
The Concept of ‘Due Diligence’ in the UN Guiding Principles on Business and Human Rights: A Rejoinder to John Gerard Ruggie and John F. Sherman, III

Jonathan Bonnitcha* and Robert McCorquodale**

We are grateful to John Gerard Ruggie and John F. Sherman for engaging with our article.¹ We share their objective of more firmly grounding businesses’ respect for human rights and agree that the 2011 United Nations Guiding Principles on Business and Human Rights (Guiding Principles) have already made a significant contribution to this end.² We admire their ongoing commitment to promoting the Guiding Principles and businesses’ respect for human rights. We welcome the opportunity to respond to their Reply in this constructive spirit.

In this Rejoinder, we focus on three main issues raised in their Reply. The first is the extent to which it is useful to consider the way that certain concepts are used outside the Guiding Principles in order to interpret and apply the Guiding Principles. The second is the extent of businesses’ responsibility for ‘contributing’ to adverse human rights impacts. The third is Ruggie and Sherman’s mischaracterization of our central argument. Ruggie and Sherman also raise other issues, including whether there is evidence of businesses overlooking their responsibility to provide a remedy within the framework established by the Guiding Principles and whether it is appropriate to use the verb ‘modelled’ as a synonym for the verbs ‘paraphrased’, ‘drew from’ and ‘adapted’. These other issues are already addressed in our article and accompanying footnotes.

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¹ Ruggie and Sherman, “The Concept of “Due Diligence” in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale”, in this issue, at 921.

² 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.

The first issue we address here is whether, in some circumstances, it is useful to consider how concepts are used outside a normative text in order to understand the way they are used inside that text. Ruggie and Sherman take a strong view that this is not appropriate. They argue that the Guiding Principles are a different type of normative text to ‘state-based law’. We agree with Ruggie and Sherman that the Guiding Principles were conceived as a form of polycentric transnational governance and that they are addressed to several different actors. We agree that concepts derived from ‘state-based law’ are not necessarily appropriate as analogies in this context, but we do not agree with their assertion that they are ‘fundamentally inappropriate’. Ruggie and Sherman’s view is plainly inconsistent with the Guiding Principles themselves, which define the concept of ‘internationally recognized human rights’ by express reference to a set of international legal instruments.³

This brings us to the concept of ‘due diligence’. We argue that the Guiding Principles implicitly invoke two different understandings of due diligence and that this results in confusion. Neither of these understandings has its origin in international human rights law. Much of our article is devoted to a discussion of the way that different regulatory schemes – some of which are polycentric – combine and develop the two concepts of due diligence in different ways. Our criticism is not that the Guiding Principles seek to develop a new concept of human rights due diligence.⁴ Our criticism is that their attempt to do so is not internally consistent, which gives rise to practical problems. It is in this context that we suggest that certain elements of international human rights law provide a useful analogy.

The second issue is the extent of businesses’ responsibility for ‘contributing’ to adverse human rights impacts. Ruggie and Sherman suggest that we overlook this responsibility and that a careful understanding of this mode of involvement in adverse human rights impacts clarifies the relationship between businesses’ foundational responsibility to respect human rights and their remedial responsibilities for adverse human rights impacts.

In fact, our article does address businesses responsibilities for ‘contributing’ to adverse human rights impacts. We follow the Guiding Principles – notably, Guiding Principles 13, 19 and 22 – in dealing with businesses’ responsibility for ‘causing’

³ Guiding Principle 12 defines the range of ‘internationally recognized human rights’ that business enterprises should respect by reference to the Universal Declaration of Human Rights, GA Res. 217, 10 December 1948, the International Covenant on Civil and Political Rights (ICCPR), 1966, 999 UNTS 171, the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966, 993 UNTS 3, and certain International Labour Organization conventions. The ICCPR and the ICESCR, e.g., were drafted by states, adopted by states and are addressed primarily to states. They are, to use Ruggie and Sherman’s term, ‘state-based law’. International law is also referred to in the text and/or Commentaries to Guiding Principles 1–2, 4–10, 25 and 28, and, in relation to business enterprises specifically, in Guiding Principles 12, 17, 18, 23 and 31.

⁴ Ruggie and Sherman attempt to link our argument to the 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), which failed to win the support of UN Commission on Human Rights. In fact, our article does not refer to the Norms. Our interpretation of businesses’ responsibilities in relation to human rights under the Guiding Principles is very different to the scope of businesses’ obligations in relation to human rights that the Norms purported to define. Ruggie and Sherman’s reference to the Norms and their failure is irrelevant to our article.

and 'contributing' to adverse human rights impacts together. The Guiding Principles are clear that businesses' responsibility for 'contribution' to adverse human rights impacts is a case of businesses being responsible for their own impact. This is explicit in Guiding Principle 13:

The responsibility to respect human rights requires that business enterprises:

- (a) Avoid causing or contributing to adverse human rights impact through their own activities, and address such impacts when they occur.

The Guiding Principles distinguish businesses' responsibility for their own impacts from their responsibility for the impacts of third parties that the business in question does not contribute to, but that are nevertheless 'directly linked' to that business through its 'business relationships'.⁵

The long extract from the Commentary to Guiding Principle 19 quoted by Ruggie and Sherman is entirely consistent with our treatment of 'contribution'. This extract explains that where a business 'causes' adverse human rights impacts it should 'take the necessary steps to cease and prevent' that impact. In contrast, insofar as the impacts of third parties that are 'directly linked' to a business are concerned, the business should use its 'leverage' to 'prevent or mitigate the adverse impact'. With this distinction in mind, the Commentary to Guiding Principle 19 distinguishes between a business enterprise's responsibility for its own 'contribution' and its responsibility for the contribution of third parties: '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*.'⁶ This extract reflects the central distinction we invoke in our article between responsibilities for a business's own impacts and for third party impacts, as established in Guiding Principle 13. A business enterprise has a strict or no fault responsibility for the impacts of its own activities, whereas a reasonable care standard of conduct applies in relation to the impacts of third parties.

The third issue is Ruggie and Sherman's serious mischaracterization of the interpretation of the Guiding Principles that we propose. Ruggie and Sherman cite the Commentary to Guiding Principle 22, in particular, the paragraph that deals with businesses' responsibility to provide a remedy when they cause or contribute to adverse human rights impacts. They go on to state: '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.' This is the opposite of our argument! Our argument is that a business that causes or contributes to adverse human rights impact has a responsibility to provide (or cooperate in the provision of) a remedy regardless of whether it instituted processes of human rights due diligence and regardless of whether that adverse impact was difficult to foresee or expensive to avoid.

⁵ See Guiding Principle 13(b).

⁶ Commentary to Guiding Principle 19 (emphasis added).

In another passage, they characterize our argument concerning businesses' responsibility to provide a remedy for adverse human rights impacts of third parties with which they have business relationships as follows: "They thereby reach their conclusion that businesses ... are not responsible for infringements by third parties (subsidiaries, affiliates, contractors, supply chain partners, government or private security providers?) unless they failed to conduct human rights due diligence."⁷ This mischaracterization neatly illustrates the central thesis of our article – that slippage between two different concepts of due diligence creates potential for confusion, which is continued in the Reply.⁸

Although we think our article addressed this point repeatedly and at length, we welcome the chance to restate it here and deal with any residual misunderstanding. We do not argue that instituting processes of human rights due diligence is sufficient to discharge a business enterprise's responsibilities for the impact of third parties. Our argument is that a business enterprise is not responsible for such impacts if it has exercised reasonable care – that is, acted with due diligence, understood as a standard of conduct – to prevent and mitigate such impacts.

Having addressed these mischaracterizations, it seems that our proposed resolution is not so far from the position adopted by Ruggie and Sherman. In particular, it seems that we agree that:

- a business enterprise has a responsibility to provide (or cooperate in the provision of) a remedy for adverse human rights impacts that it causes, or contributes to, regardless of whether those impacts were difficult to foresee or costly to avoid;⁹

⁷ The question of whether an entity – such as a 'subsidiary' or an 'affiliate', to use Ruggie and Sherman's words – should be regarded as part of a 'business enterprise' or whether it should instead be regarded as a third party that is 'directly linked to the [business enterprise's] operations, products or services by their business relationships' is an important one, which has been discussed elsewhere in the academic literature. E.g., Mares, 'Responsibility to Respect: Why the Core Company Should Act When Affiliates Infringe Human Rights' in R. Mares (ed.), *Siege or Cavalry Charge? The UN Mandate on Business and Human Rights* (2012) 169. This distinction has important consequences, because Guiding Principle 13 distinguishes between responsibilities relating to adverse human rights impacts that the business enterprise itself causes or contributes to and responsibilities relating to adverse human rights impacts that a business enterprise does not cause or contribute to but that are, nevertheless, 'directly linked' to it by its business relationships. The Commentary to Guiding Principle 13 defines the scope of a business enterprise's 'business relationships' as including 'relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services'. This definition, suggests that 'subsidiaries' and 'affiliates' should be regarded as part of the 'business enterprise' itself, whereas the other entities listed by Ruggie and Sherman would normally be regarded as third parties. Having addressed the substantive issue, we also note that 'business enterprise' is a central concept that is used throughout the Guiding Principles. Any confusion as to whether a given legal entity is part of a particular 'business enterprise' or merely a third party that is 'directly linked' to that business enterprise stems from the Guiding Principles themselves, not from our article.

⁸ After arguing that 'human rights due diligence' is an entirely self-defining concept that refers to a process for identifying and managing the risk of human rights impacts, Ruggie and Sherman then fall back on the definition of 'due diligence' contained in the *Merriam-Webster Dictionary*. The definition they quote from Webster's dictionary defines due diligence as a standard of reasonable care, not a process for identifying and managing risk of harm!

⁹ At one point in the Reply, Ruggie and Sherman, *supra* note 1, at 926, restate and criticize our argument in the following terms: '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 *not* responsible

- human rights due diligence processes are the means by which business enterprises should avoid and mitigate such impacts;¹⁰ but
- instituting such processes does not relieve a business enterprise from its responsibility to provide a remedy.¹¹

These are clarifications of considerable practical significance. They confirm that a business is responsible for its adverse human rights impacts without any need for victims to show that these infringements resulted from insufficient diligence on the part of the business in question. To return to the example we gave in our article, these clarifications confirm that, today, the victims of an event such as the Bhopal disaster in India would not need to show that the chemical leak was a result of insufficient diligence in the maintenance of that facility's safety systems in order to establish that Union Carbide had breached its responsibility to respect human rights within the scheme established by the Guiding Principles. Notwithstanding remaining points of disagreement, we believe that clarification of these key points is an important step in more firmly grounding businesses' respect for human rights, wherever they operate.

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' (emphasis added). From this passage, it seems that Ruggie and Sherman object only to the second part of our argument, which concerns the extent of businesses' responsibility for adverse human rights impacts that they neither cause nor contribute to. They do not raise any objections to our view that a business is strictly responsible for its own adverse human rights impacts, without any need for proof of fault.

¹⁰ In their Reply, Ruggie and Sherman, *supra* note 1, at 928, state that 'due diligence is how risks and impacts are identified and mitigated'. We agree.

¹¹ In their Reply, Ruggie and Sherman, *supra* note 1, at 928, state that a 'company's responsibility to remediate or to play a role in remediation [is not] contingent on whether or not it conducted due diligence'. We agree.