
The Concept of ‘Due Diligence’ in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale

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We welcome the opportunity to respond to Jonathan Bonnitcha and Robert McCorquodale’s discussion of the 2011 United Nations Guiding Principles on Business and Human Rights (Guiding Principles).¹ The UN Human Rights Council unanimously endorsed the Guiding Principles in June. They constitute the only official guidance the Council and its predecessor, the Commission on Human Rights, have issued for states and business enterprises on their respective obligations in relation to business and human rights. It also marked the first time that either body ‘endorsed’ a normative text on any subject that governments did not negotiate themselves. UN High Commissioner for Human Rights Zeid Ra’ad Al Hussein describes the Guiding Principles as ‘the global authoritative standard, providing a blueprint for the steps all states and businesses should take to uphold human rights’.² The Guiding Principles have been widely drawn upon in standard setting by other international organizations, governments, businesses, law societies, including the International Bar Association³

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¹ Bonnitcha and McCorquodale, ‘The Concept of ‘Due Diligence’ in the UN Guiding Principles on Business and Human Rights’, in this issue, at 899. Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework (Guiding Principles), UN Doc HR/PUB/11/04 (2011), available at www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

² Ra’ad Al Hussein, ‘Ethical Pursuit of Prosperity’, 23 *Law Society Gazette* (March 2015), available at www.lawgazette.co.uk/analysis/comment-and-opinion/ethical-pursuit-of-prosperity/5047796.fullarticle.

³ See International Bar Association, Practical Guide on Business and Human Rights for Business Lawyers, available at www.ibanet.org/LPRU/Business-and-Human-Rights-for-the-Legal-Profession.aspx.

and even the International Federation of Football Associations.⁴ Civil society groups and workers organizations use them as advocacy tools.

The Guiding Principles were developed by John Ruggie over a six-year mandate as the UN Secretary-General's special representative for business and human rights; John Sherman was a senior legal advisor. The mandate involved extensive research and consultations as well as pilot projects that road-tested proposals before actual drafting began. Given the role the Guiding Principles play, it is especially important that interpretations by leading scholars fully reflect both the letter and the spirit of the text. When it comes to the concept of corporate human rights due diligence, however, Bonnitcha and McCorquodale stray from both. They analogize from state-based legal concepts and contexts to private sector non-legal processes and miss critical elements in the logic and provisions of the Guiding Principles. They thereby end up in a place that is quite inconsistent with, and falls short of, the Guiding Principles, while failing to reflect how key stakeholders are currently implementing them. In trying to fit everything into, or render compatible with, traditional legal forms, they inadvertently illustrate why international human rights law has had such limited effects on corporate practices and why the Guiding Principles have succeeded where conventional initiatives have failed.⁵

We begin with a summary of their core arguments as we understand them and then take up each in turn:

- The authors claim that the Guiding Principles invoke human rights due diligence both as a standard of conduct to discharge a responsibility and as a process to manage human rights risks, without adequately distinguishing between the two. This, they say, leads to confusion as to when and whether businesses should be obliged to remedy human rights infringements. They claim that the confusion means that many businesses regard human rights due diligence only as a best practice and effectively ignore their responsibility to provide remedy.
- To avoid this confusion and restore the responsibility to provide remedy to its rightful place, they argue, it is necessary to go back to international human rights law as applied to states, which is the ultimate source of the responsibility to respect. International law provides that states are responsible for their own human rights violations but are not responsible for those committed by third parties unless states fail to exercise due diligence to prevent such harm.
- Consistent with that state-based conception, they conclude, a business should be responsible under the Guiding Principles to remedy its own infringements of human rights without regard to its exercise of due diligence. But its responsibility to remedy harm by third parties depends on whether it failed to exercise human rights due diligence.

⁴ J. G. Ruggie, *For the Game – For the World: FIFA and Human Rights* (2016), available at www.hks.harvard.edu/centers/mrcbg/programs/crj/research/reports/report68.

⁵ See, e.g., Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev. 2 (2003).

Bonnitcha and McCorquodale are entitled to their own preferences with regard to the criteria of liability and remedy. But none of these interpretations is aligned with the Guiding Principles, and they fall well short of the Guiding Principles' own scope for the conditions of enterprises' responsibility to respect human rights and provide for, or contribute to, remedy.

1 Alleged Confusion between Human Rights Due Diligence as Risk Management Process and Standard of Conduct

We should point out that it is not correct to say that due diligence is 'at the heart' of the Guiding Principles. The 'Protect, Respect and Remedy' framework is more complex. It addresses states, businesses as well as adversely affected individuals and communities in different yet complementary ways. For states, the emphasis is on their legal obligations under the international human rights regime to protect against human rights abuses by third parties within their jurisdiction, including business, as well as on policy rationales that are consistent with, and supportive of, meeting those obligations. For businesses, beyond compliance with legal obligations, the Guiding Principles focus on the need to prevent and address involvement in adverse human rights impacts, for which conducting human rights due diligence is prescribed. For affected individuals and communities, the Guiding Principles include means by which they can be further empowered to realize remedy through judicial and non-judicial means. The Guiding Principles seek to achieve greater alignment among the three governance systems in the business and human rights domain under the 'Protect, Respect and Remedy' framework. Thus, human rights due diligence is but one component of a more complex system.

But let us turn to the main point regarding the alleged confusion between two meanings of due diligence. Bonnitcha and McCorquodale trace due diligence as a standard of conduct back to Roman law, through Roman-Dutch tort law, Grotius, the *Lotus* case and so on up to a general comment by a UN human rights treaty body.⁶ In turn, they note that in a business context due diligence is normally understood in transactional terms, whereby a business identifies and manages commercial risks.

The recitation of the history of due diligence as a standard of conduct is irrelevant to the corporate responsibility to respect human rights under the Guiding Principles. This responsibility is neither based on nor analogizes from state-based law. It is rooted in a transnational social norm, not an international legal norm.⁷ It serves to meet a

⁶ *Case of the S.S. Lotus (France v. Turkey)*, 1927 PCIJ Series A, No. 10.

⁷ 'Companies know they must comply with all applicable laws to obtain and sustain their legal license to operate. However, over time companies have found that legal compliance alone may not ensure their social license to operate, particularly where the law is weak. The social license to operate is based in prevailing social norms that can be as important to a business' success as legal norms. Of course, social norms may vary by region and industry. But one has acquired near-universal recognition by all stakeholders: the corporate responsibility to respect human rights – or, put simply, to not infringe on the rights of others.' Business and Human Rights: Towards Operationalizing the 'Protect, Respect and Remedy' Framework, Report to the UN Human Rights Council (Business and Human Rights Report), UN Doc. A/HRC/11/13, 22 April 2009, para. 46, available at www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf.

company's social license to operate, not its legal license; it exists 'over and above' all applicable legal requirements; and it applies irrespective of what states do or do not do.⁸ For reasons discussed below, the transposition of a state-based legal concept onto the corporate responsibility to respect human rights under the Guiding Principles is fundamentally inappropriate.

As for the transactional meaning – due diligence as a business process – the record is very clear. In a progress report to the Human Rights Council from which Bonnitcha and McCorquodale quote (but without a critical sentence), Ruggie states:

Some have viewed this [due diligence] in strictly transactional terms – what an investor or buyer does to assess a target asset or venture. The Special Representative uses this term in its broader sense: a comprehensive, proactive attempt to uncover human rights risks, actual and potential, over the entire life cycle of a project or business activity, with the aim of avoiding and mitigating those risks.⁹

Not only that, but the very purpose of conducting human rights due diligence 'is to understand the specific impacts on specific people, given a specific context' (Guiding Principle 18, Commentary), not merely to manage commercial risks to the company itself. So conceived, the components of human rights due diligence under the Guiding Principles include 'assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed' (Guiding Principle 17). Simply put, without conducting human rights due diligence, companies can neither know nor show that they respect human rights and, therefore, cannot credibly claim that they do.

Through voluminous research, the Guiding Principles sought to be informed by related literatures and practices.¹⁰ But they establish their own scheme for corporate human rights due diligence, as any international instrument is entitled to do. *Merriam-Webster Dictionary's* first definition of due diligence is 'the care that a reasonable person exercises to avoid harm to other persons or their property'.¹¹ The Guiding Principles change what we should now consider 'reasonable', in the common sense use of that term, when it comes to business responsibility for human rights impacts, including remediation, which is discussed below.

As for confusion among practitioners, additional guidance since 2011 has added considerably to the common operational understanding, including by major

⁸ Commentary to Guiding Principle 11, which is the first principle addressed to business. Bonnitcha and McCorquodale state that in his 2009 progress report to the Human Rights Council 'Ruggie defines' due diligence as it is in *Black's Law Dictionary*. The wording in that paragraph may have been infelicitous, but the reference to *Black's* was intended to indicate a common legal definition, not the Guiding Principles' construct. For the full text of the Guiding Principles, see Guiding Principles, *supra* note 1.

⁹ Business and Human Rights Report, *supra* note 7, para. 25.

¹⁰ All materials were posted on the Business and Human Rights Resource Centre website, available at <https://business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights>.

¹¹ *Merriam-Webster Dictionary*, available at www.merriam-webster.com/dictionary/due%20diligence: 'due diligence'.

companies themselves.¹² In our own work with a variety of stakeholders for whom the human rights due diligence process has provided a much needed roadmap, we have found that conducting human rights due diligence can be difficult, especially in complex global value chains, but not because of confusion about its meaning under the Guiding Principles.

2 Making Human Rights Due Diligence Consistent with the Obligations of States under International Law

Having persuaded themselves that the Guiding Principles conflate two meanings of due diligence, Bonnitcha and McCorquodale 'propose and justify' an interpretation that they believe will fix this (to us, non-existent) problem. The fix consists of turning to state-based international human rights law and aligning corporate responsibility with what state obligations would be if states were violating human rights. They thereby reach their conclusion that businesses, like states, are strictly responsible for their own infringements of human rights, whether or not they conducted due diligence, but that they are not responsible for infringements by third parties unless they failed to conduct human rights due diligence (subsidiaries? affiliates? contractors? supply chain partners? government or private security providers?). As discussed in the next section, doing so would significantly diminish the scope of business responsibility for human rights harms compared to the Guiding Principles.

Here we can be brief. First, the move to state-based law is unnecessary given the fact that the Guiding Principles stipulate their own constitutive construct of human rights due diligence. Second, as part of their justification for the move, Bonnitcha and McCorquodale state: 'In subsequent writing, Ruggie explains that he consciously modelled the corporate responsibility to respect human rights on states' obligation to respect human rights in international human rights law.'¹³ This is a misreading. The word 'modelled' or 'model' does not appear on any of the pages in the book they reference.¹⁴ Ruggie merely took the literal meaning of 'respect' as 'non-infringement' from conventional human rights discourse. Indeed, 'modelling' the corporate responsibility to respect on state-based law would have been entirely out of character with the Guiding Principles, which were conceived on the basis of a polycentric transnational governance model, including the traditional world of public governance (legislation and regulation, judicial and non-judicial redress; international law and institutions);

¹² See, e.g., Office of the High Commissioner for Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, available at www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf; UN Guiding Principles Reporting Framework, available at <http://www.ungpreporting.org/>. Unilever was the first of a growing number of companies to issue a human rights report based on the Guiding Principles reporting framework. See *Enhancing Livelihoods, Advancing Human Rights: Human Rights Report* (2015), available at www.unilever.com/Images/unilever-human-rights-report-2015_tcm244-437226_en.pdf.

¹³ Bonnitcha and McCorquodale, *supra* note 1, at 916.

¹⁴ J.G. Ruggie, *Just Business: Multinational Corporations and Human Rights* (2013).

corporate governance (separate legal personality and limited liability but integrated business strategy, operations and risk management systems) and civil governance (through such social compliance mechanisms as campaigns, lawsuits, other forms of pressure and also partnering).

What Ruggie did subsequently write was that he sought consciously to move beyond ‘the conceptual shackles’ of traditional international human rights law by drawing upon the interests, capacities and engagement not only of states but also of market actors, civil society and workers organizations and the intrinsic power of ideational and normative factors.¹⁵ He aligned himself with Amartya Sen, who insists that human rights are much more than laws’ antecedents or progeny. Indeed, as Sen writes, such a narrow legalistic view threatens to ‘incarcerate’ the social logics and processes other than law that drive public recognition and respect for human rights.¹⁶

Lastly, the concept of human rights due diligence has been incorporated into a variety of national and regional legislative requirements, including on modern slavery, conflict minerals and non-financial reporting. Several of these initiatives specifically reference the Guiding Principles. How human rights due diligence is translated into legislation and regulation is an iterative process that flows from the Guiding Principles but requires far more contextual and textual specificity. But in none of these cases does there appear to be any confusion about its core meaning. In short, the move to have the corporate responsibility to respect human rights parallel states’ obligations is unnecessary, and it is out of character with the Guiding Principles and contrary to anything Ruggie has written.

3 Responsibility, Due Diligence and Remedy

As noted above, following from their desire to establish a parallel between state obligations and corporate responsibility, Bonnitcha and McCorquodale conclude that a business is strictly responsible, without proof of fault, for remedying its own infringements of human rights harm, but that it is not responsible for remedying the human rights harm of third parties unless it failed to exercise due diligence to take steps to safeguard against foreseeable harm to persons through human rights due diligence. They then attribute the comparable responsibility to businesses. They are at liberty to take this position. But the second part of this sentence is not consistent with, and falls short of, the corporate responsibility to respect under the Guiding Principles. There is a close connection between responsibility, due diligence and remedy, which Bonnitcha and McCorquodale appear to have missed.

Under the Guiding Principles, a company’s responsibility results from its being involved with an adverse human rights impact. The nature of the responsibility

¹⁵ Ruggie, ‘Life in the Global Public Domain: Response to Commentaries on the UN Guiding Principles and the Proposed Treaty on Business and Human Rights’, 23 January 2015, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2554726.

¹⁶ Sen, ‘Elements of a Theory of Human Rights’, 32 *Philosophy and Public Affairs* (2004) 315, at 319.

depends on how the company is involved. The Guiding Principles differentiate among three distinct types of involvement (not two, as claimed): whether the company causes the impact, contributes to the impact or whether the impact is directly linked to its operations, products or services without cause or contribution on its part. Perhaps it is best to quote directly from the text:

- Where a business enterprise causes or may cause an adverse human rights impact, it should take the necessary steps to cease or prevent the impact.
- Where a business enterprise contributes or may contribute to an adverse human rights impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible.
- Where a business enterprise has not contributed to an adverse human rights impact, but that impact is nevertheless directly linked to its operations, products or services by its business relationship with another entity, the situation is more complex. Among the factors that will enter into the determination of the appropriate action in such situations are the enterprise's leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity itself would have adverse human rights consequences (Guiding Principle 19, Commentary).

Human rights due diligence enters the picture by enabling the enterprise to discover whether and how it may become involved in human rights risks (forward looking) or is already involved in an adverse impact (present). Human rights due diligence includes using the information so gained to craft an appropriate response. And the enterprises' responsibility in relation to remedy is commensurate with, and proportional to, its involvement in the harm. Turning again to the text:

- 'Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes' (Guiding Principle 22). Depending on circumstances, these may encompass non-judicial mechanisms, including company–community grievance mechanisms or judicial processes.
- 'Where adverse impacts have occurred that the business enterprise has not caused or contributed to, but which are directly linked to its operations, products or services by a business relationship, the responsibility to respect human rights does not require that the enterprise itself provide for remediation, though it may take a role in doing so' (Guiding Principle 22, Commentary). But, as noted above, the enterprise is expected to use the leverage it may have with the entity causing the harm.

Finally:

Even with the best policies and practices, a business enterprise may cause or contribute to an adverse human rights impact that it has not foreseen or been able to prevent. Where a business enterprise identifies such a situation, whether through its human rights due diligence

processor other means, its responsibility to respect human rights requires active engagement in remediation, by itself or in cooperation with other actors (Guiding Principle 22, Commentary).

Under the Bonnitcha and McCorquodale rule, however, a company that had conducted human rights due diligence but did not foresee the adverse impact would have no remediation responsibilities. In none of the situations outlined is the company's responsibility to remediate or to play a role in remediation contingent on whether or not it conducted due diligence. Its responsibility is risk/impact-based. Due diligence is how risks and impacts are identified and mitigated. And remedy is commensurate with, and proportional to, the nature of the company's involvement with the risk or impact.

4 Conclusion

At the end of the day, Bonnitcha and McCorquodale are concerned with the same challenge the Guiding Principles address: more firmly grounding businesses' respect for human rights, wherever they operate. Their main issue with the Guiding Principles is alleged confusion and uncertainty about the extent of businesses' responsibility to respect human rights and about how that relates to the responsibility to provide remedy. Situational complexities and ambiguities in different business sectors and operating environments will always exist. But the confusion and uncertainties Bonnitcha and McCorquodale attribute to the Guiding Principles are of their own making. And their proposed fix, apart from being unnecessary, falls short of the Guiding Principles' scope of the corporate responsibility to respect human rights, particularly with regard to remedy.