simply be derived from concepts alone.²³⁹ Another commentator clarified the manner in which the limits of positive obligations to protect emerge from the ECtHR jurisprudence.²⁴⁰ Boundaries, therefore, are affected by principles of interpretation, such as historic interpretation, systematic interpretation, and the wording of the ECHR. The principle of comparative interpretative approach is important, as the ECtHR is reluctant to go further in the interpretation of the ECHR than an already existing European standard common to most member states.²⁴¹

A further limit comes from the principle of proportionality. States have a margin of appreciation that is especially wide for positive obligations in the area of preventative measures.²⁴² The margin of appreciation is the most important method of adjusting positive demands to the particular conditions of a certain state. A further limit of positive obligations follows from their normative nature as obligations of due diligence. And finally, the ECtHR has to rely on the basic principle that positive obligations have the purpose of effectively establishing or restoring the liberty and autonomy of the individual; “the higher the restraint placed on the individual’s freedom of choice, the more precise the requirement that is put on the state.”²⁴³

The ECtHR identified the nature of responsibility of states as one of due diligence—of taking reasonable steps to prevent and redress harm.²⁴⁴ The reasonableness of decision making is also promoted through the “should have known” standard.²⁴⁵ Drawing abstract borders around the duty to act was deemed impossible and

236. *Rees v. United Kingdom*, 106 Eur. Ct. H.R. (ser. A) 15 (1986).

237. *Özgür Gündem v. Turkey*, 2000-III Eur. Ct. H.R. 1, 21.

238. See *EMBERLAND*, *supra* note 219, at 3.

239. See *id.* at 3-4.

240. See *Dröge*, *supra* note 206, at 379.

241. See *id.* at 387.

242. See *id.* at 390.

243. *Id.* at 388-89.

244. See *infra* Part IV.A.

245. See, e.g., *Osman v. United Kingdom*, 1998-VIII Eur. Ct. H.R. 3124, 3160.

undesirable, so the ECtHR instead identified relevant factors capable of producing more precise determinations against the facts of each case. The ECtHR task calls for careful balancing, and commentators have warned that deductive reasoning is not going to be helpful when drawing the contours of legal obligations.²⁴⁶ Although it dealt with the positive duty of states to protect human rights, the ECtHR contributes to a better understanding of positive responsibilities in a CSR context. It has been explicit about the impossibility of specifying precise definitions of due diligence given the importance of specific circumstances, though it has also formulated some discrete positive obligations, identified a series of factors, and drawn attention to the inherent balancing act accompanying positive obligations.

V. COMPLICITY AND OMISSIONS—A NATURAL FIT?

A. *Actus Reus and Mens Rea in Complicity*

The review of CSR writings at the beginning of this Article has revealed a tendency to use complicity as the guiding concept in corporate responsibility when third parties commit abuses. The complexity of these cases has not escaped CSR practitioners: a GC report noted that “[a]ccording to company representatives, complicity is the most difficult human rights concept for local managers to understand and causes the most concern among executives.”²⁴⁷ A party may draw on this legal concept for two purposes: one is to strengthen the legitimacy of arguments made against a company whose business partners have committed abuses, and the second is to learn from the jurisprudence accompanying that legal concept, thereby enriching CSR argumentation.

Whether complicity is the best concept to strengthen the legitimacy in cases of omission is debatable. The recognized legal definition of complicity essentially calls one an accomplice (aider and abettor) if he knowingly provides practical assistance or encouragement that has a substantial effect on the commission of a crime.²⁴⁸ It is acts of commission that usually amount to substantial assistance; omissions, meanwhile, qualify as substantial assistance only in most extreme circumstances²⁴⁹ where the accomplice’s presence

246. See generally EMBERLAND, *supra* note 220.

247. *Embedding Human Rights*, *supra* note 15, at 40.

248. See *Protect, Respect and Remedy*, *supra* note 28, ¶ 74.

249. Furundzija was a local commander of a special unit within the armed forces of the Croatian Defense Council. 3 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 1997-

combined with authority may amount to assistance in the form of encouragement or moral support.²⁵⁰ The difference between commission and omission may be sometimes hard to tell: for example, in a case where the plaintiffs alleged that an oil company, Talisman, knowingly permitted Sudanese government troops to use the oil company's airfields for raids against civilian population in "clean-up" operations,²⁵¹ was "permitting" an action or a culpable inaction that facilitated the conduct of the perpetrator?

The required mental state for aiding and abetting differs widely by jurisdiction.²⁵² The accomplice participates in the criminal conduct of the principal perpetrator with knowledge or even with purpose,²⁵³ though the practical implications of this distinction may not be that great.²⁵⁴ It serves no purpose here to simply compare various standards as these need to be explained in their peculiar legal context,²⁵⁵ though some observations can still be made. On the one hand, the "should have known" standard that generates the duty to investigate and gather more information is not encountered in complicity.²⁵⁶ The accomplice is expected to be aware

1999, 753-54 (Andre Kilp & Goran Sluiter eds., 1999). Furundzija questioned a female Muslim civilian, apparently trying to obtain a list of names and information about the activities of her sons. *Id.* The woman was interrogated by Furundzija while his associate forced the woman to undress who then rubbed a knife against her inner thigh and lower stomach, threatening to put it inside her vagina if she would not tell the truth. *Id.* The associate subsequently forced the woman to have oral and vaginal intercourse with him. *Id.* Furundzija was present during the rape and did nothing to stop the sexual assault. *Id.* He was later charged with complicity in war crimes. *Id.*

250. *Prosecutor v. Furundzija*, No. IT-95-17, Judgment, ¶ 235 (Dec. 10, 1998).

251. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 328 (S.D.N.Y. 2003).

252. ANITA RAMASASTRY & ROBERT C. THOMPSON, *COMMERCE, CRIME AND CONFLICT: LEGAL REMEDIES FOR PRIVATE SECTOR LIABILITY FOR GRAVE BREACHES OF INTERNATIONAL LAW* 17-22 (2006).

253. The American Law Institute's Model Penal Code requires that the accomplice act "with the purpose of promoting or facilitating the commission of the offense." MODEL PENAL CODE § 2.06(3)(a) (Proposed Official Draft 1962).

254. "[W]hile conceptually significant, the difference between purpose and knowledge is often a slim one in an evidentiary sense; since legal fact-finders cannot look into the defendant's heart, they will often infer purpose from proof of knowledge regardless of whether the formal legal standard allows or requires such inference." Jenny S. Martinez, *Understanding Mens Rea in Command Responsibility - From Yamashita to Blaskic and Beyond*, 5 J. INT'L CRIM. JUST. 638, 642 (2007). "The line between knowledge and purpose, however, may not be so hard to cross. The law has long recognized various ways in which purpose can be inferred from knowledge" Markus D. Dubber, *Criminalizing Complicity - A Comparative Analysis*, 5 J. INT'L CRIM. JUST. 977, 993 (2007).

255. "[T]he issue of *mens rea* is inextricably intertwined with other aspects of a national legal system's substantive and procedural criminal law." Martinez, *supra* note 254, at 646.

256. See the discussion later in this section on the law of negligence and superior's liability where the "should have known" standard compels a duty to investigate.

both that his own conduct assists in the perpetuation of the wrongdoing²⁵⁷ and that the third party's conduct is illegal. The accomplice has "actual knowledge" rather than a "duty to become informed." Courts use "constructive" knowledge when the mental state of the accomplice is constructed from circumstantial evidence; this, however, is more a case of "must have known" as in "most likely knew" rather than "should have known" as in "did not actually know but could have known if more diligence was exercised."²⁵⁸ Even the civil- rather than the criminal-law version of aiding and abetting in the United States requires actual knowledge.²⁵⁹

On the other hand, the threshold of knowledge might not be very demanding to attract liability. In an international criminal-law context, the aider and abettor need not possess knowledge of the precise crime as long as he was aware that one of a number of crimes would probably be committed, including the one actually perpetrated.²⁶⁰ He must have been aware of the essential elements of the crime committed by the principal offender, including the offender's state of mind.²⁶¹ In the United Kingdom, the accessory is required to know only the "essential matters" of the crime.²⁶² That is, he must have knowledge of the facts forming the essential elements of the principal's offense—conduct, the circumstances in which the conduct takes place, and the consequences of the conduct—though he need not know all the details.²⁶³ The accessory "must know at least what type of crime the principal is going to commit, but he need not know the particular victim, time, or place of the crime."²⁶⁴

257. See, e.g., *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1-T, Judgment, ¶ 326 (May 21, 1999) (requiring that "the act of participation be performed with knowledge that it will assist the principal in the commission of the criminal act.").

258. The ICJ notes that the aider and abettor must assist the principal perpetrator with knowledge. INT'L COMM'N OF JURISTS, 2 CORPORATE COMPLICITY & LEGAL ACCOUNTABILITY: CRIMINAL LAW AND INTERNATIONAL CRIMES 17 (2008) [hereinafter INTERNATIONAL CRIMES]. "The person who is giving the assistance, encouragement or moral support must know that his or her actions would contribute to the crime. This knowledge can be inferred from all relevant circumstances, including both direct and circumstantial evidence." *Id.*

259. See RESTATEMENT (SECOND) OF TORTS § 876 (1965) (emphasis added).

260. See Joseph Rikhof, *Complicity in International Criminal Law and Canadian Refugee Law: A Comparison*, 4 J. INT'L CRIM. JUST. 702, 707 (2006).

261. See *id.*

262. See THE LAW COMM'N, PARTICIPATING IN CRIME ¶ 2.49 (2007), available at <http://www.lawcom.gov.uk/docs/lc305.pdf>.

263. See *id.*

264. Kai Hamdorf, *The Concept of a Joint Criminal Enterprise and Domestic Modes of Liability for Parties to a Crime: A Comparison of German and English Law*, 5 J. INT'L CRIM. JUST. 208, 220 (2007).

CSR literature tends to rely on complicity and extend its legal scope in an effort to build legitimacy for claims that a parent company should be liable.²⁶⁵ From a mens rea perspective, it is convenient that the requirement of what actually needs to be known is not very demanding. If the accomplice did not actually have this knowledge, however, the complicity argumentation collapses. One cannot use complicity to impress on companies that they “should know” or that they are under a duty to acquire information about third parties’ conduct. As a consequence, complicity theory cannot provide guidance on the scope of the duty to collect information. It can only work in a “must have known” mode against spurious claims of ignorance. But the battle in CSR is less about this and more about getting companies to gather information by using, for example, human-rights impact assessments. This can be better grounded in negligence reasoning, where a party failed to undertake reasonable steps to become informed of potential risks of harm.

B. *Superior Liability*

There is another doctrine in criminal law that, unlike complicity, expressly covers omissions and imposes a responsibility to acquire knowledge to prevent and punish perpetrators: superior liability.²⁶⁶ When superiors defend themselves by claiming ignorance to the crimes perpetuated by their subordinates, superior liability becomes about culpable omissions to acquire information. This doctrine makes a poor analogy for most CSR situations that one should be guarded against; at the same time though, it carries insights for CSR by clarifying fault in hierarchical relationships. On one hand, the superior has more power to control and discipline subordinates than a company could possibly have over its partners. On the other hand, however, the superior cannot get away by abusing the aforementioned presumption in his defense, but is under a duty to acquire information about the subordinates’ conduct. For example, under the provisions of the International Criminal Court (ICC) statute, liability follows when the superior “either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit

265. See *infra* Part II.A.

266. See, e.g., Rome Statute of the International Criminal Court art. 28, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

such crimes.”²⁶⁷ The doctrine is uncontroversial when a superior actually “knew” of his subordinates conduct; however,

[t]hings begin to become more complicated when one leaves the realm of actual knowledge and moves into the realm of “had reason to know” [or] “should have known” . . . This is the hotly contested terrain of conscious and unconscious negligence, recklessness, *dolus eventualis* and other gradations of risky behaviour, and it is in this area that international courts have run into trouble in attempting to articulate a clear, coherent standard of liability.²⁶⁸

The “should have known” requirement comes into play when information existed that put the superior on notice of the risk of such crimes, which

indicates a need for additional investigation to determine whether crimes were committed or were about to be committed. It follows that ignorance regarding the commission of a subordinate’s crimes cannot be held against the superior if they have properly fulfilled their duties of supervision (in particular, they did not ignore information that indicated the commission of crimes) but still did not learn of the crimes committed by subordinates.²⁶⁹

The Trial Chamber of the International Criminal Tribunal for the former Yugoslavia in *Delalic* held that a superior’s willful blindness to the acts of subordinates cannot be a legitimate defense.²⁷⁰ This is not a “form of strict imputed liability” but one based on an individual’s own fault.²⁷¹ That is, “the superior lacks such information by virtue of his failure to properly supervise his subordinates [and is] ‘at fault in having failed to acquire such knowledge.’”²⁷² This reasoning follows the precedent of the post–World War II trials that held failure to obtain information about the conduct of subordinates culpable.²⁷³ Commentators on the *Delalic* case have noted, however, that confusion remained “as to the scope of the duty to obtain information about subordinates, as to what level of

267. Liability does not follow, however, if he took “all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.” *Id.*

268. Martinez, *supra* note 254, at 642.

269. Kai Ambos, *Joint Criminal Enterprise and Command Responsibility*, 5 J. INT’L CRIM. JUST. 159, 162 (2007).

270. See Prosecutor v. *Delalic*, Case No. IT-96-21-T, Trial Chamber, ¶ 387 (Nov. 16, 1998).

271. Prosecutor v. *Delalic*, Case No. IT-96-21-A, Appeals Judgment, ¶ 239 (Feb. 20, 2001).

272. Prosecutor v. *Delalic*, Case No. IT-96-21-T, Trial Chamber, ¶¶ 387-88 (Nov. 16, 1998) (citation omitted).

273. See INTERNATIONAL CRIMES, *supra* note 258, at 12-15.

awareness of risk was required to trigger the duty of investigation.”²⁷⁴ Against this background, the Trial Chamber reaffirmed the grounds for liability, though it was careful to limit its scope by restating customary international law and holding the following:

[A] superior can be held criminally responsible only if some specific information was in fact available to him which would provide notice of offences committed by his subordinates. This information need not be such that it by itself was sufficient to compel the conclusion of the existence of such crimes. It is sufficient that the superior was put on further inquiry by the information, or, in other words, that it indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by his subordinates.²⁷⁵

In conclusion, the legal doctrine of superior liability has an explicit requirement of “should have known” and has generated thoughtful observations about its scope. Due to the extreme hierarchical relationships that this doctrine covers, however, it does not make a suitable analogy to the corporate context. So, in contrast to complicity, although the superior-liability doctrine is designed to find culpable omissions liable and also lays down a duty to actively seek information about third parties, for instance subordinates, this doctrine cannot strengthen the legitimacy of claims against passive parent companies. It draws attention to that crucial, preliminary step in due diligence: the duty to acquire information. The superior-liability doctrine also explicitly requires that in boundary situations where only hints of potential abuses exist, there is a duty to perform additional investigation.²⁷⁶ This is a recurrent reality in many CSR situations.

Furthermore, the doctrine shows that it is not strict liability, but liability based on own fault of remaining ignorant.²⁷⁷ If in such a hierarchical relationship as that between a military superior and subordinate, strict liability does not apply, *a fortiori* the parent company cannot be held strictly liable and assumed to have ubiquitous knowledge on what its business partners do. This does not mean that the parent company might not be at fault for failing to acquire information. It can be. These insights on culpable failure to be minimally informed and to follow red flags with additional investigation can easily be absorbed into conventional negligence analysis

274. Martinez, *supra* note 254, at 653.

275. Prosecutor v. Delalic, Case No. IT-96-21-T, Trial Chamber, ¶ 393 (Nov. 16, 1998).

276. *See id.*

277. *See* Prosecutor v. Delalic, Case No. IT-96-21-A, Appeals Judgment, ¶ 239 (Feb. 20, 2001).

through the standard of “reasonable person” and, from there, exported into CSR. Indeed, Ruggie has emphasized the determinative role that human-rights impact assessments have in the due-diligence processes and thus in fulfilling the responsibility to respect human rights: a two-step impact assessment—a merely basic assessment at the initial stage and an in-depth assessment if indication of abuse have been uncovered.²⁷⁸

C. *Complicity and Negligence as Grounds for Responsibility for Third Parties' Misconduct*

The definition of complicity used in CSR circles is much broader than the original legal definition.²⁷⁹ In the search of legitimacy, legal terms like complicity²⁸⁰ can be “stretched” to accommodate CSR cases where the parent company remains passive. This Article proposes the concept of negligence by omission—that is, failure to take steps that a “reasonable person” would take rather than remain passive in the face of risks of abuses perpetuated by business partners. Whether such stretching is done rigorously enough, however, may be a matter of preference or academic debate.²⁸¹

278. Special Representative of the Secretary-General on the Issue of Human Rights & Transnat'l Corps. & Other Bus. Enters., *Human Rights Impact Assessments – Resolving Key Methodological Questions*, U.N. Doc. 09/22/2009A/HRC/4/74 (Feb. 5, 2007).

279. The ICJ noted the colloquial manner in which “the word ‘complicity’ has been used on a daily basis in policy documents, newspaper articles and campaigning slogans, to describe the different ways in which one actor becomes involved in an undesirable manner in something that someone else is doing.” CIVIL REMEDIES, *supra* note 18, at 1.

280. Other legal categories are receptive to including omissions as a type of blameworthy conduct. One is *superior liability* where omission of the superior to prevent or punish abuses by his subordinates can attract liability by virtue of the hierarchical relationship if he knew or should have known of the abuses. See, e.g., Rome Statute, *supra* note 266, art. 28. Another category is *joint criminal enterprise* where the omission of a participant to anticipate and prevent omissions that were not even agreed upon can attract liability by virtue of agreeing on the criminal venture (common design) in the first place. See generally Antonio Cassese, *The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise*, 5 J. INT'L CRIM. JUST. 109 (2007). As the International Tribunal for Former Yugoslavia synthesized, “aiding and abetting is to be distinguished from the notion of common design, where the *actus reus* consists of participation in a joint criminal enterprise and the *mens rea* required is intent to participate.” Prosecutor v. Furundzija, No. IT-95-17, Judgment, ¶ 249 (Dec. 10, 1998). While omission are ready-made categories of *actus reus*, drawing on such concepts is unlikely to provide legitimacy for CSR claims because the characterizations misrepresent the functioning of most MNEs and the original circumstances behind these concepts are far too removed from the usual CSR cases.

281. Talking of “beneficial complicity” introduces the motivational aspect of benefit that is completely foreign to complicity analysis (purpose or knowledge constitute the *mens rea* in complicity). Furthermore, talking of “silent complicity” extends a factor used in complicity reasoning—omission that counts as moral support/encouragement—though such omission requires extremely stringent circumstances to amount to substantial assistance. See, e.g., *Furundzija*, No. IT-95-17, Judgment, ¶¶ 208-09 (“[P]resence, when com-

This Article does not object to using complicity for legitimacy purposes. Actually, it carefully covers the cases where the company knowingly and actively assists the perpetrator. The concept is stretched beyond its legal definition if the company is unaware of the fact that its actions assist the perpetrator or the company is just passive in the face of the abusive conduct of its partners. CSR writings consciously use a wider definition than the legal one here, though this is not a problem as using other legal concepts would require similar “stretching.”

The purpose behind choosing complicity over negligence is clear enough: if an actor is negligent for doing nothing about its business partners’ actions, the actor must have had a duty to act, or a duty to assist, the legitimacy of which must first be established. Conversely, if an actor is complicit in the harm inflicted by its partners, the existence of the duty to act is not a prerequisite. Thus the notion of complicity, broadly defined, could provide rhetorical force for arguments targeted against genuine corporate accomplices, as well as against companies passive due to ignorance.

Problems arise, however, if one characterizes as complicity corporate acts of assistance done in ignorance or corporate conduct in the form of omissions with the expectation of finding clarity and inspiration in complicity jurisprudence. If one is interested in understanding the potential ways forward and the inherent tensions accompanying the liability for omissions, complicity jurisprudence will be of little help. This jurisprudence has developed within the confines of a narrow definition of complicity. It covers culpable conduct by omission only in circumstances unlikely to be replicated in the vast majority of corporate activities. When it comes to the required mental state of the accomplice, there is significant variation among national jurisdictions. If intent is not required from the accomplice, then knowledge about the perpetrator’s conduct is necessary.²⁸² The problem in numerous CSR cases is not that companies intend to assist in human-rights violations, but that they are, and remain, happily ignorant. Indeed, very few companies have conducted human-rights impact assessments. Thus, legal complicity cannot help with clarifications of cases of omissions, whether it is an omission to take care to know the facts or an omission to prevent and remedy harm when information exists.

bined with authority, can constitute assistance in the form of moral support, that is, the *actus reus* of the offence.”).

282. RAMASASTRY & THOMPSON, *supra* note 252, at 19-21.

This Article suggests retaining “complicity” for only some corporate conduct, while using “negligence” for the rest. Complicity would be reserved for commissions of discrete acts of assistance undertaken with knowledge of perpetrator’s conduct; these discrete acts need to be distinguished from the larger legitimate act of doing business in the host country.²⁸³ Negligence, conversely, would be used for discrete acts undertaken with insufficient knowledge as well as for omissions to influence a third party. Both omissions to acquire information and to act upon it can be unreasonable. Building on these considerations, CSR cases might be found somewhere on the following scale indicating the concepts—complicity or negligence—that are able to strengthen the legitimacy of positive obligations:

1. Acting (assisting the perpetrator) with intention or full knowledge ⇒ *complicity*,
2. Acting with some knowledge ⇒ *complicity* under actual or even constructive knowledge; or *negligence*, gross negligence, or recklessness, by failing to acquire more information,
3. Acting with no information ⇒ *negligence* by failing to acquire more information; or *no culpability*.
4. Omission to act with full knowledge ⇒ *complicity* through moral support/encouragement (only under stringent Furundzia-like circumstances);²⁸⁴ or, in most cases, *negligence* or *gross negligence* by failing to meet the standard of conduct of “reasonable man,”
5. Omission to act with some knowledge ⇒ *negligence* by failing to acquire more information.

In conclusion, failure to conduct a basic human-rights impact assessment does not make an actor complicit, but rather, negligent. Failure to follow red flags with additional investigation makes one negligent, and not complicit, unless those red flags were big enough²⁸⁵ and one acted to assist. Failure to act to prevent and redress harm does not make one complicit but negligent for failing to do what a “reasonable person” would have done.

D. *Implications of Shifting from Complicity to Negligence*

Changing the characterization from complicity to negligence has several implications. The first regards the legitimacy of corporate

283. As the SRSG considered: “Mere presence in a country, paying taxes, or silence in the face of abuses is unlikely to amount to the practical assistance required for legal liability.” *Protect, Respect and Remedy*, *supra* note 28, ¶ 77.

284. See *Furundzija*, No. IT-95-17, Judgment, ¶¶ 233-35.

285. See generally THE LAW COMM’N, *supra* note 262, ¶ 2.65.

responsibilities. One is not negligent if he is not under a duty to act; the rule is that failure to assist the one in need is not culpable as a difference from acting to cause harm.²⁸⁶ Complicity does not have this problem. By seeing the company as complicit, one does not have to establish first a duty to assist as required in situations of “negligence by omission.”

Although complicity analysis does not require questioning whether a responsibility for third parties’ misconduct exists in the first place, negligence still addresses culpable omissions better than complicity. Negligence law has created a few exceptions from the principle of “no liability for omissions” and has recognized a duty to act in such cases where there is a prior relationship between actor and perpetrator or where the prior conduct created a potentially dangerous situation exploited by third parties committing abuses.²⁸⁷ Complicity by omission to act is exceptionally rare, and exists mainly in situations not analogous to the vast majority of CSR cases. Negligence law can handle omissions with greater ease and has established legitimate bases in which to ground responsibility.

Second, complicity does not impose any requirement to acquire information or to reach a particular level of knowledge. One is complicit only if he acts with knowledge or even intent in some more demanding jurisdictions.²⁸⁸ Should one lack the required level of knowledge about the perpetrator’s conduct and how one’s conduct assists the perpetrator, a court would simply not find complicity. The law of negligence, conversely, potentially treats ignorance as a species of culpable omissions. By using the standard of the “reasonable person,” negligence is explicit about a discrete obligation to become informed and reach a reasonable level of knowledge. In other words, the law of negligence has built in a “should have known” standard which compels a duty to investigate. Complicity, however, does not have that standard and instead relies on a simple “actual knowledge” standard on which a duty to acquire information cannot be established.

This fact is important in many CSR cases because the availability of more information and the knowledge held by the company enlarges the space where one can challenge the reasonability of corporate decisions, including those related to third parties (business partners) inflicting harms. Therefore, there is the insistence in CSR on conducting human-rights impacts assessments.

286. *See supra* Part III.A.

287. *Id.*

288. *See supra* Part V.A.

Third, as a difference from complicity that hardly contemplates liability for omissions, negligence has dealt extensively with culpable omissions. This wealth of experience can inform CSR arguments with sound legal analysis. Building on the flexible, evolving standard of the “reasonable person,” this body of law identifies much better the relevant factors that courts weigh, particularly with attention to various (conflicting) policy considerations. Businesses and CSR writers have repeatedly shown the necessity of and decried the absence of clearer boundaries of responsibility. A look at negligence jurisprudence shows that duties of care are inherently hard to define *ex ante*. Courts perform a careful balancing act involving many factors to be analyzed with attention to the specific circumstances of the case. Important concepts such as proximity, foreseeability, and reasonableness are flexible, and are influenced by public policy and morality.

Courts strike a balance within the confines of their institutional role and, if presented with allegations of culpable corporate omissions in CSR cases, their interpretation of negligence principles is bound to be restrictive. Other institutions—lawmakers, policy makers, stakeholders, and the “public” crystallizing its own expectations—do not have to, and will not, strike the same balance in determining whether conduct was negligent or reasonable.²⁸⁹ Even then, such institutions cannot escape taking into account the elements identified above. The impression is that “negligence” seems more inspirational to those trying to understand the factors on which a finding that a course of action was reasonable hinges and how the scope of responsibility is likely to be determined.

Fourth, it should be emphasized that achieving a defensible understanding on the “scope” issue impacts the “legitimacy” of positive obligations too. The fact remains that liability for omissions has an exceptional status in law and thus will lead to laws and legal principles being applied restrictively. On the one hand, should responsibilities become unduly burdensome and wide, they would shake the already contestable basis of legitimacy offered by a stretched definition of complicity as currently used in CSR argumentation.²⁹⁰ On the other hand, a reasonable definition of

289. The ICJ Panel “has noted that as societal expectations develop and expand, so too will the expectations placed on the reasonable person by the law of civil remedies, and the requirements of careful conduct today, will always be higher than they were yesterday.” CIVIL REMEDIES, *supra* note 18, at 16.

290. These are precisely the grounds on which the SRSG criticized the U.N. Norms. See *Protect, Respect and Remedy*, *supra* note 28, ¶¶ 51-52.

boundaries can reinforce the legitimacy worked out through negligence arguments.

Fifth, this analysis affects the understanding of Principle 2 of the GC, which mentions complicity.²⁹¹ Principle 2 has been interpreted in subsequent GC productions and CSR writing as drawing attention that responsibility attaches not only for direct harms but also for the misconduct of third parties.²⁹² Does that mean that the GC did not contemplate culpability of omissions, or if it did, that it purposely grounded responsibility for omission allowing third parties to inflict harm in the concept of complicity? These questions can be answered confidently in the negative. As a broad statement of principle, without building on a legal foundation or meaning to create legal obligations, the GC did not need to be overly rigorous.

Commentators and subsequent explanatory materials could have been more rigorous and could have distinguished better between culpable action and inaction, and what legal doctrine can offer legitimacy and advise on the boundaries of responsibility for inaction. The mandate of the SRSG took on this task and raised the level of argumentation in CSR to a higher level. From a negligence angle, the GC's second principle is essentially an appeal: do not remain ignorant (inform yourself!) of CSR risks, and consequently act diligently as a "reasonable person" to avoid becoming an accomplice or remaining negligently passive. Acting to assist a perpetrator with knowledge of consequences will attract complicity charges. In other cases—both commissions and omissions—negligence charges will result from either not acquiring information or from reaching unreasonable decisions.

Sixth, given that negligence is, for a majority of CSR situations, the legal characterization preferred in this Article, the scope of responsibility is limited by the "reasonable person" standard (and the factors found relevant there). This standard, as developed in criminal and civil laws of negligence, encompasses acting with due diligence to gather information and to act upon it to prevent (unreasonable) risks from materializing. The clarification achieved by courts through case law that defines "reasonable care in specific circumstances" is replicated in a completely different institutional setting by multistakeholder CSR forums.²⁹³ Neither

291. U.N. Global Compact Ten Principles, *supra* note 31.

292. See *supra* Part II.A.

293. These forums include the U.N. Global Compact, the Global Reporting Initiative, the Voluntary Principles for Security and Human Rights, and countless others.

the courts nor the CSR movement can deliver *ex ante* supreme clarity on what operational measures the positive obligations entail or what the precise limits of such obligations are.

VI. CONCLUSION

This Article recognizes the key challenge raised by culpable omissions in the ongoing efforts to conceptualize CSR. Accounting for the omissions of influential companies to acquire information on their partners' human-rights impacts and to subsequently act to prevent and repair harm is crucial for defining the responsibility to respect human rights falling upon business groups, such as MNEs. In CSR, it is the subsidiary, contractor, joint-venture partner, or whatever affiliate that commits, or is involved in, human-rights abuses that occur in developing countries. Speaking of the responsibility of the entire business group to respect those human rights does not make sense without identifying the responsibility of the parent company, for instance the controlling entity, often based in a developed country. Due to its position at the helm, the parent has a unique opportunity as well as a responsibility to exercise oversight that can be failed by both its culpable actions and inactions. Failing to clarify the scope of the parent's responsibility for its own inaction leaves a large gap in the responsibility to respect human rights inasmuch as this is applicable to corporate groups.

But on what grounds should the parent be active and how much due diligence can be expected from the top to protect human rights overseas are questions still awaiting more attention and analysis. Pondering over the legitimacy and scope of the parent responsibility for inaction would be an important step toward escaping that recurring doubt and delivering more clarity on what due diligence of the parent is required.

One step toward clarifying the conceptual foundation and limits of culpable inaction of parent companies is to acknowledge two different foundations for responsibility for third parties: complicity and negligence. This Article reviewed both doctrines and their implications for CSR. The bottom line is that negligence is better suited for the treatment of omissions (to get information and to reasonably act on it) in order to prevent and redress harm inflicted by third parties, while complicity is better suited for commissions (when information exists and the company acted to assist third parties).

When one holds “company x” complicit in human-rights abuses because it did “nothing,” in most cases that means the company behaved unreasonably by failing to intervene even though there existed a combination of factors—foreseeability, proximity, fairness, causal link—that created a duty to act as a reasonable person would have under the circumstances. No objection can be made to using complicity in a broad, nonlegal sense for advocacy purposes. At the same time, in policy documents, and especially scholarly contributions to CSR, one is well advised to put a premium on properly categorizing culpable omissions so as to better identify the elements that combine to create a responsibility. For this purpose, jurisprudence offers both rigorous analysis and vast practical experience by identifying relevant factors, showing the delicate balance to be stricken, and revealing potential tensions and intractable aspects. Therefore it is important to pay more attention to proper categorization and to jurisprudence: not to be bound by unavoidable narrow definitions but to “steal” crucial elements and the experience in trying to balance them.

Proponents of CSR are constantly asked, and rightly so, to clarify better the boundaries of CSR. Leaders of large MNEs often ask impatiently: “Where do we draw the line? Just tell us how far our responsibility extends!” Answers have come in concentric circles, in diagrams with many bullet points, in philosophy grounded theories, all trying to demarcate a line. What jurisprudence in negligence law and IHRL reveals—and the CSR movement has not yet fully grasped—is that when one determines liability for negligent omissions, various factors are juggled in a delicate balancing act where (legal) principles coexist with pragmatic considerations of public policy and societal perception of fairness. From this unavoidable balancing act, the more precise limits of inherently hard-to-define positive obligations of due diligence emerge, and the corporate sphere of influence is clarified.

