

**THE CONCEPT OF ‘DUE DILIGENCE’ IN THE UN GUIDING PRINCIPLES
ON BUSINESS AND HUMAN RIGHTS:
REPLY TO PROFESSORS BONNITCHA AND McCORQUODALE***

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We welcome the opportunity to respond to Professors Bonnitcha and McCorquodale’s discussion of the UN Guiding Principles (UNGPs). The UN Human Rights Council unanimously endorsed the UNGPs in June 2011. 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 UNGPs as “the global authoritative standard, providing a blueprint for the steps all states and businesses should take to uphold human rights.”¹ The UNGPs have been widely drawn upon in standard setting by other international organizations, governments, businesses, law societies including the International Bar Association,² and even the International Federation of Football Associations or FIFA.³ Civil society groups and workers organizations use them as advocacy tools.

The UNGPs were developed by Professor 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 road testing proposals before actual drafting began. Given the role the UNGPs 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, Professors Bonnitca 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 UNGPs. They thereby end up in a place that is quite inconsistent with and falls short of the UNGPs, 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 UNGPs succeeded where conventional initiatives have failed.⁴

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

- (1) The authors claim that the UNGPs invoke human rights due diligence (HRDD) 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 HRDD only as a best practice and effectively ignore their responsibility to provide remedy.
- (2) 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.

- (3) Consistent with that state-based conception, they conclude, a business should be responsible under the UNGPs 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 HRDD.

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

Confusion between HRDD 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 UNGPs. 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 policy rationales that are consistent with, and supportive of, meeting those obligations. For businesses, beyond compliance with legal obligations, the UNGPs 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 UNGPs include means by which they can be further empowered to realize remedy through judicial and non-judicial means. The UNGPs 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, HRDD 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. 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 UNGPs. 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.⁵ It serves to meet a 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.⁶ For reasons discussed below, the transposition of a state-based legal concept onto the corporate responsibility to respect human rights under the UNGPs 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 stated:

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.⁷

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” (UNGP 18, Commentary), not merely to manage commercial risks to the company itself. So conceived, the components of HRDD under the UNGPs include “assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed” (UNGP 17). Simply put, without conducting HRDD companies can neither know nor show that they respect human rights, and therefore cannot credibly claim that they do.

Through voluminous research the UNGPs sought to be informed by related literatures and practices.⁸ But they establish their own scheme for corporate human rights due diligence, as any international instrument is entitled to do. Webster’s first definition of due diligence is “the care that a reasonable person exercises to avoid harm to other persons or their property.”⁹ The UNGPs 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, discussed below.

As for confusion among practitioners, additional guidance since 2011 has added considerably to common operational understanding, including by major companies themselves.¹⁰ In our own work with a variety of stakeholders for whom the HRDD 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 UNGPs.

Making HRDD consistent with international law relating to the obligations of states

Having persuaded themselves that the UNGPs conflate two meanings of due diligence, Bonnitca 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 (subsidiaries? affiliates? contractors? supply chain partners? government or private security providers?) unless they failed to conduct HRDD. As discussed in the next section, doing so would significantly diminish the scope of business responsibility for human rights harms compared to the UNGPs.

Here we can be brief. First, the move to state-based law is unnecessary given the fact that the UNGPs stipulate their own constitutive construct of human rights due diligence. Second, as part of their justification for the move Bonnitca and McCorquodale state: “In subsequent writing, Ruggie explains that he consciously modelled the corporate responsibility to respect human rights on states’ obligation to respect to human rights in international human rights law” (p. 21 of ms). This is a misreading. The word “modeled” or “model” does not appear on any of the pages in the book they reference.¹¹ Ruggie merely took the literal meaning of “respect” as “non-infringement” from conventional human rights discourse. Indeed, “modeling” the

corporate responsibility to respect on state-based law would have been entirely out of character with the UNGPs, which were conceived on the basis of a polycentric transnational governance model: the traditional world of public governance (legislation and regulation, judicial and non-judicial redress; international law and institutions); 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, workers organizations and the intrinsic power of ideational and normative factors.¹² He aligned himself with Amartya Sen, who insists that human rights are much more than laws’ antecedents or progeny. Indeed, 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.¹³

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 UNGPs. How human rights due diligence is translated into legislation and regulation is an iterative process that flows from the UNGPs 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 UNGPs and contrary to anything Ruggie has written.

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 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 that sentence is not consistent with and falls short of the the corporate responsibility to respect under the UNGPs. There is a close connection between responsibility, due diligence and remedy, which Bonnitcha and McCorquodale appear to have missed.

Under the UNGPs, a company's responsibility results from its being involved with an adverse human rights impact. The nature of the responsibility depends on *how* the company is involved. The UNGPs 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 (UNGP 19, Commentary):

- “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.”

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). HRDD 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” (UNGP 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” (UNGP 22, Commentary). But, as noted above, the enterprise is expected to use the leverage it may have with the entity causing the harm.

Here is the clincher (UNGP 22, Commentary):

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.

Under the Bonnitcha and McCorquodale rule, however, a company that had conducted HRDD 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.

Conclusion

At the end of the day, Professors Bonnitcha and McCorquodale are concerned with the same challenge the UNGPs address: more firmly grounding businesses' respect for human rights, wherever they operate. Their main issue with the UNGPs 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 Professors Bonnitcha and McCorquodale attribute to the UNGPs are of their own making. And their proposed fix, apart from being unnecessary, falls short of the UNGPs' scope of the corporate responsibility to respect human rights, particularly with regard to remedy.

Notes

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¹ Zeid Ra'ad Al Hussein, 'Ethical pursuit of prosperity,' 23 *The Law Society Gazette* (March 2015), available at <http://www.lawgazette.co.uk/analysis/comment-and-opinion/ethical-pursuit-of-prosperity/5047796.fullarticle> (last visited 17 February 2017).

² See *IBA Practical Guide on Business and Human Rights for Business Lawyers*, available at <http://www.ibanet.org/LPRU/Business-and-Human-Rights-for-the-Legal-Profession.aspx> (last visited 17 February 2017).

³ Ruggie, '*For the Game. For the World.*' *FIFA & Human Rights*, available at <https://www.hks.harvard.edu/centers/mrcbg/programs/cri/research/reports/report68> (last visited 17 February 2017).

⁴ See, for example, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Document E/CN.4/Sub.2/2003/12/Rev. 2 (2003).

⁵ '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.' *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, UN Document A/HRC/11/13 (22 April 2009), para 46.

⁶ Commentary to UNGP 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 UNGPs' construct. For the full text of the UNGPs, see *Guiding Principles on Business and Human Rights: Implementing the 'Protect, Respect and Remedy' Framework*, available at

http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

(last visited 17 February 2017).

⁷ *Supra*, Note 5, para 25.

⁸ All materials were posted on the Business and Human Rights Resource Centre website;

<https://business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights>.

⁹ <https://www.merriam-webster.com/dictionary/due%20diligence> (last visited 17 February 2017).

¹⁰ See, for example, Office of the High Commissioner for Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, available at

http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf, and *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 UNGP Reporting Framework; available at https://www.unilever.com/Images/slp-unilever-human-rights-report-2015_tcm244-437226_1_en.pdf (all last visited on 17

February 2017).

¹¹ J. G. Ruggie, *Just Business: Multinational Corporations and Human Rights* (2013).

¹² J. G. Ruggie, *Life in the Global Public Domain: Response to Commentaries on the UN Guiding Principles and the Proposed Treaty on Business and Human Rights*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2554726 (last visited 17 February 2017).

¹³ Sen, 'Elements of a Theory of Human Rights, 32 *Philosophy and Public Affairs*, 32 (Autumn 2004), 315, at 319.