Mandatory Human Rights Due Diligence

READING PACKET

John Balouziyeh and Catherine Gilfedder, “Doing well by doing good: Human rights as a pillar of corporate social responsibility,” *The Oath*, Part 1: A Tribute to John Ruggie, Issue 106 (Oct. 2021); Part 2: Human rights compliance as a legal obligation, Issue 107 (Nov. 2021); Part 3: Business and Human Rights Forum in Geneva, Issue 108 (Dec. 2021)

Jonathan Bonnitcha and Robert McCorquodale, “The Concept of ‘Due Diligence’ in the UN Guiding Principles on Business and Human Rights,” *European Journal of International Law*, Vol. 28, No. 3 (Nov. 2017), pp. 899-919 (excerpt)

OHCHR, “Corporate human rights due diligence: emerging practices, challenges and ways forward,” Summary of the report of the Working Group on Business and Human Rights to the General Assembly, A/73/163, Office of the United Nations High Commissioner for Human Rights (Oct. 2018)

John Gerard Ruggie and John F Sherman, “The Concept of ‘Due Diligence’ in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale,” *European Journal of International Law*, Vol. 28, No. 3 (Nov. 2017), pp. 921-928 (excerpt)

Julia Graff, “Corporate War Criminals and the International Criminal Court: Blood and Profits in the Democratic Republic of Congo,” *Human Rights Brief 11*, no. 2 (2004), pp. 23-26.

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Patricia H Werhane, “Corporate Moral Agency and the Responsibility to Respect Human Rights in the UN Guiding Principles: Do Corporations Have Moral Rights?” *Business and Human Rights Journal*, Vol 1:1 (Jan. 2016), pp. 5-20 (excerpt)

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Doing well by doing good – Part 1

Human rights as a pillar of corporate social responsibility: In this two-part series on business and human rights, Catherine Gilfedder and John Balouziyeh of Dentons offer guidance on how multinational corporations, drawing on international best practices, can pioneer socially responsible business models.

OVERVIEW

Part I of this series explores the legacy of John Ruggie, the late UN Special Representative on human rights and business enterprises, and discusses how corporations, following the frameworks he designed, can partake in human rights reporting, monitor their supply chains and implement human rights policies.

Part II, to be published in the November edition of the Oath, will explore how human rights compliance is increasingly evolving into a legal obligation rather than a voluntary undertaking. John and Catherine will examine laws that have already been passed in the EU requiring multinational corporations to partake in human rights monitoring and compliance, and the potential future of this trend in the Middle East. Finally, it will examine government-sponsored initiatives to promote human rights protection in the Middle East through the creation of human rights commissions and committees to carry out human rights monitoring.

INTRODUCTION

The impact of John Ruggie's work in the field of business and human rights is immeasurable. Within a decade of his 2005 appointment as the United Nations Special Representative on human rights and business enterprises, most of the world's major multinational corporations had adopted human rights policies. The first strand of Ruggie's vision (and the inspiration behind the first "pillar" of the UN Guiding Principles he championed) is that human rights protection is not the exclusive domain of sovereign states; multinational corporations, by virtue of their economic power and structural similarity to states, also bear responsibilities under international human rights law. These include the protection of the human rights of their employees and ensuring that downstream supply chains respect human rights, women's rights and children's rights.

John Ruggie's untimely passing last month has sent shock waves through the business and human rights communities. The world mourns his loss and remembers his legacy. His pioneering scholarship in the field of business and human rights has inspired multinational companies to demonstrate their leadership in the areas of ethics, environmental stewardship, labor rights and the rule of law.

Drawing on Ruggie's legacy and his groundbreaking book, Just Business: Multinational Corporations and Human Rights, we offer some guidance on how multinationals can do well by doing good. Adopting a human rights policy is the first step. Such policies are most effective when they impel company officers, directors and management to synchronise their corporate missions with the greater good of society and creatively achieve their corporate purpose in a way that positively impacts their communities.

PROMOTING HUMAN RIGHTS AS CORPORATE POLICY

The promotion of human rights falls along a continuum. Engagement on human rights can be as simple as including a clause in a company's supply contracts that requires a company's suppliers to uphold international human rights law and refrain from acts that potentially constitute child labor, human trafficking or modern slavery. Alternatively, action can be much more robust. It might involve participation

in the UN Guiding Principles Reporting Framework, self-reporting through the Business & Human Rights Resource Centre, adopting global human rights policies and auditing global supply chains to ensure that all suppliers and their agents and affiliates comply with international human rights law.

Businesses have a variety of tools at their disposal for promoting human rights and environmental stewardship as core company principles. The first step might be to incorporate a human rights protection clause in all of a company's contracts. Alternatively, it might be the adoption of a human rights policy and environmental charter or a commitment to participate in a human rights self-reporting mechanism.

UN Guiding Principles Reporting Framework

The UN Reporting Framework is the first standardised framework for companies to report human rights issues related to their businesses. The Framework guides companies on identifying major human rights issues related to their businesses and on monitoring their progress in addressing these issues. It consists of 31 questions, eight of which companies just beginning to use the Framework must respond to in order to meet the minimum threshold for using the Framework. This phased approach is designed to incentivise companies to improve and expand their engagement over time.

Encouraging businesses to focus and prioritise their resources where they are needed most, the UN Reporting Framework focuses on salient human rights issues. The Framework consists of brief, straightforward questions that allow companies to "know internally and show externally" their understanding and effective management of human rights risks. It provides implementation guidance for participating companies and assurance guidance for internal auditors

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and external assurance providers. The aim of the UN Reporting Framework is to foster a better conversation among all business stakeholders and expand the conversation from social compliance departments to other relevant business departments for greater engagement.

Business & Human Rights Resource Centre

Working towards the goals of the UN Guiding Principles to build corporate transparency and strengthen corporate accountability, the Business & Human Rights Resource Centre ("BHRRC") works to advance human rights in business and eradicate and seek accountability for abuse.

The BHRRC maintains a database of companies that have adopted human rights policies or business codes of conduct. Many of these companies report on compliance with and breaches of their internal policies and voluntarily disclose shortcomings with respect to business practices that may infringe on human rights, workplace health and safety norms or environmental stewardship. The BHRRC's self-reporting mechanism promotes a degree of accountability and ensures that multinational companies aspire to a uniform transnational human rights standard.

Adoption of business and human rights policies

Human rights policies are an indispensable staple of the corporate governance policy suite of any business serious about promoting human rights, ethics, transparency, environmental stewardship and workplace safety. We suggest that human rights policies include, as a baseline minimum, the following provisions:

» Respect for the human rights of company employees, including the right to just and favorable working conditions, physical integrity, workplace safety, privacy and family life, and to freedom from bullying in the workplace.

» A covenant to protect the right of employees to be free from discrimination on the basis of nationality, race, gender or any other protected class.

» Respect for the right of employees to express their opinions or their faith in the workplace.

» A commitment to environmental stewardship and to comply with applicable

John Ruggie

Photo by Eric Bridiers, U.S. Mission to the U.N. in Geneva, taken on December 4, 2012.

local, national and international norms relating to environmental protection and preservation.

» A commitment to act in accordance with national and international standards of business transparency and integrity and to combat bribery and corruption.

» Support for the rule of law and for the institutions, processes and frameworks that ensure accountability, predictability and justice.

» A covenant to combat human trafficking and eradicate modern slavery.

Human rights risks relating to supply chains

Human rights violations are an inherent risk that may arise indirectly within a company's global supply chains. Such violations may relate to the rights of employees working within those supply chains and the impacts of such supply chains on the environment. Such supply chains can include property leases, catering and cleaning services, recruitment agencies, vendors of IT equipment and other goods and outsourced business process services.

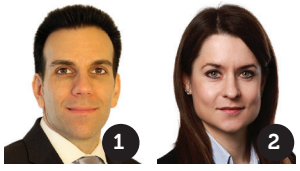
Companies with global operations face a risk that their impact on local communities and the environment may adversely impact human rights through their supply chains. This risk can be mitigated by appropriately vetting local vendors, undertaking due diligence on local partners and ensuring that local vendors, services providers and partners commit to comply with all applicable local laws.

Multinational companies can further mitigate risk by ensuring that their supply chains adopt business and human rights policies at least as rigorous as the companies' own policies or codes. In addition, companies may go a step further by implementing annual or biannual training on their local supply chain partners to ensure that they understand, respect and ensure the respect of universal human rights standards in their local operations.

PIONEERING A SOCIALLY RESPONSIBLE AND ENVIRONMENTALLY SUSTAINABLE BUSINESS MODEL

Dentons has extensive experience in the field of business and human rights, having advised a wide range of businesses, financial institutions, international organisations, NGOs and governments on international human rights law. A pioneer in the field of international law, Dentons can help companies navigate the burgeoning field of business and human rights and the proliferation of treaties, international declarations and guidelines in the field, including the OECD Guidelines for Multinational Enterprises, the International Labor Organization's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, the American Convention on Human Rights, the Human Rights Declaration of the Association of Southeast Asian Nations and European Union Directive 2014/95/EU on corporate sustainability reporting. We help clients to comply with human rights reporting requirements, design human rights policies, and conduct due diligences of JV partners and supply chains to eliminate human trafficking, modern slavery and other abuses of international human rights law. Dentons has experience in developing protocols that mitigate the risk of human rights abuses and that support socially responsible and sustainable business models.

John Balouziyeh and Catherine Gilfedder regularly advise clients on business and human rights issues and risk management through investment structuring and ESG-related measures. They act for a number of corporations, international organisations and NGOs in claims before a range of courts and in designing and implementing human rights policies



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Doing well by doing good: Part 2

Human rights as a pillar of corporate social responsibility: In this second part to the series on business and human rights, John Balouziyeh and Catherine Gilfedder of Dentons discuss how human rights compliance is evolving into a legal obligation, with an insight into EU laws and on what corporates in the Middle East are doing to be more socially responsible.

Part I of this series, published in the October edition of *the Oath*, explored the legacy of John Ruggie, the late UN Special Representative on human rights and business enterprises, and discussed how corporations, following the frameworks he designed, can partake in human rights reporting, monitor their supply chains and implement human rights policies.

In this second part to the series on business and human rights, John and Catherine explore how human rights compliance is increasingly evolving into a legal obligation rather than a voluntary undertaking. They examine laws that have

already been passed in the EU requiring multinational corporations to partake in human rights monitoring and compliance, and the potential future of this trend in the Middle East.

INTRODUCTION

Part I of this series explored voluntary measures to promote human rights in business enterprises. Voluntary measures discussed in Part I include the adoption of business and human rights policies, monitoring company supply chains, ensuring that commercial agents comply with international human rights standards and participation in the UN Guiding Principles Reporting Framework. Aside from "voluntary" or "soft law"-inspired policy and corporate risk-driven measures, there is an ever-increasing momentum towards the concretisation of corporate obligations as binding legal norms.

HUMAN RIGHTS OBLIGATIONS OF MULTINATIONAL CORPORATIONS

The economic power, political influence and expanded geographical footprint of corporate actors means their potential to directly cause human rights abuses through their own actions or to assist with violations perpetrated by others is monumental. Perhaps due to such heightened risk, various jurisdictions have seen litigation alleging corporate "complicity" in state human rights abuses.

On the international law plane, many scholars consider corporates already bear certain direct international law obligations, including around respect for human rights (arising from their power, structural similarity to states and/or capacity to influence states); others consider such obligations likely to crystallise in the near future.

Aside from the question of direct corporate obligations under international law, negotiations continue towards a global UN treaty on business and human rights that would require signatory states to impose legally binding obligations on corporations in the human rights arena. In the meantime, a number of individual states have introduced legislation imposing legal obligations in the human rights arena upon corporations within their regulatory jurisdiction.

For example, France adopted its Loi de vigilance (Corporate Duty of Vigilance Law) in 2017. It establishes a legally binding obligation for French parent companies to identify and prevent adverse human rights and environmental impacts resulting from their own activities, from activities of companies they control, and from activities of their subcontractors and suppliers, with whom they have an established commercial relationship. Not all French companies are covered – the law targets only the largest, i.e. those which either employ (a) 5,000 within France; or (b) 10,000 in direct or indirect subsidiaries in France or abroad. Those covered are required to prepare, publish and implement a "vigilance plan", identifying and laying out remedial measures to prevent, inter alia, infringements of human rights. Failures to do so can result in judicial complaints and orders requiring the publication of a vigilance plan. Indeed, a number of cases involving alleged breaches of obligations under the loi de vigilance are already before

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the French courts. The EU also plans to introduce binding obligations to carry out due diligence, including on human rights and environmental impacts: in March 2021, the European Parliament approved an outline proposal for an EU-wide Directive. As and when the legislation is finalised, it will require all member states to implement the obligations into their national legislation within a specified period. There have been calls for similarly comprehensive legislation in jurisdictions across Africa, Asia and in the US, building upon more targeted or sector-specific laws such as the UK Modern Slavery Act 2015 and California's Transparency in Supply Chains Act 2012.

As such, for most companies it is only a matter of time before assessing and reporting upon human rights impacts becomes mandatory (possibly under the regimes of numerous jurisdictions in parallel) and so it makes obvious commercial sense to address areas of risk now.

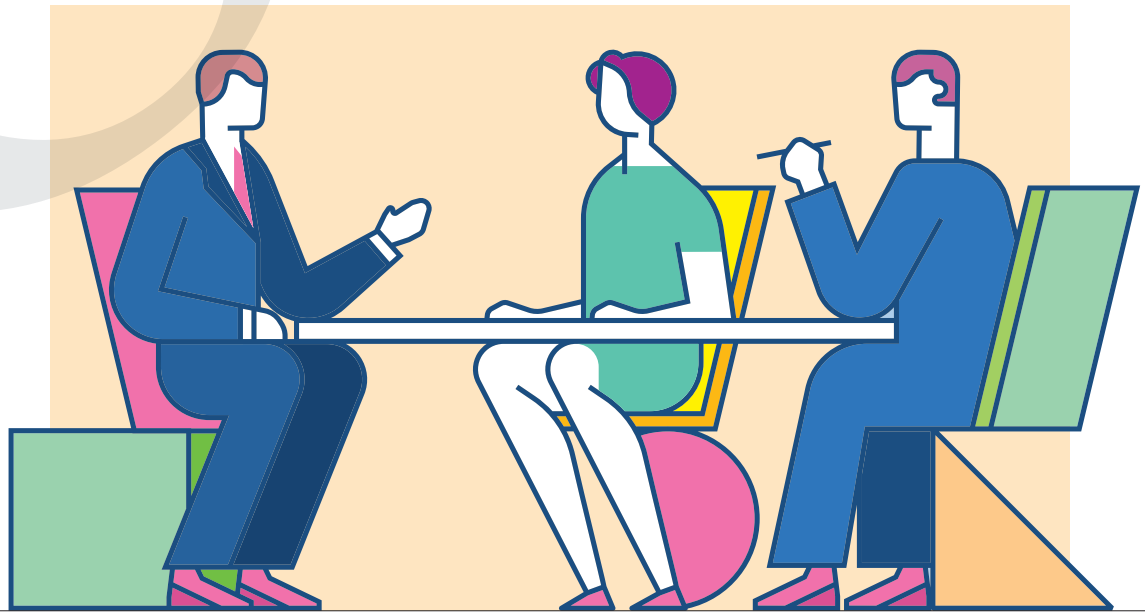
REGIONAL CONSIDERATIONS

Just as regional human rights treaties vary from one region to another, the specific provisions of human rights policies might appropriately vary from one location to another. What may be culturally acceptable in one country may not be in another.

This does not mean, however, that multinational corporations may set up operations in a particular destination in order to flout international human rights standards. While there are some variations of human rights standards across regions, first order human rights, such as the right to life and human dignity, are inherent and non-derogable. As these rights are universal, they can be characterised as first-order rights that tolerate no derogation. They are held by all people at all times simply by virtue of their being human. They are thus inalienable rights, because being or not being human is an inalterable fact of nature. It is not something that can be earned, merited or lost.

In this same vein, acts that inherently clash with first order human rights, such as torture and slavery, are prohibited under all circumstances. Just as states cannot circumvent prohibitions on torture or slavery by lodging reservations in international human rights treaties, corporations cannot circumvent customary prohibitions on torture or slavery by setting up operations in locations where human rights standards are not upheld or enforced. Jus cogens human rights norms create inescapable erga omnes obligations owed to the international community as a whole at all times and under all circumstances.

Some corporate counsels operating in the Middle East, fearing that adopting human rights policies might conflict with local law, express consternation in adopting human rights policies. The opposite is actually true. The overwhelming majority of countries in the Middle East are states parties to the principal international human rights treaties, including the International Covenant on Civil and Political Rights; the International Covenant on Economic,



Social and Cultural Rights; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Elimination of All Forms of Discrimination against Women; and the Convention on the Rights of the Child. Some human rights treaties, such as the International Convention on the Elimination of All Forms of Racial Discrimination, have been acceded to or ratified by every state in the Middle East.

In addition, many countries across the Middle East have established commissions charged with implementing and enforcing human rights standards in accordance with international and Islamic law. The State of Qatar, for example, appointed the National Human Rights Committee to oversee and carry out investigations on human rights abuses in the country. Oman's Human Rights Commission acts as a national platform to promote and protect human rights among all segments and institutions of Omani society. The Federal National Council of the UAE passed a draft law in April of 2021 to establish a National Human Rights Commission to promote and protect human rights and freedoms in accordance with the provisions of the country's constitution and legislation. Saudi Arabia's Human Rights Commission has made major strides in Saudi Arabia, particularly in combatting human trafficking and forced slavery, while women's rights continue to be a central focus of Saudi Vision 2030, which mentions women not once or twice, but eight times, while setting as a national economic and national security priority the expansion of female entrepreneurship. Vision 2030 recognises that "Saudi women are yet another great asset. With over 50 percent of our university graduates being female, we will continue to develop their talents, invest in their productive capabilities and enable them to strengthen their future and contribute to the development of our society and economy." Saudi Vision 2030 seeks to "increase women's participation in the workforce from 22 per cent to 30 per cent," constituting a 36 per cent increase over the next nine years.

General counsels of companies operating in the Middle East can give thought to how their companies' human rights policies complement and reinforce the policies of their host countries, working hand-in-hand to reinforce human life and dignity.

PIONEERING A SOCIALLY RESPONSIBLE AND ENVIRONMENTALLY SUSTAINABLE BUSINESS MODEL

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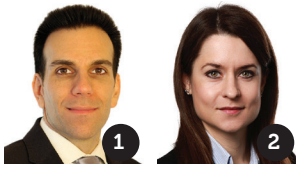

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Doing well by doing good: Part III

Human rights as a pillar of corporate social responsibility: In the third part, Catherine Gilfedder and John Balouziyeh of Dentons highlights the positive developments of the UN Working Group's latest report and on the vision for the next decade of business and human rights.

In Part I of this series, John Balouziyeh and Catherine Gilfedder explored the legacy of John Ruggie, the late UN Special Representative on human rights and business enterprises, and discussed how corporations, following the frameworks he designed, can monitor their supply chains and implement human rights policies. Part II of this series explored how human rights compliance is increasingly evolving into a legal obligation rather than a voluntary undertaking. To commemorate the tenth anniversary of the UN Guiding Principles on Business and Human Rights (UNGPs), this third part of the series will explore the UN Working Group on Business and Human Rights' stocktaking report and roadmap for the next decade, which were released in November 2021 as part of the annual United Nations Forum on Business and Human Rights, which was held in Geneva and virtually from November 30 to December 1, 2021.

INTRODUCTION

As the leading platform for multi-stakeholder dialogue on business and human rights, the annual UN Forum brings together thousands of participants from governments, international organisations, business trade unions, civil society, local communities, the legal sector and academia. Over the course of three days, stakeholders from across the globe discuss the implementation of the UNGPs, current business-related human rights issues as well as the successes and challenges in realising a more sustainable global economy. To commemorate this year's tenth anniversary of the UNGPs, the UN Working Group, informed by wide-ranging stakeholder consultations, used the Forum to launch a new project that aims to scale up the implementation of the UNGPs more widely over the next decade. The project, called "UNGPs 10+", consists of two main components. The first component was published in the form of a "stocktaking" report that takes stock of the first ten years of the UNGPs' implementation. The report (which was also accompanied by an assessment of institutional investors) includes assessments on progress, gaps and challenges, as well as opportunities and obstacles for advancing more robust policy action in the next few years. The stocktaking report is followed by a "roadmap for the next decade", a second report that provides recommendations for stakeholders on how to further implement the UNGPs.

WHAT HAVE THE UNGPS ACHIEVED SO FAR?

The UNGPs have received support from states, businesses and civil society alike. The unanimous endorsement of the Principles by the UN Human Rights Council in 2011 has instigated a new era of socially responsible business and corporate respect for human rights. By offering a common framework and strategy to identify, manage and prevent business-related human rights risks and impacts and by providing examples of tools that can be used to achieve these goals, the Principles have encouraged companies to place responsible business higher up on their agendas. Many corporations have opted to develop human-rights statements, commit to the UN Global Compact, adopt human rights policies, offer increased transparency on human rights performance through benchmarking and reporting, or implement the UNGPs in their policies and practices. These developments are built on the vision that the responsibility to respect human rights does not lie solely with states but also extends to businesses due to the fact that their actions may affect

the enjoyment of human rights by others, both positively and negatively.

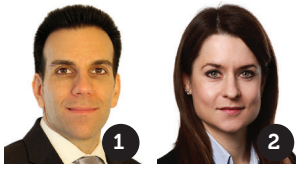
Perhaps the most remarkable and normative development flowing from the UNGPs is the expectation that corporations use corporate human rights due diligence (HRDD) as a key tool to translate the responsibility to respect human rights into practice. In its present condition, the international legal framework does not provide a generally accepted norm or conception of HRDD. In the words of the UN Working Group and as set out under the UNGP framework, HRDD requires companies to identify and assess both actual or potential adverse human rights impacts that they may cause or contribute to, to prevent and mitigate their adverse impacts, and to account for how they address these impacts by either providing for or cooperating in the remediation of such impacts through legitimate and effective grievance mechanisms. As a result of the UNGPs, many states have voluntarily chosen to establish "National Action Plans" on business and human rights, often resulting in new policy and legislation seeking to expand the corporate responsibility to respect human rights. Particularly in relation to HRDD, this has resulted in the emergence of various different variants of regulatory and mandatory HRDD regimes across jurisdictions with differing scope, orientation and conceptions of corporate responsibility and liability.

WHAT DOES THE FUTURE HOLD?

Building on the positive developments that were highlighted in the Working Group's stocktaking report, the UN Working Group used this year's Forum as an opportunity to engage stakeholders and discuss how to further implement the UNGPs over the next decade. In its "roadmap for the next decade", the Working Group sets out eight key action areas on which stakeholders should focus to ensure effective and full realisation of the UNGPs. The key action areas include, among others, ensuring coherence and alignment in standards development (action area 1), increased and more meaningful stakeholder engagement (action area 5), improved tracking of business impacts and performance (action area 7) and enhanced capacity-building and coordination to support faster and wider UNGP implementation (action area 8).

Each action area identifies relevant priority goals, as well as supporting actions that can be taken by stakeholders, including companies, to effectively achieve these goals. The Working Group recognised that considerable challenges remain when it comes to the coherent implementation of the UNGPs, resulting in governance gaps that give undesirable room for business-related human rights to occur across different sectors and regions. A particular emphasis was therefore placed on the general need for more coherent action, as well as the need for companies to build on existing efforts to respect human rights in order to ensure widespread implementation of the Principles.

Catherine Gilfedder and John Balouziyeh regularly advise clients on business and human rights issues and risk management through investment structuring and ESG-related measures. They act for a number of corporations, international organisations and NGOs in claims before a range of courts and in designing and implementing human rights policies. They wish to thank Joanna Khatib, Dentons junior pro bono coordinator, for her assistance in research and drafting Part III of this series.



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The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights

Jonathan Bonnitcha* and Robert McCorquodale**

Abstract

Due diligence is at the heart of the United Nations Guiding Principles on Business and Human Rights, which establish the main parameters internationally for considering corporate responsibility for human rights violations. However, the Guiding Principles invoke two different concepts of due diligence: the first is a process to manage business risks and the second is the standard of conduct required to discharge an obligation. In this article, we show that the Guiding Principles invoke these two concepts without explaining how they relate to each other. This confusion creates uncertainty about the extent of businesses' responsibility to respect human rights and uncertainty about how that responsibility relates to businesses' correlative responsibility to provide a remedy when they infringe human rights. On this basis, we propose and justify an interpretation of the Guiding Principles that clarifies the relationship between the two concepts of due diligence.

1 Introduction

In 2008, John Ruggie, the Special Representative of the UN Secretary-General, proposed a 'conceptual and policy framework' to address the relationship between business and human rights.[1] This Framework articulated businesses' responsibility to

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[1] Protect, Respect and Remedy: A Framework for Business and Human Rights, Report to the UN Human Rights Council (Framework Report), UN Doc. A/HRC/8/5, 7 April 2008, available at www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf.

respect human rights, which was said to be grounded in widely shared social expectations of appropriate business conduct.[2] The 2011 United Nations Guiding Principles on Business and Human Rights (Guiding Principles)[3] were an attempt 'to provide concrete and practical recommendations for … implementation [of the Framework]'.[4] The Guiding Principles were endorsed by the United Nations (UN) Human Rights Council[5] and have since been incorporated in a range of international regulatory instruments addressing corporate responsibility for human rights violations.[6]

Due diligence is at the heart of the Guiding Principles. As Ruggie explained, '[t]o discharge the [corporate] responsibility to respect [human rights] requires due diligence. This concept describes the steps a company must take to become aware of, prevent and address adverse human rights impacts'.[7] Five of the 31 Guiding Principles appear under the heading 'Human Rights Due Diligence', reinforcing the centrality of the concept in Ruggie's scheme.[8] Two other Guiding Principles (4 and 15) refer to due diligence, as does the Commentary to several other Guiding Principles.

The use of the term 'due diligence' in the Guiding Principles appears to be a clever and deliberate tactic, as it is familiar to business people, human rights lawyers and states, among whom Ruggie sought to build a consensus on his approach.[9] However, due diligence is normally understood to mean different things by human rights lawyers and by business people. This article argues that human rights lawyers understand 'due diligence' as a standard of conduct required to discharge an obligation,[10] whereas business people normally understand 'due diligence' as a process to manage business risks. The Guiding Principles invoke both understandings of the term at different points, without acknowledging that there are two quite different concepts

2 *Ibid.*, para. 54. On the logic of appropriateness, as opposed to the logic of consequences, see J. Ruggie, *Just Business: Multinational Corporations and Human Rights* (2013), at 106.

3 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.

4 Report to the UN Human Rights Council on 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (Report on Guiding Principles), UN Doc. A/HRC/17/31, 21 March 2011, para. 9.

5 UN Human Rights Council Resolution 17/4, UN Doc. A/HRC/RES/17/4, 16 June 2011.

6 E.g., Organisation for Economic Co-operation and Development (OECD), Guidelines for Multinational Enterprises, available at http://oecd.org/daf/inv/mne/48004323.pdf; International Finance Corporation, Sustainability Performance Standards, available at www.ifc.org/wps/wcm/connect/7540778049a792dcb87efaa8c6a8312a/SP_English_2012.pdf?MOD=AJPERES; Equator Principles on Project Finance Requirements, available at www.equator-principles.com/index.php/ep3, which all now incorporate human rights due diligence requirements based on the Guiding Principles, *supra* note 3.

7 Framework Report, *supra* note 1, para. 56.

8 Guiding Principles, *supra* note 3, at 17–21.

9 Ruggie, *supra* note 2, at 141–148.

10 In his first use of the term in the Framework Report, *supra* note 1, para. 25, Ruggie defines due diligence as a standard of conduct, referring to the definition of due diligence in *Black's Law Dictionary*: '[T]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or discharge an obligation.'

operating and without seeming to explain how the two concepts relate to one another in the context of business and human rights.

In this article, we advance three arguments. First, we show that the Guiding Principles invoke two very different understandings of due diligence without clarifying how they relate to each other. Second, we contend that the confusion arising from this conceptual slippage is problematic in practice, both because it creates uncertainty about the extent of businesses' responsibility to respect human rights and because it creates uncertainty about how that responsibility relates to businesses' correlative responsibility to provide a remedy in situations where they have infringed human rights. Third, we propose and justify an interpretation of the Guiding Principles that clarifies the relationship between the two concepts of due diligence. A key element of this proposal is the argument that due diligence, understood as a standard of conduct, is not a relevant concept in defining the extent of businesses' responsibility for their own infringements of human rights, it is only relevant in defining the extent of businesses' responsibility for infringements of human rights by third parties.[11] In order to advance these arguments, we begin by clarifying the two different concepts of due diligence and the way in which they relate to each other.

2 Due Diligence as a Business Process

In a business context, due diligence is normally understood to refer to a process of investigation conducted by a business to identify and manage commercial risks: '[the] main purpose [of due diligence] is to confirm facts, data and representations involved in a commercial transaction in order to determine the value, price and risk of such transactions, including the risk of future litigation.'[12] One example is in the area of mergers and acquisitions where 'the purpose of due diligence is … to enable a purchaser to find out all he [/she] reasonably can about what it is he [/she] is buying to help him decide whether to proceed'.[13] This might involve an analysis of assets, contracts, customers, employee agreements and benefits, environmental issues, facilities, plant and equipment, financial conditions, foreign operations and activities, legal factors, product issues, supplier issues and tax issues.[14] While due diligence processes often include legal risks within their scope, the risk of legal liability is simply another commercial consideration to be identified and managed in the context of a particular transaction. For example, in order to make an informed commercial decision about

[11] For the purposes of this article, we accept Ruggie's characterization of businesses' responsibility to respect human rights as a global norm grounded in 'social expectations', as opposed to a legal obligation under international law. Our aim is to clarify the extent and implications of this social norm, as articulated in the Framework Report, *supra* note 1, and the Guiding Principles, *supra* note 3.

[12] Martin-Ortega, 'Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last?', 31 *Netherlands Quarterly of Human Rights* (2013) 44, at 51.

[13] Evans, 'Due Diligence: The English Way', 6 *International Company and Commercial Law Review* (1995) 195, at 195.

[14] See Slaughter and May, *Due Diligence and Disclosure in Private Acquisitions and Disposals* (2007), at 8–10; Chu, 'Avoiding Surprises through Due Diligence', 6 *Business Law Today* (1996–1997) 8.

whether to proceed with an acquisition, the acquirer may investigate the potential for legal liability arising from past acts of corruption,[15] or past environmental contamination,[16] even if no legal claims against the target have proceeded to final judgment at the time of the transaction.

Business due diligence processes are not specific to mergers and acquisitions, as the term is used to refer to any set of processes undertaken by a business to identify and manage risks to the business – for example, the risks of partnering with a particular organization, employing particular individuals, making a loan or investing in a given sector.[17] The scope and extent of a due diligence process will vary according to the nature and context of the transaction.[18] In subsequent sections, we will also see that instituting processes of due diligence is a legal requirement under some regulatory schemes. Nevertheless, the basic understanding of due diligence in a business context is 'a procedural practice to assess risk in a company's own interest'.[19]

3 Due Diligence as a Standard of Conduct

The concept of due diligence, understood as a standard of conduct required to discharge an obligation, can be traced to Roman law.[20] Under Roman law, a person was liable for accidental harm caused to others if the harm resulted from the person's failure to meet the standard of conduct expected of a *diligens* (or *bonus*) *paterfamilias* – a phrase that translates roughly as a prudent head of a household.[21] This was an objective standard, which allowed a defendant's conduct to be assessed against an external standard of expected conduct, rather than in light of the defendant's own intentions and motivations. It was also fact specific, in that what could be expected of a prudent person was dependent on the circumstances of the case.[22] Elaborating in the 6th century AD, Justinian argued that an individual may be liable for harm where 'what should have been foreseen by a diligent man was not foreseen'.[23]

15 E.g., UK Bribery Act 2010, s. 23; US Foreign Corrupt Practices Act 1977, 15 USC § 78dd-1. For the latter, see US Department of Justice, Foreign Corrupt Practice Review, Opinion Procedure Release no. 008-02, issued to Halliburton, 13 June 2008.

16 E.g., UK Environmental Protection Act 1990, s. 43, part IIA.

17 There is considerable literature setting out the benefits of well-designed due diligence processes in facilitating good business decision making. See, e.g., L. Spedding, *The Due Diligence Handbook: Corporate Governance, Risk Management and Business Planning* (2009); Perry and Herd, 'Reducing M&A Risk through Improved Due Diligence', 32 *Strategy and Leadership* (2004) 12.

18 See Godfrey, Fox and Harris, 'Transactional Skills Training: All About Due Diligence', *Transactions: Tennessee Journal of Business Law* (Summer 2009) 357, at 358.

19 Martin-Ortega, *supra* note 12, at 51.

20 R. Zimmerman, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1996), at 1009.

21 C. Lobingier, *The Evolution of the Roman Law: From Before the Twelve Tables to the Corpus Juris* (2nd edn, 1923), at 105; cf. E.A. Whittuck, *Institutes of Roman by Gaius*, with a Translation and Commentary, translated by Edward Poste (4th edn, 1905), at 429.

22 Zimmerman, *supra* note 20, at 1008.

23 Justinian, *The Digest of Roman Law: Theft, Rapine, Damage and Insult*, translated by Colin Kolbert (1979), at 91.

8 Conclusions

One of the achievements of the Guiding Principles has been to shift the focus of debate about business and human rights away from controversies about *ex post* liability for corporate violations and towards the adoption of processes required to prevent adverse human rights impacts.[125] For this reason, the Guiding Principles emphasize the role of due diligence processes as the means by which businesses should discharge their responsibilities. However, we have argued that the Guiding Principles also invoke a different concept of due diligence – that of a standard of conduct required to discharge an obligation or responsibility. Business people are generally more familiar with the former concept, whereas human rights lawyers are more familiar with the latter. In the first sections of this article, we clarify these two different concepts of due diligence – and the relationship between them – and argue that the Guiding Principles use the two concepts in a way that is contradictory and unclear.

On this basis, we have offered a way to interpret the Guiding Principles coherently. In our view, a business enterprise's responsibility to respect human rights is best understood as comprising two elements: its responsibility for its own adverse human rights impacts and its responsibility for the human rights impacts of third parties with which it has business relationships. The former is a strict – or no fault – responsibility; the latter responsibility requires that the business satisfy a due diligence standard of conduct. In line with this distinction, a business enterprise has a correlative responsibility to provide a remedy for all its adverse human rights impacts, not only those adverse human rights impacts that result from a failure to act diligently. In contrast, a business enterprise is only required to take reasonable steps to prevent and mitigate the adverse human rights impacts of third parties. Due diligence processes are the means by which business enterprises should ensure that they discharge their responsibility to respect human rights – both as it relates to their own adverse human rights impacts and as it relates to third party impacts.

In addition to resolving a fundamental conceptual confusion within the Guiding Principles, this interpretation is practically relevant for several reasons. First, business enterprises seeking to implement the Guiding Principles need clarity about the standard of conduct that they are expected to meet in avoiding adverse human rights impacts. Second, victims of corporate human rights abuse and non-governmental organizations advocating on their behalf need clarity as to whether the remedial responsibilities recognized by the Guiding Principles apply only in cases in which human rights infringements are the result of a lack of diligence by a business enterprise. Third, it is relevant to the future of the Guiding Principles as a basis for national and international regulations and voluntary codes of conduct. The corporate responsibility to respect human rights could not be implemented in law, nor remedies made available, without clarification of the standard of conduct required to discharge this responsibility.

[125] See P. Simons and A. Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* (2014), at 315, who note that a governance gap still remains.

INFORMATION NOTE

UNITED NATIONS HUMAN RIGHTS SPECIAL PROCEDURES
SPECIAL RAPPORTEURS, INDEPENDENT EXPERTS & WORKING GROUPS

Summary of the report of the Working Group on Business and Human Rights to the General Assembly, October 2018 (A/73/163)

Corporate human rights due diligence: emerging practices, challenges and ways forward

Background and focus

The unanimous endorsement of the Guiding Principles on Business and Human Rights by the United Nations Human Rights Council in 2011 represented a watershed moment in efforts to tackle adverse impacts on people resulting from globalization and business activity in all sectors. They provided, for the first time, a globally recognized and authoritative framework for the respective duties and responsibilities of Governments and business enterprises to prevent and address such impacts.

The Guiding Principles clarify that all business enterprises have an independent responsibility to respect human rights, and that in order to do so they are required to exercise human rights due diligence to identify, prevent, mitigate and account for how they address impacts on human rights.

In its report to the General Assembly, the Working Group on Business and Human Rights* highlights key features of human rights due diligence and why it matters; gaps and challenges in current business and Government practice; emerging good practices; and how key stakeholders — States and the investment community, in particular — can contribute to the scaling-up of effective human rights due diligence.

What is corporate human rights due diligence?

Human rights due diligence is a way for enterprises to proactively manage potential and actual adverse human rights impacts with which they are involved. It involves four core components: (a) *Identifying and assessing actual or potential adverse human rights impacts* that the enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships; (b) *Integrating findings from impact assessments across relevant company processes* and taking appropriate action according to its involvement in the impact; (c) *Tracking the effectiveness of measures* and processes to address adverse human rights impacts in order to know if they are working; (d) *Communicating on how impacts are being addressed* and showing stakeholders – in particular affected stakeholders – that there are adequate policies and processes in place.

Enterprises should identify and assess risks by geographic context, sector and business relationships throughout own activities (both HQ and subsidiaries) and the value chain.

The prevention of adverse impacts on people is the main purpose of human rights due diligence. It concerns risks to people, not risks to business. It should be ongoing, as the risks to human rights may change over time; and be informed by meaningful stakeholder engagement, in particular with affected stakeholders, human rights defenders, trade unions and grassroots organizations. Risks to human rights defenders and other critical voices need to be considered.

Increasing uptake at policy level

Since 2011, corporate human rights due diligence has become a norm of expected conduct. It has been integrated in other policy frameworks for responsible business, such as the recent OECD Due Diligence Guidance for Responsible Business Conduct that provides concrete guidance for due diligence in practice. The human rights due diligence standard is increasingly reflected in government policy frameworks and legislation, including mandatory disclosure of risks of modern slavery in supply chains. In the 20 national action plans on business and human rights that have been issued to date, Governments have reaffirmed the expectation that business enterprises exercise human rights due diligence.

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A growing number of investors are starting to ask enterprises how they manage their risks to human rights. Also, among business lawyers there is a growing recognition that they should advise corporate clients to exercise human rights due diligence. In the world of sports, human rights due diligence processes have become an integral part of the selection process for mega sporting events.

Among business enterprises, a small but growing number of large corporations in different sectors have issued policy statements expressing their commitment to respect human rights in line with the Guiding Principles. Several such enterprises are developing practices that involve ongoing learning and innovation around the various components of human rights due diligence to prevent and address impacts across operations and relationships, including in supply chains.

Business practice: gaps and challenges

Assessments by benchmark and ranking initiatives highlight that the majority of companies do not demonstrate practices that meet the requirements set by the Guiding Principles. This may indicate that risks to workers and communities are not being managed adequately in spite of growing awareness and commitments. The Working Group notes gaps in current practice in corporate disclosure of risk assessments and human rights due diligence processes, as well as the "taking action" and "tracking of responses" components of human rights due diligence. Similarly, connections between human rights due diligence and the remediation of actual impacts are not being made in practice. Beyond a small group of "early adopters" – mostly large corporations based mainly, but not exclusively, in some Western markets – there is a general lack of knowledge and understanding of the corporate responsibility to respect human rights. Translating corporate policies into local contexts is a challenge across sectors.

Gaps in Government practice

A lack of government leadership in addressing governance gaps remains the biggest challenge. A fundamental issue is that host Governments are not fulfilling their duty to protect human rights, either failing to pass legislation that meets international human rights and labour standards, passing legislation that is inconsistent, or failing to enforce legislation that would protect workers and affected communities. While some home Governments have introduced due diligence or disclosure legislation, such efforts also remain patchy or uncoordinated. Governments are not providing enough guidance on human rights due diligence and support tailored to national business audiences, including small and medium-sized enterprises. A lack of policy coherence in government practice is part of the overall picture, and Governments are not leading by example in their own roles as economic actors.

Overall assessment

While a small group of early adopters are showing the way and good practices are building up, considerable efforts are still needed, as the majority of enterprises around the world remain either unaware of their responsibility, or unable or unwilling to implement human rights due diligence as required of them in order to meet their responsibility to respect human rights. The fundamental challenge going forward is to scale up the good practices that are emerging and address remaining gaps and challenges. That will require concerted efforts by all actors. Evidence of what constitute some of the strongest drivers for changing business practice suggests that governments and investors have a key role to play. For Governments in particular, addressing and closing market and governance failures is an inherent part of their duties.

Key message to business enterprises: just get started

In spite of slow progress overall, the good news is that effective due diligence can be done. Practice examples are building up, which can provide a starting point for a wider group of companies. This, together with the development of numerous tools and resources for business in recent years, means that enterprises can no longer cite a lack of knowledge as an excuse for not getting started.

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Companies should just get started. The first step is to identify specific actual or potential adverse impacts related to an enterprise's activities or its business relationships. Each potential impact identified will have to be assessed for its likelihood and severity. Every actual impact identified will need to be addressed. In terms of process, getting started requires leadership from the top to turn human rights policy commitments into reality.

Lessons from "early adopters" on how to get started, the journey of moving from policy to practice, and key milestones are compiled in a companion "practice paper" to the report. The companion paper also identifies good practice elements in relation to a number of aspects of human rights due diligence, including stakeholder engagement, transparency and meaningful reporting on human rights, integrating human rights in supply chain management beyond tier one, exercising leverage, addressing systemic issues and corporate engagement on the Sustainable Development Goals.

Recommendations to business

(a) If they have not yet implemented human rights due diligence, enterprises should **just get started**, including by **assessing their potential and actual impacts** on human rights, assessing where existing processes fall short and developing an action plan for putting in place **human rights due diligence procedures** for their own activities and value chains, in line with the Guiding Principles, including by learning from good practices emerging in their own industry and in other sectors.

(b) If they have already adopted human rights due diligence policies and processes based on the Guiding Principles, enterprises should continue on the journey and seek to continuously **enhance approaches by engaging with affected stakeholders**, civil society organizations, human rights defenders and trade unions and by being transparent about the management of potential and actual impacts.

(c) All enterprises should consider **collective leverage approaches**, especially when faced with systemic human rights issues.

Key message to the investment community: leverage can and should be used

Increasingly, investors are asking questions to companies about human rights policies and human rights due diligence. This practice has moved beyond the niche realm of socially responsible investors to become part of a wider trend of integrating environmental, social and governance considerations into mainstream investment decision-making. There is an increasing recognition of the responsibility of investors and financial institutions, and that proper human rights due diligence improves risk management overall and is good for both people and investments.

Recommendations to the investment community

Entities in the investment community should implement human rights due diligence as part of their own responsibility under the Guiding Principles, more systematically **require effective human rights due diligence by the companies they invest in** and coordinate with other organizations and platforms to ensure alignment and meaningful engagement with companies.

Key message to Governments: use all available regulatory and policy levers

States have a duty to protect people against business-related human rights impacts. They have a range of levers that they can and should use, such as: policy tools and frameworks, including national action plans in order to enhance policy coherence overall; legislation, regulation and adjudication; economic incentives in "economic diplomacy" and public procurement; lead by example in their role as economic actors; provision of guidance (including for SMEs); and promotion of multi-stakeholder dialogue.

Recent developments show that action is possible in all these areas, and that government leadership from the top is a critical factor.

Recommendations to Governments

The Working Group recommends that States **use all available levers** to address market failures and governance gaps to advance corporate human rights due diligence as part of standard business practice, ensuring alignment with the Guiding Principles, including by:

(a) Using **legislation** to create incentives to exercise due diligence, including through mandatory requirements, while taking into account elements to drive effective implementation by businesses and promote level playing fields;

(b) Using **their role as economic actors** to advance human rights due diligence, including by integrating human rights due diligence into the operations of State-owned enterprises and agencies that promote trade and investment, and into public procurement;

(c) Promoting greater **policy coherence** within Governments, including by adopting or strengthening the implementation of national action plans on business and human rights;

(d) Providing **guidance to business** enterprises, including small and medium-sized enterprises, on human rights due diligence tailored to local contexts;

(e) Facilitating **multi-stakeholder platforms** to promote dialogue on business-related risks to human rights, ways to address them and to strengthen monitoring and accountability, including in a sector

Links

Full report (available in Arabic, Chinese, English, French, Spanish and Russian):
http://ap.ohchr.org/documents/dpage_e.aspx?si=A/73/163

Companion paper I – *Corporate human rights due diligence: Background note and elaborating on key aspects:* www.ohchr.org/Documents/Issues/Business/Session18/CompanionNote1DiligenceReport.pdf

Companion paper II – *Corporate human rights due diligence – Getting started, emerging practices, tools and resources*:
www.ohchr.org/Documents/Issues/Business/Session18/CompanionNote2DiligenceReport.pdf

Working Group's thematic page on human rights due diligence:
www.ohchr.org/EN/Issues/Business/Pages/CorporateHRDueDiligence.aspx

2018 UN Forum on Business and Human Rights: www.ohchr.org/2018ForumBHR

UN Guiding Principles on Business and Human Rights:
www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

The Corporate Responsibility to Respect: An Interpretive Guide (Office of the UN High Commissioner for Human Rights):
www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf

Endnote

**) The Working Group on the issue of human rights and transnational corporations and other business enterprises (known as the Working Group on Business and Human Rights) is mandated by the Human Rights Council to promote worldwide dissemination and implementation of the Guiding Principles on Business and Human Rights (resolutions 17/4, 26/22, and 35/7). The Working Group is composed of five independent experts, of balanced geographical representation, and it is part of what is known as the Special Procedures of the Human Rights Council. Special Procedures mandate-holders are independent human rights experts appointed by the Human Rights Council to address*

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either specific country situations or thematic issues in all parts of the world. The experts are not UN staff and are independent from any government or organization. They serve in their individual capacity and do not receive a salary for their work.

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

John Gerard Ruggie[*] and John F. Sherman, III[**]

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 Association[3]

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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.

 doi:10.1093/ejil/chx047

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/cri/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.

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Corporate War Criminals and the International Criminal Court: Blood and Profits in the Democratic Republic of Congo

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Corporate War Criminals and the International Criminal Court: Blood and Profits in the Democratic Republic of Congo

by Julia Graff

HUMAN RIGHTS ORGANIZATIONS HAVE long criticized corporations operating in war-torn countries for maximizing profits at the expense of human rights. Shareholders' primary concern with the bottom line often leads corporate decision-makers to purchase raw materials in developing countries at the cheapest price, regardless of the human rights credentials of their suppliers. Some corporations, increasingly concerned by allegations of complicity in human rights abuses, are implementing stronger monitoring devices to ensure that they comply with international standards.

Other companies intentionally engage in illegal business ventures with armed groups in places where weak judiciaries are unlikely to prosecute much-needed investors for corporate malfeasance. In countries experiencing ongoing civil conflict, the systematic elimination of independent judges, prosecutors, and witnesses willing to testify reduces the likelihood of prosecution and weakens the rule of law. This article explores the possibility of holding corporate officers and managers criminally responsible before the International Criminal Court (ICC) for grave human rights violations committed by their agents, employees, or business partners, using the Democratic Republic of Congo (DRC) as a test case.

Background

NEARLY TWO YEARS AFTER THE ROME STATUTE entered into force, the ICC is now almost fully operational. The Court has jurisdiction over war crimes, crimes against humanity, and genocide committed after July 1, 2002. The Office of the Prosecutor (OTP) may receive referrals of cases from the UN Security Council, states, individuals, and non-governmental organizations, but the OTP may also act on its own initiative to investigate and prosecute cases, with authorization from the Pre-Trial Chambers. The ICC may try the nationals of states parties as well as the nationals of non-ratifying states if they commit certain crimes within the territory of a state party. Under the principle of complementarity embodied in the Statute, the Court only has jurisdiction when the relevant states are unable or unwilling to prosecute. Chief Prosecutor Luis Moreno Ocampo made clear in his September 2003 policy paper that the OTP intends to focus the Court's limited resources on those leaders who bear the most responsibility for crimes, "such as the leaders of the state or organisation allegedly responsible for those crimes."

The ICC can prosecute heads of state, political and military leaders, and the leaders of irregular warring factions, yet corporations are not subject to criminal liability before the ICC. Some delegations argued during the drafting stages of the Rome Statute that the inclusion of corporations within the Court's jurisdiction would facilitate victims' compensation. Others cautioned that the evidentiary challenges of prosecuting legal entities, and many national legal systems' rejection of the criminal liability of corporations, made the exclusion of corporations from ICC jurisdiction more appropriate. Following the philosophy of the Nuremberg Tribunal that "international crimes are committed by men, not by abstract entities," article 25(1) of the Rome Statute ulimately limited the Court's jurisdiction to "natural persons." The OTP may prosecute corporate officers, managers, and employees, but not the corporate entity itself.

From Nuremberg to the *ad hoc* tribunals for the former Yugoslavia and Rwanda, international courts have found individual corporate officers, managers, and employees criminally responsible for war crimes, crimes against humanity, and genocide. Moreno Ocampo has recently made several statements indicating the OTP's interest in investigating the financial links to crimes committed in the Democratic Republic of Congo (DRC). In the OTP policy paper, Moreno Ocampo stated that "financial transactions … for the purchase of arms used in murder, may well provide evidence proving the commission of such atrocities."

At the September 2003 Assembly of States Parties, Moreno Ocampo announced that his office is closely following the situation in the Ituri district of the northeastern DRC, where massacres, rape, and forcible displacement routinely occur. While it is not certain that the first cases before the Court will be from the DRC, the chief prosecutor revealed that he is prepared to seek authorization from the Pre-Trial Chambers to begin an investigation of those responsible for the crimes committed there. He emphasized the possibility that those who direct operations in the extractive industries "may also be the authors of crimes, *even if they are based in other countries*" (emphasis added). Such statements, along with the broad prosecutorial discretion granted to the OTP, lead some to wonder how far the Court will go in pursuing military, political, and even corporate leaders.

The Test Case: Civil War and the Extractive Industries in DRC

MORE THAN THREE MILLION CIVILIANS have died in the DRC since 1998, making it the most devastating conflict to civilians since World War II. At least 5,000 civilians have died in the Ituri district alone since July 1, 2002, the effective date of the Court's temporal jurisdiction. Before the upsurge in violence in May 2003, the United Nations estimated that the violence in Ituri had internally displaced approximately 500,000 people, or ten percent of the area's population. On January 16, 2004, a massacre in Ituri left an estimated 100 dead, prompting the chief prosecutor to announce a few days later at the International Conference Against Genocide that he will select two cases from Ituri by mid-2004, and hopes to begin investigations by October. If this timeline proceeds as planned, trials could begin in 2005.

The root of the current conflict dates back to May 1997, when the Alliance of Democratic Forces for the Liberation of Congo, led by Laurent Kabila, overthrew the dictatorship of Mobutu Sese Seko. Rwanda and Uganda supported Kabila's uprising, but soon became concerned that his regime would not expel the Rwandan Hutu extremists hiding in eastern DRC after the Rwandan genocide. Uganda and Rwanda invaded the country in 1998 to destabilize the

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Kabila government, ostensibly to prevent a Hutu invasion of Rwanda and to protect ethnic Tutsis in the DRC. In the process, however, they heightened regional and tribal tensions, supported Congolese rebels, and strategically positioned themselves to exploit the DRC's coveted mineral resources. Angola, Zimbabwe, and Namibia sent troops to back Kabila. He managed to retain power until his assassination in January 2001, when his son Joseph was appointed to succeed him.

As the war continued, the DRC government maintained control of only the western half of the country, leaving the eastern DRC an occupied territory under the primary control of Uganda and its local proxies from 1998 to 2003. During that time, Uganda dramatically increased its exports of diamonds, gold, and coltan, a rare mineral used in cellular phones and laptop computers, from the rebel-held Congolese territory. The Ugandan army helped arm and train the approximately ten armed insurgent groups that currently exist in Ituri, instigating ethnic feuds between the Hema and Lendu militias to gain access to the region's vast mineral resources.

Under mounting international pressure, Rwanda and Uganda agreed in July and August 2002, respectively, to withdraw their troops from the eastern DRC. By mid-2003, most foreign troops had officially pulled out of the region, but the Ugandan Peoples' Defense Forces (UPDF) trained local paramilitary forces to protect the economic interests of the UPDF officers after their departure. The Rwandan Patriotic Army left in place certain officers from battalions specializing in mining activities to perform the same functions as apparent civilians. While their withdrawal was a positive development for the resolution of the conflict, the exiting powers left in their wake an intricate web of actors in a self-financing war economy.

The UN Panel of Experts for the DRC

In June 2000, the Security Council established a Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of Congo (Panel) to investigate the extent to which investment in the extractive industries fueled the war. In its October 2002 report, the Panel alleged that 85 companies were involved in business activities in the DRC that breache the Guidelines for Multinational Enterprises of the Organization for Economic Cooperation and Development (OECD). American, European, and South African corporations figure high on the list. The Panel also named specific Congolese and international businesspeople as well as high-ranking military officers and political officials from Uganda, the DRC, Zimbabwe, and Rwanda who were connected to illegal mining activities and arms trafficking. The violations include "theft, embezzlement, diversion of public funds, undervaluation of goods, smuggling, false invoicing, non-payment of taxes, kickbacks to public officials and bribery."

The Panel's 2002 report provoked strong reaction from the companies and countries it alleged were helping to perpetuate the war in the DRC. Western governments and business lobbies pressured the UN to excise a controversial section of the Panel's subsequent 2003 report that detailed the continued participation of military officials and businesses in the illegal export of minerals. The UN complied, voicing concerns that the information could endanger the DRC's transitional government. The 2003 report also states that cases against 48 of the companies have been resolved, while the rest of the cases are either pending or require further monitoring.

The 2002 report describes in great detail the way in which "elite networks" of political and military leaders, as well as businessmen and certain rebel leaders, cooperate to protect and exploit resources and generate revenue in areas controlled by the DRC government, Rwanda, and Uganda. By controlling the various armies and local security forces and carrying out select acts of violence, these elite networks monopolize the production, commerce, and financing involved in extracting diamonds, gold, copper, cobalt, and coltan. Rebel administrations in the occupied territories serve as fronts for these international operations, generating public revenue which is then diverted into network coffers.

> "On January 16, 2004, a massacre in Ituri left an estimated 100 dead, prompting the chief prosecutor to announce a few days later at the International Conference Against Genocide that he will select two cases from Ituri by mid-2004, and hopes to begin investigations by October."

The elite network operating in the government-controlled area of the DRC is comprised of Congolese and Zimbabwean government officials and private businesspeople. This network transfers publicly owned mineral assets by way of secret contracts to joint ventures controlled by private companies, amounting to a multi-billion dollar corporate theft of the DRC's public assets. Officials in the Congolese government grant mining licenses and export permits to the companies in exchange for personal gain. The Congolese government then uses revenue from the sale of diamonds and other resources to purchase arms for the Congolese Armed Forces.

The Congo Desk of the Rwandan Patriotic Army (RPA) centrally manages the elite network in the Rwandan-controlled area of the DRC, linking the commercial and military activities of the RPA. A Panel source claims that income to the Congo Desk accounted for 80% of the RPA's revenues in 1999, thus facilitating Rwanda's continued commercial presence in the DRC. The RPA controls most of the coltan mining in the eastern DRC, does not pay taxes on the extracted mineral, and uses forced labor, reported-

ly including prisoners brought in from Rwanda who work as indentured servants. In the Ugandan-controlled area, the elite network is decentralized and loosely hierarchical. The Panel reported that the network generates revenue "from the export of primary materials, from controlling the import of consumables, [and] from theft and tax fraud." The UPDF have trained local militias, and the elite network has fostered ethnic tension by alternately favoring Hema and Lendu businessmen and politicians, leading to increased violence in the region.

Corporations could thus be implicated in, and found criminally liable for, a number of violations of international criminal law committed in the DRC. Such violations include subjecting local populations, including children, to forced labor in the extraction of natural resources; the torture, rape, and murder of thousands of civilians during military operations to secure mineral-rich land; and the destruction of agricultural infrastructure to force peasant farmers to participate in extractive work, resulting in reduced food supplies and slave-like conditions in the coltan mines.

Prosecution of Corporate Criminals Before the ICC

To the extent that corporate officers and managers play a role at all in the atrocities, they are more likely to remain behind the scenes, issuing secret orders, turning a blind eye to "efficient" business practices, or supplying the means to commit the crime. Under the Rome Statute, direct participation in the crime is not necessary to establish the criminal liability of corporate officers and managers. The OTP may invoke theories of "intermediary participation," such as command responsibility and accomplice liability, to hold them accountable for acts committed by others.

> "Under the Rome Statute, direct participation in the crime is not necessary to establish the criminal liability of corporate officers and managers."

Command or Superior Responsibility

Under the theory of command responsibility, an official commander, or one effectively acting as a commander, may be individually criminally responsible for failing to supervise properly and control the conduct of others acting under his or her effective authority and control. Articles 6(3) and 7(3) of the Statutes for the International Criminal Tribunals for Rwanda and the former Yugoslavia, respectively, provide for command responsibility, but they do not differentiate between military commanders and civilian superiors. In a controversial departure from that approach, the US delegation to Rome proposed distinct "state-of-mind" requirements for the liability of military commanders on the one hand and civilian superiors on the other. Examples of people who might fall under the category of civilian superiors are government officials, corporate officers and managers, and even teachers and leaders of social groups and churches. After much debate and compromise, the delegates adopted this distinction in article 28 of the Rome Statute.

Article 28(b) governs civilian superiors and imposes a much more rigorous test than does 28(a), which pertains to military commanders. A military commander may be criminally liable if he or she either knew or *should have known* of a subordinate's criminal activities and failed to take "all necessary and reasonable measures within his or her power to prevent or repress their commission" or to inform the competent authorities. In contrast, for the Court to hold civilian authorities criminally liable for their subordinates' conduct, article 28(b)(i) provides that the prosecutor must demonstrate that the superior "either knew, or *consciously disregarded* information which clearly indicated the subordinates were committing or about to commit" a crime (emphasis added). This more rigid state-of-mind requirement, akin to willful blindness, may be difficult to meet in most cases.

The prosecution must also establish a superior-subordinate relationship based on either *de jure* control, emanating from an official delegation of power, or *de facto* control. By definition, such a relationship does not exist among equals. It seems unlikely, therefore, that the Court will deem a corporate officer or manager the superior of his or her rebel trading partners or of fellow corporate actors with whom he or she designs and implements criminal plans. A superior-subordinate relationship may be established, however, if the clients are acting at the behest of the corporation when they commit the crime (e.g., while providing security for mining facilities or when carrying out orders to assassinate a company's union members). The prosecutor could establish such a relationship by showing that the subordinates who committed the crime were under the accused's actual and effective control when they acted.

It is not unprecedented for an international tribunal to find a corporate manager liable on the theory of superior responsibility. In *Prosecutor v. Musema*, the International Criminal Tribunal for Rwanda convicted the director of a tea factory and sentenced him to life imprisonment for acts of genocide and crimes against humanity that his employees perpetrated against Tutsi refugees. The Trial Chamber found that Musema exercised effective control over the employees of the tea factory, but it was not satisfied that he exercised such control over other groups of perpetrators, such as the *interahamwe* paramilitary forces and plantation workers. Thus, the standard for effective authority and control is high—it is not merely one's capacity to influence local armed groups that triggers superior responsibility, but rather actual and effective subordination stemming from an exercise of that influence. This will be easier to prove when a corporation directly employs the perpetrators.

Aiding and Abetting, or Accomplice Liability

Article 25 of the Rome Statute provides a less rigorous means of holding corporate war criminals accountable for acts committed by others. Unlike superior responsibility, aiding and abetting liability requires that the accused act knowingly. Because it does not require a superior-subordinate relationship, article 25 might be an appropriate mechanism for holding corporate actors accountable for transactions with suppliers whom they know procure raw materials by means of grave human rights abuses.

Section 3(a) of article 25 provides that a person can commit a crime "whether as an individual, jointly with another or through another person," and section 3(b) covers one who "orders, solicits, or induces" the commission or attempted commission of a crime. Section 3(c) establishes that a person will be individually responsible for a crime if that person "aids, abets, or otherwise assists in its commission or attempted commission, *including providing the means for its commission*" (emphasis added). A person could also be criminally liable under section 3(d) if he or she "in any other way contributes" to a crime or an attempted crime by a group of persons acting with a common purpose. That section further provides that such contributions can be made either with the aim of furthering the group's criminal activity or purpose, or *simply with the knowledge that the group intends to commit the crime*.

The Rome Statute does not specify what constitutes the provision of means to commit a crime and the forms of contribution for facilitating the commission of a crime required for aiding and abetting liability. In the *Zyklon B Case* (1946), the British Military Court convicted German industrialist Bruno Tesch, the owner of a company that supplied poison gas and corresponding equipment, for selling Zyklon B gas to the Nazi S.S., knowing that the S.S. was using it to kill allied nationals in concentration camps. By analogy, if a company operating in the DRC trades weapons for diamonds, the ICC might deem such weapons the means for the commission of a crime. However, if a corporation purchases diamonds from a rebel group or a state whose military uses the revenue to purchase arms for use against civilians, will the purchase money itself fall within the definition of "means of commission" or "contribution" to the crime? Or would the corporation have to pay more than fair market value for the commodities it purchases from known human rights violators for such payment to constitute a contribution? The Court will have to grapple with these and other complicated questions in 2004 as it begins to develop its own jurisprudence based on the cases it accepts from the DRC or other countries.

Conclusions and Recommendations

The intricate and extensively documented web of corporate involvement in the DRC's brutal conflict would make it an interesting test case for holding corporate officers and mangers accountable for the role they play in exacerbating civil conflicts. The chief prosecutor has been outspoken in his interest in investigating the financial transactions behind the war crimes in the DRC. The OTP already has a considerable amount of investigatory work from the UN Panel of Experts at its disposal if it decides to pursue leading international businesspeople in the Antwerp and New York diamond markets or high-tech companies that rely on Congolese cobalt. The imprisonment at The Hague of corporate executives would further the Court's goal of deterrence and motivate corporations to monitor more strictly their business activities in war-torn countries.

However, practical limitations might result in few, if any, prosecutions of corporate officers. States and corporations may simply refuse to cooperate with the OTP's requests for information or extradition of corporate officers. Moreover, the OTP is acutely aware that its work will be under the microscope of the international community and that the Court's legitimacy rests on avoiding charges of politicization. Thus, the OTP may decide to tread lightly on what surely will be controversial grounds and shy away from high-level prosecutions of corporate officers until the Court establishes a reputation of fairness and neutrality.

Given the high legal hurdles imposed by article 25(3) and, to a lesser extent, article 28(b), it might be difficult to successfully prosecute individuals on the grounds of corporate complicity or superior responsibility in the DRC and elsewhere in future cases. If the OTP moves forward with an investigation in the DRC, the Security Council should make available all of the information the UN Panel uncovered in its investigation of corporate involvement in the war. The cooperation of the international community, particularly the intelligence services and the attorneys general of African as well as European and American governments, will be essential in allowing the prosecutor to investigate the financial transactions that fuel the war. The referral of the DRC case by an African country would further strengthen the Court's legitimacy among developing countries. If the OTP begins investigating the DRC, human rights advocates in Africa and in countries with commercial links to the country should pressure their governments to cooperate fully with the investigation, as it will set an important precedent for the relationship between the Court and the international community.

In the DRC and elsewhere, NGOs and human rights advocates who seek to hold corporations accountable for their contributions to serious human rights abuses should focus their investigative work on the issues presented here and forward relevant information to the Office of the Prosecutor. The most critical information is that which helps establish the existence of a superior-subordinate relationship, the state of mind of corporate officers and managers, and the aiding and abetting of crimes. Activists from countries whose nationals and corporations the UN Panel has identified as having violated international human rights and humanitarian law principles while in the DRC should pressure those companies to adhere to the OECD Guidelines, while pressuring the governments where those companies are registered to investigate and take appropriate action against them. Activists in the United States should pressure their congressional representatives to strike the provisions of the American Servicemembers Protection Act of 2002 that prohibits the US government from cooperating with ICC investigations.

Finally, those countries concerned that the Court might exercise jurisdiction over their nationals doing business in the DRC should conduct thorough, transparent investigations and, if necessary, prosecute their own corporate officers. In this way, the principle of complementarity will serve to keep cases off the ICC's docket and ensure that corporate officers are brought to justice in their own countries. ***HRB***

Articles

Corporate Moral Agency and the Responsibility to Respect Human Rights in the UN Guiding Principles: Do Corporations Have Moral Rights?

Patricia H WERHANE*

Abstract

In 2011 the United Nations (UN) published the 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework' (Guiding Principles). The Guiding Principles specify that for-profit corporations have responsibilities to respect human rights. Do these responsibilities entail that corporations, too, have basic rights? The contention that corporations are moral persons is problematic because it confers moral status to an organization similar to that conferred to a human agent. I shall argue that corporations are not moral persons. But as collective bodies created, operated, and perpetuated by individual human moral agents, one can ascribe to corporations secondary moral agency as organizations. This ascription, I conclude, makes sense of the normative business responsibilities outlined in the Guiding Principles without committing one to the view that corporations are full moral persons.

Keywords: corporate moral agency, corporate moral rights, human rights

I. Introduction: Corporate Human Rights Obligations as a Double-Edged Sword

In 2011 the United Nations, under the guidance of Special Representative of the Secretary-General for Business and Human Rights, John G. Ruggie, published the 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework' (Guiding Principles). These are a set of principles spelling out the respective duties and responsibilities of governments and businesses to 'respect, protect and [when necessary] remedy violations of human rights'. These are voluntary guidelines with no legal enforcement mechanisms, and they apply to all nation-states and to all business enterprises, including corporations.

This article argues that if, as the Guiding Principles specify, for-profit corporations have responsibilities to respect human rights, then those whose rights are to be respected by corporations have reciprocal obligations to respect corporate rights. This is because,

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as I shall argue, human rights entail reciprocal responsibilities. However, this conclusion leads us to a set of difficult issues. Does it make sense to say that corporations have moral rights? Ordinarily, the notion of a human right concerns either relationships between individual moral agents (usually specified as adult sane individuals), or legal entitlements guaranteed by law and/or by nation-states, or in some cases, by all of the above. But corporations are not literally human beings. So the reciprocal relationships between rights bearers, if there are such, would entail (i) ascribing to corporations the same qualities of moral agency that we ascribe to adult human beings or (ii) contending that such obligations do not apply to corporations vis-à-vis individual human beings, thus would not be *moral* obligations but rather social expectations, or (iii) that such obligations, if they are social expectations rather than moral obligations, as the Guiding Principles seem sometimes to suggest, would have to be guaranteed by law and nation-states. But, as the Guiding Principles state, corporate responsibilities to respect human rights are voluntary—that is, not necessarily enforced as legal demands on business. In other words, (iii) does not apply. This voluntarism of responsibilities, then, implies that they are merely social expectations (ii), or normative claims (i). If it is the latter, then this implies that corporations, like individuals, are moral agents who can be responsible and, as such, subjects of rights claims. The contention that corporations are moral persons is problematic because it confers moral status on an organization similar to that conferred on a human agent. On the one hand, this status may give corporations a great deal in the way of rights, rights unequal to and greater than those of ordinary moral individuals. On the other hand, this moral status may merely be applicable to the individuals who are constituents of, or agents for, an organization. If so, then we would merely aggregate or bundle these moral rights of individuals and for convenience call them 'corporate rights'. But that conclusion is problematic as well, because then one cannot hold a corporation as an institution morally responsible, but merely the individuals who are agents for, and constituents of, that organization.

Given this set of thorny issues, I shall present a way out of these dilemmas. I shall argue that corporations are not moral persons or individual moral agents. But as collective bodies created, operated, and perpetuated by individual human moral agents, one can ascribe to corporations *secondary* moral agency as organizations. This ascription, I will conclude, makes sense of the normative business responsibilities outlined in the Guiding Principles without committing one to the view that corporations are full moral persons.[1]

In what follows, Section II sets out the question of corporate obligations to respect human rights. Section III traces the origins of the notion of corporate personhood. Section IV outlines an account of basic human rights, which, it turns out, are importantly and primarily *normative,* moral rights. Sections V and VI address the issues of corporate moral agency and corporate moral rights. Section VII addresses the question of corporate moral rights. The article concludes with addressing the implications of the argument for the propositions of the Guiding Principles.

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[1] In this article I shall only focus on for-profit corporations, and I shall use the terms 'corporation' and 'organization' interchangeably. I recognize that not all organizations are corporations, and that there may be different criteria for moral agency in various organizations. That is a topic for another article.

II. Do Corporations Have Responsibilities to Respect Human Rights?

The Guiding Principles state:

> These Guiding Principles are grounded in the recognition of
> (a) States' existing obligations to respect, protect, and fulfil human rights and fundamental freedoms;
> (b) The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights….
>
> Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved … The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.[2]

Note the normative language of the Guiding Principles: 'Business enterprises *should* …' Although the next line states, 'The responsibility to respect human rights is a global standard of expected conduct …', thus outlining societal expectations, the terms 'should', 'responsibility', and later, 'obligations' are normative and imply *moral* responsibilities on the part of businesses as well as what society expects. Moreover, these responsibilities involve more than merely respect. It extends to 'mitigat [ing] adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts'.[3] As Wettstein points out,[4] these obligations parallel Henry Shue's earlier claim that rights entail three kinds of duties: avoid deprivation of human rights ('avoid infringing on the human rights of others'), protect human rights ('address adverse human rights impacts …'), and aid those who have suffered from 'adverse human rights impacts'.[5]

One justification for these principles, as Tom Donaldson once argued based on social contract theory, is that because corporations are allowed by communities to do business, they have reciprocal obligations to those communities.[6] The Guiding Principles make a similar argument: 'The role of business enterprises *as specialized organs of society* performing specialized functions, required to comply with all applicable laws and to respect human rights'.[7]

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[2] Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', A/HRC/17/31 (21 March 2011) 1, 13.

[3] Ibid, 14.

[4] Florian Wettstein, 'CSR and the Debate on Business and Human Rights: Bridging the Great Divide' (2012) 22 *Business Ethics Quarterly* 739.

[5] Ibid; Henry Shue, *Basic Rights* (Princeton: Princeton University Press, 1980).

[6] Tom Donaldson, *Corporations and Morality* (Englewood Cliffs NJ: Prentice-Hall, 1982).

[7] Human Rights Council, note 2, 14 (my italics).