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Human Rights Due Diligence and the Root Causes of Harm in Business Operation

A Textual and Contextual Analysis of the Guiding Principles on Business and Human Rights

*Radu Mares**

Abstract

Following John Ruggie's UN mandate (2005-2011) the notion of human rights due diligence (HRDD) has become widely used by policymakers, corporations, NGOs and professionals. The question is whether this HRDD concept, as developed in the UN Guiding Principles (GPs), adequately addresses the deeper causes of human rights infringements in business operations. This article provides a textual and contextual analysis of the GPs and related documents with a focus on the concepts of mitigation and root causes. The GPs contain provisions that open the door for HRDD to be interpreted for a less demanding result. There are also drafting imperfections. The GPs refer repeatedly to mitigation of impacts which introduces redundancy and ambiguity in an instrument prized for its clarity and simplicity. This analysis of the GPs addresses concerns that the GPs propose an overly process-oriented and risk-management approach that leaves business too much flexibility and discretion. A closer look reveals that mitigation in the GPs entails multiple meanings, functions and organizational contexts. A surprisingly multifaceted concept is placed at the center of HRDD. To realize its human rights protection potential, the notion of HRDD must impress with utmost clarity that HRDD cannot be merely about reducing abuses and applying band-aids on symptoms, but should aim for not less than elimination of infringements of human rights from a company's operations and should address the underlying, deeper causes of abuses. Clarifying mitigation will ensure the internal consistency of the GPs and present HRDD as a rightholder-centered risk management approach suited to the human rights context.

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I. Introduction

This article analyzes one of the key concepts the United Nations Guiding Principles for Business and Human Rights¹ (GPs) put forward: human rights due diligence (HRDD). HRDD is a familiar concept to business executives, corporate lawyers and international law specialists. The heritage of the notion is clearly traceable in international law,² in international human rights law,³ in national law (e.g., compliance with legal obligations by undertaking due diligence steps)⁴ and in business risk management (e.g., as a method to identify and mitigate risks to companies and investors).⁵ In this light, U.N. Special Representative John Ruggie's choice to model the social responsibilities of companies around this HRDD concept appears as an inspired one. Due diligence has entered the day-to-day language of business and human rights (BHR), and corporate social responsibility (CSR) more broadly, shaping the way companies, civil society groups, policymakers, and professionals

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- 1 John Ruggie (U.N. Special Representative of the Secretary General), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter *Guiding Principles*].
 - 2 Treaty on Claims, Fisheries, Navigation of the St. Lawrence, etc., American Lumber on the River St. John, Boundary, Gr. Brit-U.S., art. VI, May 8, 1871, 17 Stat. 863 (commonly referred to as the Alabama Arbitration case) (indicating that a neutral State is bound to "use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace ..."). See generally JOANNA KULESZA, *DUE DILIGENCE IN INTERNATIONAL LAW* (Brill 2016).
 - 3 Velásquez-Rodríguez v. Honduras, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 172 (1988) (stating that "[a]n illegal act which violates human rights and which is initially not directly imputable to a State . . . can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.").
 - 4 Securities Act of 1933, § 11, 15 U.S.C. § 77k (1933) (providing that experts who conducted "reasonable investigation" have a due diligence defense against buyers of securities that suffered damages from a faulty registration statement). See also William K. Sjostrom Jr., *The Due Diligence Defense Under Section 11 of the Securities Act of 1933*, 44 BRANDEIS L.J. 549 (2006).
 - 5 Transactional due diligence covers issues such as "business development, regional analysis, legal, tax and accounting matters, the environment, health and safety (EHS), human resources, security, and procurement." MARGARET WACHENFELD ET AL., *STATE OF PLAY: THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS IN BUSINESS RELATIONSHIPS* 41, 54 (2012), <http://www.ihrb.org/pdf/state-of-play/State-of-Play-Full-Report.pdf>.

think and talk about corporate responsibilities regarding human rights. But as it is said, familiarity should not breed content. While the overwhelming amount of work regarding HRDD currently goes towards specification in distinct CSR contexts—through new standards and tools,⁶ guidance,⁷ adaptations to diverse industrial⁸ and issue contexts⁹—and also in incorporating this concept in various bodies of regulation,¹⁰ little attention goes to critically examining the soundness of HRDD as outlined within the GPs.

On the one hand, HRDD—as referenced and reinforced in other main CSR instruments¹¹—is a useful reference point to stakeholders challenging business¹² around basic prudential steps thus enabling both collaborative work and criticism (e.g. failure to conduct assessments, to report, to take elementary corrective measures). On the other hand, the question is whether the GPs add limited value and might, overall, set the bar too low: a HRDD that

6 *Human Rights Compliance Assessment*, DANISH INST. FOR HUMAN RIGHTS, <https://hrca2.humanrightsbusiness.org/>. See also *Human Rights Due Diligence Info Portal*, GLOBAL COMPACT NETWORK GERMANY, <http://mr-sorgfalt.de/en/> (launched in 2016 by the Global Compact Network Germany and twentyfifty).

7 See Shift & Mazars LLP, *UNGUIDING PRINCIPLES REPORTING FRAMEWORK* (2015), http://www.ungpreporting.org/wp-content/uploads/2015/03/UNGReportingFramework_2017.pdf.

8 See European Commission, *European Commission Sector Guides on Implementing the UN Guiding Principles on Business and Human Rights* (2017), https://ec.europa.eu/anti-trafficking/publications/european-commission-sector-guides-implementing-un-guiding-principles-business-and-hum-0_en (covering three sectors: oil and gas, information and communication technology and employment and recruitment agencies).

9 GWENDOLYN REMMERT ET AL., *RESPECTING HUMAN RIGHTS - AN INTRODUCTORY GUIDE FOR BUSINESS* 28–53 (Global Compact Network, twentyfifty Ltd. & German Institute for Human Rights 2013) (going right by right to exemplify expected business conduct).

10 French Parliament has been discussing since 2013 a legislative proposal to impose mandatory human rights due diligence on large companies. Proposition de Loi 1519 du 6 novembre 2013 relative au devoir de vigilance des sociétés meres et des entreprises donneuses d'ordre [Proposed Law 1519 of Nov. 6, 2013 relating to the duty of vigilance of parent companies and undertakings giving orders], ASSEMBLÉE NATIONALE, www.assemblee-nationale.fr/14/propositions/pion1519.asp.

11 ORG. FOR ECON. CO-OPERATION AND DEV., *OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES* 31, 34 (5th ed. 2011).

12 “Business” and “company” are terms used interchangeably in this article, unless the context indicates otherwise.

lacks sufficient specificity of the expected action, lacks a reviewer able to determine whether a company exercised sufficient diligence, and seemingly speaks of *mitigation* (i.e. reduction) of impacts as an acceptable aim of HRDD. This article focuses on the notion of mitigation as a threat to the internal consistency of the GPs and as an opening for watering down HRDD in various ways such as insufficient effort, long timeframe for improvements, or inappropriate techniques used to manage impacts. The GPs' emphasis on HRDD might result in an overly process-oriented and risk-management approach that leaves companies too much flexibility and discretion, especially as legal obligations and complaint mechanisms are still largely absent.¹³

The inquiry here examines whether there is full alignment between the abstract, normative responsibility to respect (RtR) and the operational, risk-management inspired HRDD. Two main questions are raised. First, do the repeated references to *mitigation*, understood as a reduction of impacts, diminish the stringency of the RtR's prescription that companies should eliminate adverse human rights impacts from operations? Mitigation means reduction of impact, potentially indicating that residual impact is tolerated, temporarily or permanently.¹⁴ This is problematic from a human rights perspective which is geared fundamentally towards ensuring rights and eliminating impacts. Analysis of GPs should clarify in what circumstances such residual impact might be acceptable. Second, do the GPs sufficiently address the danger that HRDD will be understood and implemented superficially instead of tackling the *root causes* of adverse human rights impacts?¹⁵ This analysis aims to

13 GWYNNE SKINNER, ET AL., *THE THIRD PILLAR: ACCESS TO JUDICIAL REMEDIES FOR HUMAN RIGHTS VIOLATIONS BY TRANSNATIONAL BUSINESS* 86–91, 105–129 (2013).

14 United Nations Office of the High Commissioner of Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, 7, 18 U.N. Doc. HR/PUB/12/02 (2012) [hereinafter *Interpretive Guide*] (indicating that “[t]he mitigation of adverse human rights impact refers to actions taken to reduce its extent, with any residual impact then requiring remediation.”).

15 Sharan Burrow, *Global Supply Chains: What does Labour Want?*, OPENDEMOCRACY (May 31, 2016), <https://www.opendemocracy.net/beyondslavery/ilc/sharan-burrow/global-supply-chains-what-does-labour-want> (noting that MNEs “constantly look to cut costs to maximise profits, putting considerable pressure on workers’ wages and working conditions. . . . Corporate and multi-stakeholder ‘corporate social responsibility’ schemes have had little if any positive impact on guaranteeing workers’ rights, and instead have deferred

clarify whether and how the GPs and subsequent materials from the GPs' drafters orient HRDD towards tackling the root causes of impacts and thus make HRDD a tool inherently capable of helping to eliminate abuses from corporate operations.

There is potential for the misinterpretation of the GPs as the implementation rush takes place.¹⁶ By their nature, the GPs operate at a higher level of abstraction and generality given that it was meant as a foundational document applicable to all human rights, industries, and countries.¹⁷ Inevitably, misinterpretation will occur and this might have to do with the way stakeholders grasp the GPs' message. However, to some extent, this might have to do with the way the GPs have been formulated. To facilitate the implementation work already under way, it is desirable that the potential for misinterpretation be addressed, particularly because the non-binding GPs rely explicitly on their persuasive force to frame and set in motion dynamics that push forward BHR governance. A textual and contextual analysis of the GPs and related materials is warranted.

This article draws on reports from the UN Special Representative of the Secretary General on business and human rights (SRSG) mandate of John Ruggie (2005-2011) as well as post-mandate documents to which Ruggie is associated, mainly the Interpretive Guide¹⁸ and reports from Shift.¹⁹ In terms of structure, the article has four main sections. Section 2 presents the problem raised by mitigation in a human rights context. Section 3 analyzes the corporate responsibility to respect human rights and the drafting of Pillar 2 of the GPs from the general to the more specific provisions.

addressing underlying structural issues.”).

16 John Ruggie, *The Shift from Principles to Practice*, SHIFT, (Mar. 2012), <http://www.shiftproject.org/article/shift-principles-practice-0> (noting the “proliferation of activities” following the GPs creates a potential risk for “divergent interpretations” and of “los[ing] much of the convergence” the BHR field has gained).

17 See Interview by Ron Popper with John Ruggie, *Six Questions for John Ruggie: Where is the Business and Human Rights Agenda Going?*, MIRIN (Oct. 24, 2008), <http://mirinpucro.blogspot.se/2008/10/seis-perguntas-para-john-ruggie.html> (commenting that “[t]he sheer intellectual magnitude of the task has been the most daunting challenge.”).

18 See *Interpretive Guide*, *supra* note 14.

19 Shift is a US-based non-profit organization promoting the implementation of the GPs chaired by John Ruggie. SHIFT, <http://www.shiftproject.org/> (last visited Sept. 8, 2017).

Section 4 clarifies the appropriate context and role of mitigation in the GPs. Section 5 examines the issue of root causes of adverse impacts and documents how the GPs and materials produced in the post-mandate period account for this issue.

II. “Mitigation” of Adverse Impacts Between Redundancy and Ambiguity

According to the GPs, businesses have a responsibility to respect human rights, meaning “they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”²⁰ That responsibility requires business action on three main fronts: policy, due diligence, and remediation.²¹ In turn due diligence is a process composed of four main steps including: “assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.”²² Each of the four steps is detailed in one principle and associated commentary.²³ The corporate responsibility boils down to preventive and corrective measures to address “adverse impacts.”²⁴ Adverse impacts are composed of both “actual” impacts—harms “that [have] already occurred or [are] occurring”—and “potential” impacts—risks “that may occur but [have] not yet done so.”²⁵

The notion of mitigation understood as reduction of impacts is entirely absent from the 2008 Protect-Respect-Remedy Framework.²⁶ However it is used frequently in the 2011 GPs. For instance, the notion is used to clarify the aims of HRDD: “In order to identify, prevent, *mitigate* and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence.”²⁷ Interestingly, the The Office of the United Nations High Commissioner for Human Rights (OHCHR)

20 *Guiding Principles*, *supra* note 1, Principle 11, at 13.

21 *Id.* Principle 15, at 15.

22 *Id.* Principle 17 at 16.

23 *Id.* Principles 18–21, at 17–20.

24 *Id.* Principle 13, at 14.

25 *Interpretive Guide*, *supra* note 14, at 5–7.

26 See John Ruggie (Special Representative of the Secretary-General on Human Rights and Transnational Corporations and other Business Enterprises), *Protect, Respect and Remedy: A Framework for Business and Human Rights*, ¶ 51, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) [hereinafter *Protect, Respect and Remedy*].

27 *Guiding Principles*, *supra* note 1, Principle 17, at 16 (emphasis added).

Interpretive Guide offers an extensive definition of HRDD without referring to mitigation or the aims of HRDD.²⁸ It seems HRDD can be clarified with or without references to mitigation, which fuels the inquiry into whether there might be something inappropriate with stressing mitigation in a human rights context.

The problems raised by mitigation circle around its relationships with prevention and remediation. What is the value added by including the notion of mitigation? What does it add to what prevention and remediation already say? Does it clarify anything—in terms of the aim, measures, effort, timescale, context—for our understanding of RtR and HRDD? Are we in the presence of a mere redundancy from imperfect drafting of the GPs or a deeper ambiguity requiring better specification of the GPs? Both redundancy and ambiguity could be alleviated through textual and contextual interpretations of GPs.

While the added value of mitigation is unclear, as it lives under the specter of redundancy, there is a danger that it dilutes what prevention and remediation already impress: passivity is not an option under the RtR at the ex ante or ex post stages, and that diligence has to be exercised to address adverse impacts. The danger is that a potent and operational concept as HRDD might unwarrantedly reopen the aim dimension that the RtR clarified at the general and abstract level in Principle 11. As argued herein, the aim of RtR is the elimination of human rights abuses from a company's operations and value chains. The drafting of Pillar 2 needs to be examined to clarify the relation between RtR and HRDD. However, the GPs are much more than a statement of RtR and HRDD as they contain a blueprint for transnational governance to reach the goal of elimination of human rights abuses in business. This will take the analysis of mitigation towards clarifying RtR in global value chains, a fragmented and dispersed organizational setting characterized by multiple causes of harm and weak rule of law in less developed countries. This setting leads to complex issues of distributing responsibility for human rights within value chains: upwards or downwards, and among public and private actors. The result is a partial or shared responsibility in complex situations where multiple actors are involved and root causes are exceedingly difficult to tackle.

28 *Interpretive Guide*, *supra* note 14, at 6.

With concepts like mitigation and leverage,²⁹ the GPs seek to find a path between full responsibility and no responsibility for lead firms in value chains as stakeholders search for smart policy mixes to govern value chains where lead firms are part of the solution and carry a reasonable burden. Therefore an analysis of mitigation in the GPs should interpret the text of the GPs in context, with sensitivity to business organizational contexts and the challenges specific to the human rights governance context.

A. *Opportunity to Pick and Choose*

The Commentary accompanying HRDD explains that “potential impacts should be addressed through prevention or mitigation.”³⁰ Difficulties arise because less demanding action might be expected under mitigation than prevention. However, the Commentary shows little concern for redundancy or effort to separate distinct contexts where the two terms might apply. This deficiency is compounded by the explanation offered in the Interpretive Guide. Therein, mitigation is about the aim of reduction as it covers actions taken to reduce the extent and/or likelihood of impacts.³¹ In turn, prevention is about the aim of non-occurrence: “the prevention of adverse human rights impact refers to actions taken to ensure such impact does not occur.”³² Overall, and with their concise formulation, the GPs arguably give businesses the opportunity to pick and choose between different aims encapsulated in prevention and mitigation.

It is one thing to say that HRDD will at times fail to prevent occurrence and impact³³ and another thing to give companies the choice between aiming for elimination/non-occurrence and reduction of impact. The implication would be either a benign redundancy or a danger of watering down the aim of RtR. As to the redundancy, mitigation might mean nothing more than taking preventive and corrective measures. As to the danger, the appeal of the operational concept of HRDD over the more abstract RtR cannot be overlooked.³⁴ RtR, which carries the aim of elimination

29 The GPs explain that “[e]verage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm.” *Guiding Principles*, supra note 1, Principle 19 Commentary, at 18.

30 *Guiding Principles*, supra note 1, Principle 17 Commentary, at 16.

31 *Interpretive Guide*, supra note 14, at 7.

32 *Id.*

33 *Guiding Principles*, supra note 1, Principle 22 Commentary, at 20.

34 Radu Mares, ‘Respect’ Human Rights: *Concept and Convergence in LAW, BUSINESS*

and appears as the abstract, general, and aspirational part, might become downplayed with attention going to HRDD, which speaks of mitigation and appears operational, more specific, and more familiar to risk managers and decision-makers. Such reversal between the operational HRDD and the normative RtR makes the specificities of the human rights context harder to grasp and eventually misdirects the HRDD risk management process.

Whether companies can pick and choose between reduction and non-occurrence of impact is troublesome because the human rights context has its specificities. Reduction means *residual impact* on human rights in business operations is a given and is an accepted social cost of doing business, whether only temporary or even permanently. However, the human rights perspective does not accommodate residual impact easily. The normativity of international human rights standards aims for elimination of infringements of such rights, not for their reduction. First, human rights instruments always emphasize elimination by referring to rightholders through terms such as “Everyone,” “No one,” “All [persons],” and so on.³⁵ These instruments do not say “some people” or a “majority” to aim merely for reducing infringements of human rights. Second, by their very nature, human rights are *minimum* standards of treatment that are meant to ensure human dignity.³⁶ Just offering fractional protection does not make sense. So it is not just formulations in treaties but the entire normative thrust of human rights standards that indicates elimination rather than reduction as the sole legitimate aim.³⁷ Surely, under international law, state obligations correlating to human rights are at times formulated with qualifiers like progressive realization and the maximum available resources; for instance, a UN

AND HUMAN RIGHTS: BRIDGING THE GAP 38–41 (Robert C. Bird et al. eds., 2014) (arguing that HRDD overtook RtR as the key concept behind paragraph 13b where the company is responsible to act even if it did not cause/contribute to impacts in third party operations. HRDD was instrumental in expanding the scope of RtR when comparing the 2008 Framework Report with the 2011 GPs operationalizing the 2008 Report).

35 G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

36 *See id.* at art. 1 and 22.

37 U.N. Office of the United Nations High Commissioner for Human Rights, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, at 25-26, U.N. Doc. HR/PUB/06/12 (2012), <http://www.ohchr.org/Documents/Publications/PovertyStrategiesen.pdf> (explaining how the human rights based approach emphasizes elimination, see for instance how the “key targets and indicators” are formulated).

Covenant lays down the obligation that “[e]ach State Party to the present Covenant undertakes to take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant”³⁸ Furthermore, the Sustainable Development Goals,³⁹ which often replicate human rights aspirations, contain aims of significantly reducing the quantity⁴⁰ as well as aims of outright elimination.⁴¹ This, however, does not signify tolerance of residual harm. Rather, it is a twofold acknowledgement that first, there is no magic wand to instantaneously eliminate infringements of human rights and second, maximum efforts must be pursued and even measured against precise timescales to ensure those rights.⁴²

38 G.A. Res. 2200 (XXI), International Covenant on Economic, Social and Cultural Rights at Article 2.1 (Dec. 16, 1966) (“[e]ach State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant . . .”).

39 See generally G.A. Res. 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development (Sept. 25, 2015).

40 For example, one aim is “[b]y 2020, halve the number of global deaths and injuries from road traffic accidents” (Goal 3.6). G.A. Res. 70/1, at 16 (Sept. 25, 2015). Or “[b]y 2030, reduce at least by half the proportion of men, women and children of all ages living in poverty” *Id.* at 15. Another aim is “[b]y 2030, reduce the global maternal mortality ratio to less than 70 per 100,000 live births” *Id.* at 16. Another aim is “[b]y 2030 . . . substantially reduce the number of people suffering from water scarcity” *Id.* at 18.

41 For example, one aim is “[b]y 2030, eliminate gender disparities in education” *Id.* at 17. Or, “[e]liminate all forms of violence against all women and girls” *Id.* at 18. Another aim is “[t]ake immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms.” *Id.* at 20.

42 Mariëtte van Huijstee et al., *How to Use the UN Guiding Principles on Business and Human Rights in Company Research and Advocacy*, SOMO (Nov. 2012), <https://www.somo.nl/wp-content/uploads/2012/11/English-version.pdf> (commenting on residual impact as follows: Mitigation of adverse impacts “refers to actions taken to reduce the extent of an impact by a third party, with any residual impact then requiring remediation. This *should not be interpreted as meaning that it is appropriate for a company to reduce a human rights abuse by a third party to some extent and that a little bit of remaining abuse is acceptable*. All the company’s efforts should be focused on ceasing the human rights impact by the third party that is causing the harm, but since the company does not have full control over the third party, a full stop cannot be guaranteed by this company.”) (emphasis added).

The inherent aim of human rights standards can only be elimination of abuses. Duty-bearers take measures that should have the capacity and design to achieve that aim, and not a lesser aim of reducing abuses, which entails acceptance of residual harm.⁴³ In the GPs, both states and businesses are asked to respect human rights.⁴⁴ Notably though, states and companies have different options to achieve elimination of human rights abuses from their jurisdiction or operations. Thus, companies have the option of eliminating abuse from their operations by either protecting rightholders or separating themselves from the rightholders, that is, by cutting links with abusive third parties.⁴⁵ In contrast, sovereign states only have the option of increasing the protection for their populations (rightholders) to meet their elimination goal. The GPs are more than a code of corporate conduct; they are meant as a foundational treatment of transnational governance insights into how overlapping responsibilities of companies and states relate to each other in global value chains. Therefore, the GPs have no space for ambiguity on such a fundamental dimension as the aim of RtR and HRDD. In human rights, speaking of elimination, as opposed to mitigation, is an indication that doing business or governing through abusing rights (repression) is inherently illegitimate and cannot be accepted as a systemic feature of business or government.

Referring to measures that reduce impact should not obscure the aim of elimination of abuse. Indeed, the GPs sensibly refer to “measures” for the prevention, mitigation, and remediation when explaining the corporate responsibility to respect human rights,⁴⁶ but the aim of elimination risks being lost as references to mitigation and due diligence pile up and the complexities of protecting rights in global value chains become apparent. Insisting on the aim of elimination is not simply a matter of formulation where one might lean toward either the aspirational or the pragmatic. It is a matter

43 ON COMMON GROUND CONSULTANTS INC., HUMAN RIGHTS ASSESSMENT OF GOLDCORP'S MARLIN MINE, CANADA, at 83 (Susan Joyce, et. al. eds. 2010), http://hria-guatemala.com/en/docs/Human%20Rights/OCG_HRA_Marlin_Mine_May_17.pdf (“Some impacts to the environment may be tolerated from a human rights perspective so long as these are within the established standards for human health. The overarching standard for human rights is an absolute: ‘do no harm.’”).

44 See *Guiding Principles*, *supra* note 1, Principle 6, at 10.

45 See *id.* Principle 19 Commentary, at 18.

46 *Guiding Principles*, *supra* note 1, Principle 11 Commentary, at 13.

of directing effort in the proper direction and designing governance responses capable of delivering on that aim. It is about an effort to identify, reflect, and address root causes of abuse, not about complacent and half-hearted efforts aimed at tackling symptoms with simplistic mitigation measures. It is about detecting misdirected and substandard business measures that do not comply with the GPs and are inappropriate in the human rights context, but might still be promoted as in line with HRDD and RtR.

B. Silences

The above ambiguity resulting in pick and choose options is further compounded by some silences in the GPs. The GPs neither indicated specific actions tailored for the particularities of each human right nor guided inquiries into the reasonable amount of effort a business should put in addressing impacts. Thus, on the one hand, rather than pursuing specificity, Ruggie opted for a foundational document applicable to all contexts and rights, admittedly a general but necessary document in the deeply contested field of BHR.⁴⁷ On the other hand, Ruggie did not make the GPs dependent on a monitoring or adjudicative body: that would have added not only teeth to the GPs, but would have also endowed them with a mechanism to specify HRDD in context by establishing facts and assessing them against a normative standard of reasonableness. Through precedent, HRDD would have been progressively clarified in an authoritative manner. These are limitations of the GPs that were well accepted by the drafters and that arguably do not detract from the GPs' value added.⁴⁸ But without ex ante or ex post ways of specifying HRDD, the risk of indeterminacy about the due diligence effort expected arises. Indeed, fine assessments of due diligence, reasonableness, and prudence cannot be done in the abstract and specification is inherently difficult ex ante; due diligence can only be assessed in light of specific circumstances of the case⁴⁹ for which a reviewer—such as a court or other investigator—is indispensable.

47 See JOHN GERARD RUGGIE, *JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS* xi–xii (W. W. Norton & Co. 2013).

48 Radu Mares, *Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress*, in *THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS – FOUNDATIONS AND IMPLEMENTATION* 1-50 (Radu Mares ed., 2012) (outlining the ways in which the SRSG contributed to the BHR debate and the reference point that GPs have become among other CSR standards).

49 *Interpretive Guide*, *supra* note 14, at 6.

Mindful of the failed precedent of the UN Norms that were built on the standard-reviewer coupling, Ruggie instead sought a persuasive account of the BHR field by combining public and private governance in a “polycentric governance” system⁵⁰ and harvesting the leverage of multiple stakeholders. So the GPs are the results of a mandate aiming to deliver a widely agreed upon document on which subsequent efforts to specification and accountability could build.

The question however is whether the problematic presence of *mitigation* negatively affects the HRDD notion, which is already under the specter of indeterminacy given that the GPs are silent on the amount of effort and specific measures. HRDD is grounded in risk management, which brings familiarity and increases the traction of the GPs with businesses executives.⁵¹ However, the GPs emphasize that HRDD refers to risks to rightholders and not merely risks to business.⁵² Given that HRDD address this specific type of risk, some options raised by risk management do not apply in the human rights context. The enterprise will not have the liberty to choose among different risk management techniques that it has for other risks – to simply take the risk and do nothing, to reduce the risk to a tolerance level the company might deem acceptable based on its calculations, or to insure against it.

The GPs offer valuable insights in each of these situations. First, taking the risk and doing nothing is not acceptable; a company that has a “crucial” relationship with a third party might choose to continue dealings as opposed to terminating the relationship, but the GPs require that “[i]n any case, for as long as the abuse continues and the enterprise remains in the relationship, it should be able to demonstrate its own ongoing efforts to mitigate the impact and be prepared to accept any consequences—reputational, financial or legal—of the continuing connection.”⁵³ Similarly, taking the

50 John G. Ruggie, *Life in the Global Public Domain: Response to Commentaries*, JAMES G. STEWART BLOG (Feb. 5, 2015), <http://jamesgstewart.com/author/john-g-ruggie> (explaining polycentric governance).

51 See RUGGIE, *supra* note 47, at 141–8.

52 *Guiding Principles*, *supra* note 1, Principle 17 Commentary, at 16 (“[H]uman rights due diligence can be included within broader enterprise risk-management systems, provided that it goes beyond simply identifying and managing material risks to the company itself, to include risks to rightholders.”).

53 *Guiding Principles*, *supra* note 1, Principle 19 Commentary, at 18.

risk and doing nothing about risks posed by third party operations while expecting that the government would detect and act to reduce harm is similarly unacceptable: “The corporate responsibility ‘exists independently of States’ abilities and/or willingness to fulfil their own human rights obligations . . . [and] exists over and above compliance with national laws and regulations protecting human rights.”⁵⁴ Second, reducing risks to a tolerance level chosen by the company cannot be informed solely by calculations on risks to business because HRDD is about risks to human rights and the GPs repeatedly emphasizes transparency and participation in identifying and addressing impacts.⁵⁵ Third, there is no insurance to be gained from “offsetting” impacts as the GPs indicate that good deeds in one area (e.g. social contributions, economic development) cannot offset adverse impacts on human rights in another area: “Business enterprises may undertake other commitments or activities to support and promote human rights, which may contribute to the enjoyment of rights. But this does not offset a failure to respect human rights throughout their operations.”⁵⁶ Also, adherence to process offers no insurance in the event harm occurs. There are no guarantees that harm will be excused if the company followed process (process legitimacy), and there is not a full and automatic defense based on HRDD: “business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses.”⁵⁷

Where the GPs speak of *prevention* and *mitigation* there is the danger that companies will see this twofold conceptualization—prevent and mitigate—as giving a choice between the two and

54 *Id.* Principle 11 Commentary, at 13.

55 For example, Principle 18 holds that “business enterprises should identify and assess human rights impacts through ‘meaningful consultation with potentially affected groups and other relevant stakeholders.’” *Id.* Principle 18 at 17. Principle 20 explains how the tracking of performance should “draw on feedback from both internal and external sources, including affected stakeholders.” *Id.* Principle 20 at 20. Principle 21 holds that business should be transparent about their efforts and performance as such communication would provide “transparency and accountability to individuals or groups who may be impacted and to other relevant stakeholders, including investors.” *Id.* Principle 21 at 20.

56 *Id.* Principle 11 Commentary, at 13.

57 *Id.* Principle 17 Commentary, at 16–17.

consider mitigation as being fulfilled by any of the usual risk management techniques. The GPs counteract this danger by offering parameters of HRDD throughout the GPs.⁵⁸ This is an important contribution towards presenting HRDD for what it genuinely is: a rightholder-centered risk management approach. Are these parameters sufficiently emphasized and exhaustively identified? This article highlights the troublesome implications of *mitigation* for the GPs, emphasizes the above parameters of HRDD, and adds a new general parameter of *root cause* orientation for HRDD to reduce its relative indeterminacy in a foundational instrument like the GPs.

C. *When Opportunity Meets Silence*

In sum, the concerns about the appearance of mitigation in the very definition of HRDD have to do with residual impact, and how the GPs manage to handle this residual harm. This requires analysis of the GPs for internal consistency (coherence of GPs dimension). It also requires reflection about how HRDD applies in a diversity of organizational contexts where abuses have to be eliminated from global value chains (organizational dimension) and how an instrument like GPs seeks to drive change in a global governance context through regulatory and non-regulatory means (governance dimension). With clarity on these three dimensions, HRDD will genuinely appear as a distinct, rightholder-centered risk management approach.

By bringing together the three dimensions, the specter of indeterminacy hovering over HRDD in the GPs will be reduced. This requires highlighting both the parameters contained in the GPs as well as reflecting on the options for further specification of HRDD in the post-GPs period, on which Ruggie counted.⁵⁹ The insights and general approach to BHR taken in the GPs will become clearer. In turn this will hinder self-serving interpretations and superficially compliant measures by businesses accustomed to regular risk management techniques.⁶⁰ Insisting that the reasonable

58 *E.g., id.* Principle 17, at 16. *See also* Section III.A.

59 *Guiding Principles, supra* note 1, at 5 (“[The Guiding Principles] will mark the end of the beginning: by establishing a common global platform for action, on which cumulative progress can be built, step-by-step, without foreclosing any other promising longer-term developments.”).

60 Int’l Trade Union Confederation, *The United Nations “Protect, Respect, Remedy” Framework for Business and Human Rights and the United Nations Guiding Principles for Business and Human Rights - A Guide for Trade Unionists*, 15 (May 2012)

efforts of businesses are channeled in the right direction (not merely at the symptoms but at the root causes of abuse), the spotlight is unavoidably put on the actions and inactions of other public and private stakeholders who have a bearing on global value chains. This can only facilitate reflection on the complementary or shared responsibilities of public and private actors to act for further specification of HRDD in context (i.e. define the reasonable, prudent company's conduct in the circumstances) and stronger enforcement of corporate responsibilities and state obligations (i.e. through monitoring and remedial mechanisms).

The next section contains an analysis of Pillar 2 and the multilayered concept of RtR across the three above-mentioned dimensions.

III. Corporate Responsibility to Respect Under the Shadow of Internal Inconsistency

Pillar 2 of the GPs—corporate responsibility to respect human rights—offers a multilayered concept of RtR with HRDD being the core operational concept. Pillar 2 offers layers of explanations regarding what is expected from companies in terms of aims, required actions, and operational contexts. This is a valuable treatment of RtR moving progressively to deeper levels of specificity providing, in the process, practical guidance as well as indispensable clarifications about the nature of the tasks at hand. In this way, Pillar 2 offers not only a wealth of actionable prescriptions but also dispels misunderstandings that could creep in at different junctures. A 100-page Interpretive Guide followed shortly after the release of the GPs and further augments these contributions.⁶¹

With the concerns about the definition of HRDD in Principle 17 noted above, this section expands analysis to other principles

(illustrating that “[s]ome companies are claiming that their existing CSR initiatives or practices are the ‘due diligence’ that they need. Indeed, there is a real danger that companies will recast existing CSR practices as ‘best practice’ applications of the Guiding Principles. Many of these claims and ‘best practice’ examples are not credible. Often they overlook important ideas in the Guiding principles: that the amount of due diligence must be related to risk and the severity of the impact for instance. The fundamental obligation to avoid adverse impacts is often absent in the ‘best practices’ as is remediation which is often confused with philanthropy.”).

61 *Interpretive Guide*, *supra* note 14, at 3–4.

in Pillar 2, particularly Principles 11, 13, 15 and 19. Attention goes to the specific dimensions captured in each principle and the flow from the general to the more concrete. This will reveal whether inconsistencies exist, whether formulations could be interpreted for greater clarity and better flow, and why current difficulties appeared. Attention will be paid to the aim dimension of RtR (the aim of elimination or reduction of impact), organizational context (own conduct or conduct of third parties), and responsibilities of multiple actors in value chains (lead firms, suppliers, governments).

A. The Flow From the Abstract to the Specific

Principle 11

The responsibility to respect is the most general level at which the GPs begin addressing the issue of corporate social responsibilities. Principle 11 uses a two-pronged structure to explain *respect* as “avoid infringing” rights and “address” adverse impacts with which a company is “involved.”⁶² This two-pronged explanation is a change from the initial single-pronged definition used in the 2008 Framework report which wrote: “To respect rights essentially means not to infringe on the rights of others—put simply, to do no harm.”⁶³ Going for the two-pronged definition increases complexity, however, and can foster misinterpretation as two dimensions are overlapping: the first dimension is the *aim* (do not infringe) and the second dimension is the *action* of a proactive and reactive type expected (address impacts). In other words, “avoid” refers to what to aim for (elimination rather than something less demanding like reduction, which allows for residual harm), while “address” refers to what to do (act to minimize risks *ex ante* and take corrective/remedial measures *ex post*). The two dimensions are consistent but could easily skip out of alignment.

The drafting of the GPs is a step back in simplicity from the 2008 Framework which had just one concept—“do no harm”—that relayed simply the aim of RtR and captured both *aim* and *act* in that short formulation.⁶⁴ This drafting choice is explainable by what appears as Ruggie’s overriding concern for the RtR to be understood not merely as a negative obligation—not infringe, no harm—to

⁶² *Guiding Principles*, *supra* note 1, Principle 11, at 13.

⁶³ *Protect, Respect and Remedy*, *supra* note 26, ¶ 24.

⁶⁴ *Id.*

refrain from action. Ruggie emphasized the RtR is not a negative obligation.⁶⁵ Understanding the RtR as a responsibility to refrain, to remain passive would have shortcut the entire message of HRDD as a proactive, systematic process of identifying and addressing impacts.

Between “avoid infringing” and “do no harm” (or “not to infringe”) there is full equivalence and both point towards elimination of human rights abuse from business operations. So, the aim of the RtR is clear and unchanged between 2008 and 2011: the RtR is about the elimination of human rights impacts from an enterprise’s operations and taking preventive and corrective actions able to achieve this aim. This point regarding the aim of RtR should not be obscured or watered down as RtR is explained at more concrete levels in subsequent principles.

Principle 13

Principle 13 explains what “involved,” mentioned in Principle 11, means: the company is involved when it caused, contributed, or is linked to impacts through its business relationships.⁶⁶ This dimension clarifies the scope of business involvement. However, Principle 13 is drafted in a complex way that overlaps several additional dimensions. Besides stating *when to act* (cause/contribute/linkage), Principle 13 explains generally what to do in each situation: “avoid causing or contributing . . . and address” in paragraph 13a and “seek to prevent or mitigate” in paragraph 13b.⁶⁷ Thus, it adds some specificity to the dimension of *how to act*. Furthermore, Principle 13 also uses formulations seemingly indicating different levels of stringency of responsibilities (“avoid” versus “seek to”).⁶⁸ It seems this formulation adds a third dimension as it qualifies the *amount of effort* expected from the enterprise, and sets the bar for the paragraph 13b situation a notch lower. Several observations could be made regarding this complex drafting of Principle 13.

65 *Id.* ¶ 55 (clarifying that “‘doing no harm’ is not merely a passive responsibility for firms but may entail positive steps—for example, a workplace anti-discrimination policy might require the company to adopt specific recruitment and training programmes.”).

66 *Guiding Principles, supra* note 1, Principle 13, at 14.

67 *Id.*

68 *Id.*

First, there are two conceptual faultlines in Principle 13. The first faultline is along the actions expected from a company depending on whether it caused harm or not: paragraph 13a covers involvement by causation (company conduct is the sole cause, respectively one of the causes of impact) while paragraph 13b expressly covers impact where the company has not caused impact in any way, but where RtR applies merely because of association with a wrongdoer.⁶⁹ This is the *causality faultline*. The second faultline is along own conduct and the conduct of a third party. Different ambitions in terms of elimination or reduction of impacts attach to each context: for own conduct the company can eliminate the impact, but for the conduct of third parties, the company might simply not be able to eliminate the impact due to lack of control. This is the *organizational faultline*. How the GPs square this difficulty and reconcile it with the RtR's aim of elimination becomes evident only in Principle 19 depicting "appropriate action" (leverage to minimize impacts is expected, and as last resort, termination of relationship).⁷⁰

Second, the question is why Principle 13's drafting was so ambitious to combine multiple dimensions with multiple organizational contexts. The fact that Principle 13 covers clearly with its structure the first faultline (causality faultline) is not only appropriate but of extreme importance for BHR: it does not draw the boundaries of RtR so narrowly to leave out value chain responsibility in a time where global businesses pursue expansion strategies based on outsourcing, subsidiarization and joint ventures.⁷¹ The second faultline (organizational faultline) cuts the same pie differently, but the formulation exposed by Principle 13 cannot keep up.

69 The responsibility under paragraph 13b—a responsibility by association—is not as expansive as it sounds. The company has a responsibility to act only for those impacts directly linked to its products, services and operations, and not for all impacts of its business partners. A further limitation results from the company not having to remediate the impacts, but just to prevent and mitigate its involvement first through leverage, and then by cutting links. See *Guiding Principles*, *supra* note 1, Principle 19, at 21–22; see also discussion *infra* section III.A.

70 *Guiding Principles*, *supra* note 1, Principle 19, at 20–21.

71 See U.N. CONFERENCE ON TRADE AND DEV. [UNCTAD], *World Investment Report 2013: Global Value Chains: Investment and Trade for Development* 27 (2013); ILO, *Decent work in global supply chains*, International Labour Conference, 105th Session (2016) http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_468097.pdf.

Indeed, mitigation is equally relevant in the “contribute” (13a) and “linkages” (13b) scenarios—as shown clearly by Principle 19—but is only mentioned in the latter (13b).⁷²

Table 1

Principle 13	Scenario	Action (GP 13 & 19) (Aim of RtR Dimension)	Third party (Organizational Dimension)	Involvement (Causality Dimension)
Para. 13a	Cause	Eliminate (by minimizing impact)	-	Causality
Paras. 13a 13b	Contribute	Eliminate (same) and Mitigate (by reducing impact)	Third party	Causality
Para. 13b	Linkages	Mitigate (same) and Eliminate (by cutting links)	Third party	Association

The current formulation of Principle 13 does not accommodate both these organizational and causality dimensions. The structure of Principle 13 (paragraphs a and b) is not problematic: the drafters chose the causality dimension over the organizational one. That would have been perfectly fine if the action expected from the company was left at a general level instead of attempting to specify it. However, the drafting of Principle 13 attempts just that—specificity—resulting in undesirable consequences.

One negative consequence is that by being overly ambitious in drafting and adding two other dimensions, Principle 13 ends up endangering the aim dimension exposed in Principle 11. The complex drafting of Principle 13 and the appearance of *mitigation* introduce a tension with the aim of elimination in RtR. By speaking of avoiding, addressing, preventing, and mitigating, Principle 13 reopens the aim dimension with this complex terminology. Paragraph 13a speaking of “avoid causing or contributing” and Principle 11 speaking of “avoid infringing” dovetail; “avoid” became the vector for “do no harm” in Principle 11 and gave the RtR the elimination goal. The fact that the drafting structure of Principles 13a and 11 are identical (“avoid” and “address”) while paragraph 13b uses a new terminology (“seek” to “mitigate”) compounds the perception that the responsibility

⁷² *Guiding Principles*, *supra* note 1, Principle 13, at 14.

under paragraph 13b is the odd one out, the less demanding one. The dissonance in the drafting of paragraphs 13a and 13b might indicate that something has happened to the responsibility in 13b and that might have to do with the very goal of elimination. And mitigate is the vector carrying that message. It is true that paragraph 13b is less demanding regarding remediation,⁷³ but that should not encourage interpretation that the responsibility is less demanding for other dimensions, such as the aim dimension.

Another negative consequence is an imprecise, needless and premature specification of expected actions in cause, contribute and linkages scenarios. Mitigating adverse impacts makes an appearance in this effort to specify expected action. Principle 13 crucially settles the scope dimension of RtR, that is, the situations where the RtR exists. However, it is not clear why Principle 13 had to be so complex, so ambitious. And all this in a context where paragraph 13b is already the weakly justified area of RtR as it runs counter to general legal principles of liability based on fault and causality.⁷⁴ Principle 13 adds a second layer of clarification to the RtR, but appears counterproductive, premature, and imprecise in spelling out the more concrete actions businesses should take in varying contexts. There are subsequent principles in the GPs that offer such concrete guidance: Principle 19 (discussed further below).

Principle 15

Principle 15 begins the essential discussion of the main elements and operational steps that the RtR requires. The GPs are the result of the Human Rights Council's request for operationalization of the Protect-Respect-Remedy Framework of 2008.⁷⁵ The SRSG fulfilled this task of operationalization by delivering structure, simplicity, and absence of jargon to a field ripe with ambiguities and controversies.⁷⁶

Principle 15 highlights the three main components of RtR

73 Thus, no remediation is expected from a company merely linked to harm; the remedy component of RtR is dropped in paragraph 13b. *Id.* at 16, 24.

74 See Radu Mares, *Responsibility to Respect: Why the Core Company Should Act When Affiliates Infringe Rights in THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS – FOUNDATIONS AND IMPLEMENTATION* 1-50 (Radu Mares ed., 2012).

75 Human Rights Council, Res. 8/7 U.N. Doc A/HRC/RES/8/7 (June 18, 2008).

76 Mares, *supra* note 48.

a company should have in place: policy, due diligence systems, and a process for remediation of harm. In this way, Principle 15 gives concreteness to Principle 11's abstract requirement to "address" human rights impacts. In addition, this Principle indicates that a company does not have to offer remediation in the Principle 13b situation (but only when the company caused or contributed to impact, paragraph 13a). Principle 15 sets the stage for the next operational Principles 16-22 and the flow to these principles is commendable. It is a Principle covering one dimension only and accomplishes this task with clarity.

Principle 17

Principle 17 expands on the definition of HRDD already offered in Principle 15 as a "process to identify, prevent, mitigate and account for how they address their impacts on human rights."⁷⁷ It covers well, just like Principle 15 did, the operational steps expected from a diligent company and outlines four such steps: impact assessment, appropriate action, tracking, and communication.⁷⁸ Each step will be allocated one dedicated principle (Principles 18-21), while Principle 17, with its lengthy Commentary, reflects on some characteristics ("parameters") of HRDD: its on-going nature (as opposed to one-off transactional due diligence (DD)), its adaptation to operational context, its relation to broader enterprise risk-management systems, the possibility of prioritizing action in the value chain context, HRDD as a defense, and secondary liability aspects of complicity.⁷⁹ Such useful observations are continued in Principles 23-24.

The difficulties with Principle 17 are twofold. First, the Principle uses the concepts of prevention and mitigation side by side in an enumeration displaying an inflation of terms with uncertain value added. Second, the Commentary's discussion of potential and actual impacts⁸⁰ unhelpfully links mitigation to potential impacts only—this does not aid the understanding of either prevention or remediation in the GPs.

⁷⁷ See *Guiding Principles*, *supra* note 1, Principle 17, at 16–18.

⁷⁸ *Id.* at 16–17.

⁷⁹ *Id.* Principle 17 Commentary, at 16.

⁸⁰ *Id.* ("Potential impacts should be addressed through prevention or mitigation, while actual impacts—those that have already occurred—should be a subject for remediation (Principle 22).").

Regarding the first aspect, one wonders what is gained by this inflation of terms—prevention and mitigation—in the very definition of HRDD in a document prized for simplicity and clarity. By comparison, the 2008 report explained HRDD as “a process whereby companies . . . manage the risk of human rights harm with a view to avoiding it.”⁸¹ Also, HRDD is a “concept [that] describes the steps a company must take to become aware of, prevent and address adverse human rights impacts.”⁸² These formulations appear preferable for the purpose of Principle 17 as the first general explanation of HRDD. Such formulations would not problematize the aim dimension settled in Principle 11—but actually reinforce it by mentioning “with a view to avoiding it”—and would delay description of the more concrete action expected under HRDD in each of the cause-contribute-linkages contexts until Principle 19. Such a delay would be welcome as it would leave the task of Principle 17 unique: outline the four main steps and provide general “parameters” of HRDD to grasp correctly its distinct nature among other risk management approaches. It appears that the definition of HRDD in Principle 17 amalgamates the peculiar formulation in Principle 13b—featuring prevention and mitigation—with other elements of DD—“identify” which is the first step in any DD process, and “account for how they address,” which is a CSR-specific requirement grounded in transparency and accountability that is uncommon to transactional DD.⁸³ The result is a step back from the 2008 Report formulation; as with Principle 13, “mitigation” carries the danger of reopening the goal of RtR dimension (elimination), especially as Principle 17 is the first in-depth explanation of HRDD in the GPs.

Regarding the second aspect, Principle 17 Commentary links mitigation to potential impacts only: “Potential impacts should be addressed through prevention or mitigation, while actual impacts—those that have already occurred—should be a subject for remediation (Principle 22).”⁸⁴ This is a simplistic statement that endangers the internal consistency of the GPs regarding both the ex-ante (prevention) and ex-post (remediation) stages of HRDD. The

81 *Protect, Respect and Remedy*, *supra* note 26, ¶ 25.

82 *Id.* ¶ 56.

83 *Guiding Principles*, *supra* note 1, Principle 17, at 16. For more on transactional due diligence, *see supra* note 5.

84 *Guiding Principles*, *supra* note 1, Principle 17 Commentary, at 16.

Commentary on potential and actual impacts fails to impress the full relevance of mitigation regarding both potential and actual impacts. Linking mitigation with potential impacts only runs contrary to the text of GP 19 Commentary (“leverage to prevent or mitigate the adverse impact”)⁸⁵ as well as the OHCHR Guide’s definition of mitigation (of adverse impacts in general, not only potential impacts).⁸⁶

Regarding the *ex ante* stage, the reference to “mitigation” of risks (potential impacts) adds little if anything to what “prevention” already says; the danger is one of redundancy. It is the OHCHR complex explanation of mitigation that delivers insight and clarifies what mitigatory measures are legitimate and which might not be.⁸⁷ The Commentary however achieves not more than overlap with “prevention” and carries the potential to water down the elimination aim of RtR. Regarding the *ex post* stage, the Commentary is inadequate again. By stating that actual impacts “should be a subject for remediation,”⁸⁸ the Commentary seemingly denies the applicability of mitigation with regard to remedies. The danger is one of partialism. Concerned not to water down the core idea that infringements of rights should be remediated fully, the Commentary loses sight of the specific context of third party operations to which RtR does apply. The company has to exercise leverage over third parties to respect human rights, even if the company has no responsibility to offer itself remediation in the “linkages” scenario (Principle 13b). Whether that leverage covers only re-occurrence or also remediation to rightholders is not fully clear from Principle 19, which explains the notion of leverage. So, regarding the *ex post* stage, Principle 17 represents an unsuccessful attempt at simplification of HRDD as it fails to acknowledge the multiple dimensions of mitigation in the BHR setting.

In sum, Principle 17 offers a needless complication in the formulation of HRDD (by comparison with previous SRSG reports) by referring to “mitigation” side by side with “prevention” while the Commentary offers a partial and therefore deficient framing of “mitigation” (at both *ex ante* (potential impacts) and *ex post* (actual

85 *Id.* Principle 19 Commentary, at 19.

86 *Interpretive Guide*, *supra* note 14, at 6–7.

87 *See* discussion *infra* Section IV. D.

88 *Guiding Principles*, *supra* note 1, Principle 17 Commentary, at 16.

impacts) stages). The drafting of Principle 17 again falls prey to the attraction of premature and de-contextualized specification. The result is an undesirable potential reopening of the aim dimension settled in Principle 11—because of the potency of HRDD as an operational concept compared to the abstract and normative RtR—and compounds the deficiencies raised by Principle 13 with its overly complex drafting. Caught between redundancy and incomplete specification, the formulations in Principle 17 and its Commentary are opaque and a weak link between Principles 11 and 19.

Principle 19

Principle 19 offers a description of “appropriate action” to respect human rights structured along the cause-contribute-linkages dimension introduced in Principle 13.⁸⁹ It offers much needed clarification by specifying what is expected in each setting. Thus, for the cause scenario, the company should “cease or prevent the impact.”⁹⁰ For the contribute scenario, the company should “cease or prevent its contribution and use its leverage to mitigate any remaining impact.”⁹¹ For the linkage scenario, the company should use its “leverage to prevent or mitigate the adverse impact,” and if this leverage is lacking or failing, the company “should consider ending the relationship.”⁹²

From the language of Principle 19 it becomes clear that “mitigation” of impacts is a notion relevant only when third party conduct is present: when the company contributes or is linked to a wrongdoer. As the company has no control over a third party’s operations, mitigation (reducing the impact) applies. This reduction of impacts is presented as a legitimate goal for appropriate actions and appears to be in tension with the elimination aim of general RtR in Principle 11. Principle 19 Commentary is important because it indicates that elimination of impacts can be achieved in two different ways and that mitigation (reduction goal) is tolerated conditionally and temporary.⁹³

Thus, for the contribute scenario, the company is expected to eliminate its own contribution—by preventing it *ex ante*, by ceasing

89 *Guiding Principles*, *supra* note 1, Principle 19 Commentary, at 18.

90 *Id.*

91 *Id.*

92 *Id.*

93 *Id.* at 18-19.

it while it is on-going, and by remediating it ex post—as well as to not remain passive regarding what its partner is doing. Regarding the latter, the company should aim to mitigate the impact produced by the third party; leverage should be used to at least reduce that impact. Is such residual impact tolerated indefinitely in contradiction with Principle 11, which speaks of elimination? The answer is negative: if the relationship with the third party continues, the prescriptions of the linkage scenario begin to apply due to the ongoing association of the company with the wrongdoer.

For the linkage scenario, the company, by definition, has no causal conduct of its own to preempt, to terminate (cease), or to remediate. What the enterprise has is a linkage that needs to be managed in two main steps: using leverage to address impacts, and, should that fail, terminating the relationship. The Commentary to Principle 19 clarifies some important points. The order is leverage first, termination second in order to preempt quick disengagement that would be more harmful to victims.⁹⁴ The decision to terminate should itself be scrutinized for adverse impacts on rightholders, again to preempt unintended consequences for rightholders becoming worse off. Exercising leverage can take multiple forms, ranging from applying direct pressure on the perpetrator to involving other public and private stakeholders to address impacts.⁹⁵ Having little leverage should lead first to efforts to increase that leverage before terminating the relationship. An exception for “crucial” relationships with strategic suppliers is allowed, but under the condition that mitigatory efforts still be continued and with warning that the company assumes the risk as such efforts offer no cover against potential legal, financial, or reputational consequences.⁹⁶

Mitigation and leverage are tightly linked in Principle 19 which calls for use of “leverage to prevent or mitigate the adverse impact.”⁹⁷ The disjunctive “or” appears to allow the company to choose between the aim of a full elimination or mere reduction; this is problematic for both the internal consistency of the GPs (compare with Principle 11’s aim of elimination) and the specificity of the human rights context. Thus, the dangers would come from two

94 *Id.*

95 *Interpretive Guide*, *supra* note 14, at 49.

96 *Guiding Principles*, *supra* note 1, Principle 19 Commentary, at 18.

97 *Id.*

directions: premature disengagement, which would be inconsistent with the interest of rightholders, or indefinite tolerance to residual harm, which would be inconsistent with the normative thrust of the human rights system. Through Principle 19, the GPs define a path towards elimination that impresses two points. First, residual impact is tolerated conditionally and temporarily. Mitigation (reduction as the aim) is conditional because the company has to continuously use its leverage to minimize impacts, and it is temporary because if continuous reduction stalls, the company should terminate the relationship. Second, the goal of elimination of impacts resulting from associated third party operations can be achieved either through minimization of impacts with a view to their full elimination or through elimination of the third parties from the value chain.

The GPs emphasize the two options of elimination and the order among them to impress that HRDD is a rightholder-centred risk management approach.⁹⁸ Its aim is not immediate elimination of impacts from a company's value chains per se—which would be a traditional risk management approach—but increasing the protection for rightholders. The GPs sought to define RtR and HRDD in a way that is consistent with the aim of elimination of impacts and still can summon the leverage of lead firms throughout value chains.⁹⁹ In this way, GPs remain aligned with human rights normativity by not tolerating residual harm indefinitely and unconditionally, as well as seeking to activate new sources of power to drive change throughout value chains.

It appears that Principle 19 is well aligned with Principle 11 and consistent with the aim of elimination of impacts despite the appearance of *mitigation* as reduction of impacts. The Commentary makes it clear that the relevance of mitigation is strictly in relation to third party conduct.¹⁰⁰ This is the sole organizational context where mitigation—the aim of reduction—is legitimate and where residual impact is tolerated. Mitigation introduces a temporal and conditional exception from the aim of elimination of human rights abuses. This is due to a value chain context where companies can achieve elimination of impacts by terminating the relationship with third parties instead of achieving elimination by securing rights through

98 *Id.*

99 *See id.* at 18-19.

100 *See id.*

protective measures capable of preventing and redressing impacts on rightholders. The GPs try to secure leverage by delegitimizing cut-and-run responses to risk management (i.e. abruptly cutting linkages with wrongdoers) and to maximize a company's leverage—in conjunction with actions of other actors—to actually deliver on the elimination goal of RtR. The elaborations in Principle 19 are essential for grasping how HRDD is distinct from other risk management approaches. It is in Principle 19 that the added value of *mitigation*—together with the notion of *leverage*—and its applicability to a distinct organizational context—third party harmful operations—becomes clearer. Mitigation hints at the governance dimension (polycentric governance to global value chains) and organizational dimension of the GPs (illegitimate risk-management approaches to third party non-compliance).

B. A Multilayered Concept of RtR

The RtR concept applies in a multitude of operational and organizational contexts, and the GPs offer a careful progression of the notion of corporate responsibility from the abstract “avoid infringing” to the specific “appropriate action.”¹⁰¹ The GPs gradually specify the RtR but each new layer of explanation and specificity should not problematize the aim of RtR (elimination of impacts) by casually using the notion of mitigation and unnecessarily complicated drafting. Based on this analysis, the value added by each principle can be pinpointed. Level 1 (Principle 11) is fundamentally about the aim of RtR: elimination of impacts from an enterprise's operations. Level 2 (Principle 13) is fundamentally about the scope of RtR—a responsibility to act when a business causes, contributes, or is linked to adverse impact. Level 3 of specification (Principle 19) indicates how to act in these three organizational contexts explained along the temporal dimension of before-, during-, and post-harm. Level 4 of specification is captured in Principle 15, which synthesizes and streamlines the key components of the RtR: policy, due diligence, and remediation. Level 5 of specification comes in Principle 17 that further disaggregates the key steps HRDD requires: impact assessment, action, tracking, and communication. Level 6 of specification contains parameters and insights that are indispensable for understanding and implementing the RtR, and are to be found in Principles 14, 17, 23, 24 and throughout Pillar 2. At this level,

¹⁰¹ *Id.* Principles 11 and 19, at 13, 18.

Principle 17 Commentary arguably misses the chance to impress strongly enough a key parameter: HRDD needs to tackle root causes of abuse in own operations and value chains. Only measures aimed at root causes are capable to deliver on the aim of RtR: elimination as non-occurrence of impact and abuse.

In sum, Pillar 2 offered important layers of specification as follows:

Level 1 (Principle 11)—*aim* of RtR: elimination (human rights dimension)

Level 2 (Principle 13)—*scope* of RtR: cause/contribute/linkage (causality dimension)

Level 3 (Principle 19)—*action* in the organizational context: own conduct versus third party conduct (organizational dimension)

Level 4 (Principle 15)—*action* to discharge RtR: three components of RtR (content of RtR dimension)

Level 5 (Principle 17)—*action* to discharge HRDD: four steps of HRDD (content of HRDD dimension)

Level 6 (Principles 11-24)—*parameters* (nature of the risk-management dimension)

The importance of aligning CSR standards is well accepted, as this can stabilize expectations and increase leverage brought by different stakeholders and governance schemes.¹⁰² During his mandate, the SRSG did emphasize external alignment, that is, between the GPs and other CSR instruments.¹⁰³ This insistence on alignment opened the door for the GPs to be incorporated in other binding and non-binding mechanisms, which now regularly refer to HRDD. That increased the leverage of the GPs, and of the SRSG efforts, way beyond the UN halls. This article however mulls over internal alignment, meaning the extent to which the general and more specific levels of RtR are synchronized and flow from general to specific. Were misalignments to take place, this would create possibilities for misunderstanding, less clarity, more complexity, and eventually diminish the persuasive potential of the GPs. That would reduce a key source of leverage—persuasion—on which a non-binding instrument like the GPs is bound to count on.

102 European Commission, *A Renewed EU strategy 2011-14 for Corporate Social Responsibility*, at 3–7, 13, COM (2011) 681 final (Oct. 25, 2011), [http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com\(2011\)0681/_com_com\(2011\)0681_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2011)0681/_com_com(2011)0681_en.pdf).

103 RUGGIE, *supra* note 47, at 159–166.

As the previous subsection substantiated, the flow in Pillar 2 is shortcut at times by complex drafting. Principle 13 merges a number of dimensions in such a way that terminology can simply not keep up with; the asymmetric drafting between paragraphs 13a and 13b ends up presenting the responsibility in 13b as the odd one out, and potentially out of tune with RtR's aim of elimination. Also, there is premature and needless specification when *prevention* and *mitigation* are placed side by side in the definition of HRDD in Principles 15 and 17, which risks watering down the aim of RtR. There is also amalgamation of organizational contexts and partial explanations regarding adverse impacts in Principle 17 Commentary that introduce the charged concept of mitigation accompanied by clarifications that compound redundancy and confusion regarding contexts and impacts. Finally, Principle 19 Commentary offers important insights but still omits a full explanation of the relation between *leverage* and remediation aspects.¹⁰⁴ The next section seeks to alleviate such drafting deficiencies by clarifying the precise applicability of mitigation and its added value in the economy of the GPs.

IV. Mitigation Clarified

The previous section indicated that drafting choices and the introduction of the notion of mitigation decrease clarity in Pillar 2. More specifically, mitigation understood as reduction of impacts threatens to reopen the aim of RtR (elimination of impacts) and creates new complications for both prevention and remediation. These difficulties can be explained by highlighting the multidimensional character of mitigation in the GPs: the two meanings of mitigation, the two organizational contexts where mitigation applies, and the two types of adverse impacts it covers. By identifying and untangling these dimensions, the GPs can be interpreted to justify the presence and explain the value added of mitigation in the GPs (two functions mitigation fulfills in defining the RtR), and the operational implications (legitimate and illegitimate risk-management measures). The implication is that mitigation is a charged concept with wide ramifications that should rather not be used casually to explain corporate responsibilities under the GPs.

¹⁰⁴ *Guiding Principles*, *supra* note 1, Principle 19 Commentary, at 18-19.

A. Meanings of Mitigation

Mitigation of impacts could refer to mitigation as *aim* (reduction as opposed to elimination) and mitigation as *action* (mitigatory measures to minimize impact as opposed to inaction). The problem with mitigation as aim is that in the human rights context, it is incompatible with the RtR's aim of elimination of impact (human rights harm) from business operations. That raises the question of if, and under what conditions, some contexts of the RtR could accommodate this aim of reduction. The problem with mitigatory measures is that it creates redundancy with simpler notions of preventive and corrective actions, with uncertain value added. To the extent that the distinction between measures and aim fades, the risk is that the aim of elimination specific to the RtR context—as different from other risk-management contexts—will be confused and watered down as businesses are asked to mitigate human rights abuses.

B. Contexts of Mitigation

It should be recalled that RtR has broad coverage through the cause-contribute-linkages dimensions established in Principle 13.¹⁰⁵ Principle 13 covers operations and decisions over which the company has control, as well as operations of third parties over which the company has stronger or weaker leverage, if at all. It is the context of third party operations that makes the situation more complex. Ensuring human rights in third party operations boils down to exercising leverage or terminating relationships (linkages scenario), as well as removing own harmful contributory decisions (contribution scenario). Leverage and termination are both fraught by the reality that elimination cannot be achieved satisfactorily; leverage might not be enough to deliver observance of human rights, and termination will eliminate impacts from the value chains but not from the life of rightholders that might be worse off following the lead firm cutting the relationship with the supplier.¹⁰⁶ That means that mitigation can become a legitimate aim of RtR in third party

105 See *supra* Section III.A., Principle 13.

106 CENTRE FOR RESEARCH ON MULTINATIONAL CORPS, *Conflict Due Diligence by European Companies*, SOMO 3 (November 2013), <https://www.somo.nl/nl/conflict-due-diligence-by-european-companies/> (“In the case of conflict minerals from the DRC, it is recognised that such due diligence should be undertaken in a manner that does not contribute to the de facto embargo of minerals from the region.”).

operations—in the contribution and linkages scenarios.¹⁰⁷ However, this aim is conditional and temporal.

Whether mitigation in third party operations is an aim or a measure is in the eye of the beholder. However, given the complexities of long value chains, the period of time during which residual impact is tolerated is bound to be long as change will unavoidably take time. Expecting companies to address root causes of abuse through HRDD, as proposed herein,¹⁰⁸ increases the complexity of the task even more, which entails that some residual impact will be present for the long term. Overall, complications appear because the GPs use the notion of mitigation in the context of human rights, in the transnational setting of global value chains, and in different organizational contexts involving third parties. The aim here is to prevent the risk of contamination coming from insufficient attention to context that would end up watering down the RtR and give businesses unwarranted flexibility and discretion.

C. *Types of Adverse Impacts*

Discussing mitigatory measures also requires distinguishing between potential and adverse impacts—between risk of harm and harm that has occurred. Although the GPs refer to the mitigation of adverse impacts, both potential and actual,¹⁰⁹ nowhere is mitigation defined. That definition is provided by the OHCHR Guide, which shows this definition is not a self-evident task in the human rights context. The Guide offers a twofold definition. On the one hand, “[t]he mitigation of adverse human rights *impact* refers to actions taken to reduce its extent, with any residual impact then requiring remediation.”¹¹⁰ On the other hand, “[t]he mitigation of human rights *risks* refers to actions taken to reduce the likelihood of a certain adverse impact occurring.”¹¹¹ It is this latter definition that points out that some risk-management measures are not legitimate in the human rights context. Such measures cover both the ex ante (prevention) and ex post (remediation).

107 See *supra* Section III.A., Principle 13.

108 See *infra* Section V.

109 *Guiding Principles*, *supra* note 1, Principle 17, at 16.

110 *Interpretive Guide*, *supra* note 14, at 7. (emphasis added)

111 *Id.* (emphasis added).

D. Preventive Measures

The OHCHR Guide offers an improvement over the GPs that simply stated that “[p]otential impacts should be addressed through prevention or mitigation, while actual impacts – those that have already occurred—should be a subject for remediation.”¹¹² The GPs link mitigation to potential impacts only—a clarification smacking of redundancy with prevention and failing to draw an essential operational implication. The Guide, however, defined mitigation of potential impacts as a reduction in likelihood only.¹¹³ Indeed, in traditional risk assessment, a risk is reduced by diminishing the damage (extent) and/or its probability.¹¹⁴ What the Guide indicates is that a reduction of risks in extent without a change in the likelihood (same probability) that harm will happen is an illegitimate form of mitigation under the GPs. An unchanged likelihood of harm—even after HRDD is applied—is tantamount to a permanent acceptance of residual harm, which is not acceptable even at the ex ante stage. This is due to the human rights context and the Guide captures its normativity well. Thus, preventive measures that only reduce the extent of potential harm are illegitimate under the GPs; a reduction in likelihood is indispensable.

Mitigation thus requires elaboration at the ex ante stage, a clarification that is however absent from the GPs and only added in the Guide. Further reflection on mitigation is needed even more at the ex post stage. Indeed, the GPs linking mitigation with potential impacts only will require further interpretation as it runs contrary to the text of GP 19 (“leverage to prevent or mitigate the adverse impact”)¹¹⁵ and contrary to the Guide’s definition of mitigation (of adverse impacts in general, not only potential impacts).

E. Remedial Measures

The GPs state that “[p]otential impacts should be addressed through prevention or mitigation, while actual impacts—those that have already occurred—should be a subject for remediation.”¹¹⁶ By stating that actual impacts “should be a subject for remediation,” the GPs seemingly deny the applicability of mitigation with regard

112 *Guiding Principles*, *supra* note 1, Principle 17 Commentary, at 16.

113 *Interpretive Guide*, *supra* note 14, at 7.

114 *Id.* at 83.

115 *Guiding Principles*, *supra* note 1, Principle 19 Commentary, at 19.

116 *Id.* Principle 17 Commentary, at 16.

to remedies. Not only this, but the GPs¹¹⁷ indicate that a company does not have to offer remediation for mere linkages with abusive third parties: RtR includes “[p]rocesses to enable the remediation of any adverse human rights impacts they cause or to which they contribute.”¹¹⁸ That means that the linkages scenario of Principle 13b loses the remediation component: the company does not have a responsibility to offer remediation to rightholders for the impacts caused solely by its partners without a contribution from the company. Does that mean that mitigatory measures regarding remediation are not expected? That measures to facilitate or offer remediation are optional rather than imperative, desirable but not expected?

One interpretation is that a company does not have a responsibility to offer remedies under Principle 13b situations. Principle 22 states:

Where adverse impacts have occurred that the business enterprise has not caused or contributed to, but which are directly linked to its operations, products or services by a business relationship, the responsibility to respect human rights does not require that the enterprise itself provide for remediation, though it may take a role in doing so.¹¹⁹

The GPs thus indicate it is optional and desirable for a company to engage in remediation efforts. It is legitimate too, which can be an important aspect to the extent the company takes a critical stance regarding local regulatory failures.

Another interpretation would begin by noticing that even if the company does not have a responsibility to offer remedies directly, this does not necessarily mean it should be unconcerned by whether rightholders get remediation from the third party or the state. What is then the content of appropriate action regarding remediation under the GPs, and is that action really optional in character? Principle 19 Commentary speaks about a responsibility to apply leverage to mitigate impacts.¹²⁰ Nowhere in the text are these impacts limited

117 See *id.* Principles 13b, 15c, 22, at 14, 15, 20.

118 *Id.* Principle 15c, at 15.

119 *Id.* Principle 22 Commentary, at 20–21.

120 *Id.* Principle 29 Commentary, at 18–19.

to potential impacts. Actually, regarding contribution, companies are asked to “mitigate any remaining impact.”¹²¹ And regarding linkages, companies are asked to “prevent or mitigate the adverse impact”;¹²² similarly Principle 13 indicates companies should “[s]eek to prevent or mitigate adverse human rights impacts.”¹²³ Under Principle 19, which asks companies to exercise leverage to mitigate adverse impacts, it would be curious if the company was diligently using its leverage *ex ante* to prevent and, during abuses, to stop them, but desist once the harm occurred and remain indifferent to whether the stakeholders it aimed to protect have access to remedy or not. Therefore, the imperative responsibility to exercise leverage to address impacts should expand to cover remediation by third parties.

If leverage over the third party exists, why should it be used to mitigate potential impacts only, and not actual impacts as well? This remains fully compatible with Principle 22. Such interpretation is also mindful that the distinction between linkages and contribution—despite the dramatically different prescription regarding remediation—is more a term of art and science, because stakeholders almost always disagree on the correct characterization of contribution or linkages in value chains. Lead firms are seen as (a) sometimes contributing directly through their purchasing decisions or (b) maybe encouraging by failing to take a stronger stance (possibly by adopting an outsourcing business model that systematically enhances competitive market pressures on suppliers throughout the value chains) and, ultimately, (c) always benefiting from cost reductions from exploitative value chains.¹²⁴ So the imperative nature of responsibility to exercise leverage towards remediation can be accepted, but what are its operational implications?

So far, the analysis points that taking mitigatory measures regarding remediation is imperative. Could there be mitigatory measures regarding remediation that are illegitimate? For instance, could a company terminate relationships with its supplier for failure to remediate actual impacts? Would that be legitimate

121 *Id.* Principle 19 Commentary, at 19.

122 *Id.*

123 *Id.* Principle 13, at 14.

124 *See Interpretive Guide, supra* note 14, at 5 (defines both “legal” and “non-legal complicity”).

or not? Recall what Principle 19 depicts as “appropriate action” in the linkages scenario: first apply leverage over the third party, then terminate the relationship.¹²⁵ There is a sequencing of steps—an escalation in the response of the company. The fact that the supplier has not remedied abuses, the fact that rightholders did not obtain remediation for harms, is by itself not enough reason to terminate the relationship. Conceivably, as long as using leverage makes progress in continuously reducing the risk (making gains in preventing harm and curtailing on-going abusive practices), it would not be legitimate for the lead firm to justify termination based solely on the third party’s failure to remediate past harms. Clearly, failures of the supplier to remediate harm counts—as one factor among others, with all of them assessed in a local context—in a possible escalation from leverage to termination. However, the GPs provide the company a conditional and temporary exception from the goal of elimination in third party contexts and emphasize pursuing a sequence of steps against uncompliant third parties.¹²⁶ This risk-management approach is appropriate to the human rights context where the rightholders’ interests count against facile risk-management measures (cut and run). Therefore, the Commentary to Principle 19 read together with Principle 22 should be interpreted as a rightholder-centered approach to risk management that denies the legitimacy of measures that use remediation failures to prematurely escalate from using leverage (step 1) to terminating the relationship (step 2).

It follows that some unremedied harm, the residual impact inherent in mitigation, would be acceptable as an exception from the elimination aim of Principle 11. This is due to the choice between the two mitigatory measures—elimination (of impact from value chain through cutting links) and reduction (of impact through staying engaged and exercising leverage)—that can only be legitimately made with attention to the local context and following an informed and participatory process. Failure of third parties to remediate severe harms would change the discussion and tilt the balance towards termination. Also, total unresponsiveness by third parties to remediation concerns, particularly where feasible measures are possible, would provide a stronger ground for the lead firm to legitimately terminate the relationship. Failure of suppliers

125 *Guiding Principles*, *supra* note 1, Principle 19 Commentary, at 18–19.

126 *Id.*

to remediate harm can become a root cause of ongoing and future impacts that lead firms have to address through their HRDD process.

Having the lead firm tolerate residual harm (unremediated harm) in third party operations is not tantamount to partial remediation (reduced harm) as a legitimate way of doing business under the GPs. It merely applies to one organizational context—third party operations. Remediation in this context is a composite one: third parties (suppliers and host state) offer full remediation while the company offers partial remediation by exercising leverage over the third parties. Indeed, under the GPs, full remediation is within the responsibility of the wrongdoer (supplier) to *respect* (Pillar 2) together with the obligation of the state to *protect* (Pillar 1).¹²⁷ Companies linked to the wrongdoer have a role in *mitigating* these actual impacts by exercising their leverage on third parties to obtain remediation for rightholders. This is a responsibility not to remain passive, even when third parties impact rights and even at ex post stage.

A conclusion can be derived by bring together the three angles proposed here: first, it is imperative to exercise leverage to secure remediation by others; second, unsuccessful leverage over remediation is usually not a sufficient reason to terminate the relationship; and third, the ability to justify the choice between the two mitigatory measures of leverage and termination depends on the context. The conclusion is that the GPs should not be interpreted as offering companies in the Principle 13b context blank permission to stay out of remediation and focus only on prevention.¹²⁸ While relieved of the burden of offering remediation themselves, companies are expected to use their leverage to mitigate harm, including mitigating the lack of remedies for rightholders. This point is made explicit

127 *Id.* Principles 1, 11, at 6, 13.

128 One can disagree here with the interpretation offered by Shift. “O&G companies do not have to remediate . . . Impacts they have neither caused nor contributed to: it is the responsibility of those who have contributed to the impacts to provide for or cooperate in their remediation. However, where the impacts are nevertheless linked to the O&G company’s operations, it has a responsibility to use its leverage to prevent or *mitigate the risk* of the impacts continuing or recurring.” European Commission [EC], *Oil and Gas Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights*, at 70 (2013), https://www.ihrb.org/pdf/eu-sector-guidance/EC-Guides/O&G/EC-Guide_O&G.pdf [hereinafter *Oil and Gas Guide*] (emphasis added).

in the relevant ILO document on corporate responsibilities which has been revised to incorporate the GPs. It reads: “Multinational enterprises should use their leverage to encourage their business partners to provide effective means of enabling remediation for abuses of internationally recognized human rights.”¹²⁹

Mitigation here is a legitimate aim under RtR, not only merely a mitigatory measure. It is a genuine exception from the RtR’s elimination aim that is justified by the composite remediation in the third party context. By eliminating remediation from the linkages scenario, the GPs drafters seem to have overreacted in their attempts to, on the one hand, present to businesses a precise RtR that is not overly broad in the supply chain context, and, on the other hand, to not dilute remediation through partial solutions (full remediation being a human right). However, in the value chain context, remediation is a composite one and a human rights imperative is to summon the leverage of lead firms to clean value chains and increase protection of rights throughout the chains. That means this context of remediation (ex post stage) is where mitigation has the highest value added in the GPs: it depicts a genuine exception from the aim of elimination and corrects the overreaction of the GPs to the idea of partial remediation. It is an exception that applies only to the lead firm (not to suppliers and host states), only in the context of third party operations (not causation and contribution), and only to remediation (not prevention).

This analysis allows a comparison of mitigation at the ex post and ex ante stages. At the ex post stage of remediation, mitigation is a genuine exception from the elimination aim of RtR. And it refers to the very aim of reduction and not merely to mitigatory measures. Actually, the GPs have defined the RtR to not cover remediation in linkages situations.¹³⁰ Through as argued above, and explained in the section below, mitigation can actually correct the overreaction of the GPs drafters take on the RtR.¹³¹ In contrast, at the ex ante stage of prevention, mitigation is an apparent, not a genuine, exception,

129 Int’l Labour Org., *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, at 65 (2017), http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf.

130 *Guiding Principles*, *supra* note 1, Principle 19 Commentary, at 19.

131 *Infra* Section IV.F.

from the elimination aim given that it is a conditional and temporal exception mandating some steps a company should take before cutting links with third parties.¹³²

These prevention and remediation complexities in the multiple contexts of RtR bring the analysis to the functions that mitigation actually plays in the GPs. If mitigation cannot be shown to add any value in explaining the RtR, then this charged concept should be dismissed as redundant, decried as diminishing the simplicity and clarity of the GPs, and deemed counterproductive in the human rights and business context.

F. Functions of Mitigation

The appearance of mitigation throughout the GPs introduced a level of ambiguity. The ambiguity can be explained by the multidimensional character of mitigation applied in a human rights and transnational governance context. With further interpretation, it appears that this notion serves a number of functions of high importance for RtR.

First, mitigation has a distinct place in the GPs by carving out two exceptions—a seeming exception and a genuine exception—from the goal of elimination. Furthermore, both exceptions apply only in the context of third party operations. On the one hand, the seeming exception has to do with the sequence of steps (use leverage, increase it, consider impacts of terminating relations) a company should take before cutting links with third parties. In the GPs, priority goes to reducing impacts and ultimately eliminating them through improved third party practices, not through cutting links.¹³³ In this way, referring to *mitigation* prevents the goal of elimination from taking over through the wrong means (elimination by cutting links) and legitimizes the use of leverage as the appropriate means. This exception from the elimination goal is also a temporal and conditional one.

On the other hand, the genuine exception from the elimination goal has to do with remediation. Remediation in third party operations is composite remediation and the GPs, with their polycentric governance approach, seek to mobilize leverage from

132 *Infra* Section IV.F.

133 *Guiding Principles, supra* note 1, Principle 19 Commentary, at 18–19.

multiple duty-holders—host state, supplier, and lead firm—to ensure human rights.¹³⁴ Principle 19 can be interpreted to justify an imperative responsibility for lead firms to use leverage to increase remediation, even if this in itself can only amount to partial or uncertain remediation.¹³⁵ This is a genuine and permanent exception from the elimination aim. In this way, referring to *mitigation* prevents the goal of elimination pursued by some corporate accountability advocates through ambitious means (strict liability of lead firms for failure to prevent or remediate) from taking over more modest, but potentially more realistic and transformative contributions by lead firms exercising leverage and contributing to remediation by third parties.

Second, the appearance of mitigation in HRDD seemed to have fulfilled another function. References to leverage and mitigation in Principle 19 appear to somehow counterbalance an overly narrow formulation of RtR and create an opening to expand the scope of RtR regarding remediation. Here, mitigation works not to imperil the elimination aim of RtR, but to expand the scope of RtR. Rather than a notion that confuses and potentially waters down the aim of RtR, mitigation, together with the notion of leverage, prevents a narrow interpretation of the GPs, which explicitly dropped remediation from a company's RtR in the paragraph 13b context.¹³⁶ The GPs references to mitigating adverse impacts can be used to impress that companies have an imperative rather than a discretionary role in remediation in third party operations, despite the text of Principle 22 Commentary. Thus, the rightholders' access to remedies is enhanced.

Third, introducing mitigation in the definition of RtR carries connotations of reasonableness and familiarity with established risk-management practices. Mitigation might communicate that RtR imposes a reasonable burden on companies. The operational rather than aspirational character of the entire GPs is strengthened. Mitigation points out that companies cannot truly guarantee (ensure) non-occurrence. Instead, mitigation indicates that reduction is a commendable short-term achievement for a company

134 See Ruggie, *supra* note 50.

135 See *supra* Section IV. E.

136 *Guiding Principles*, *supra* note 1, Principles 15c, 22, at 15, 20 (stating that remediation is expected only where a company cause or contributed to adverse impacts, and not for mere linkages to abusive third parties).

embarked on the long and hard road of achieving full elimination. Even in own operations, mitigation communicates that a responsible company involved in inherently hazardous activities should prepare for emergency situations with contingency planning to mitigate (reduce) the scale of a disaster, should it happen. Thus, the company would reduce unfolding impacts through diligent planning and action before the impacts escalate, rather than being unprepared and inactive. However, these correct connotations do not need to be communicated obliquely through the term “mitigation”—placed side by side with prevention—as the GPs adopt a tone and a range of explanations that achieve the task more directly and effectively. Thus, this function of mitigation, though appealing at first sight, adds little value to the GPs and would be well replaced by references to preventive and corrective measures to minimize harm, particularly in the text preceding Principle 19 where mitigation makes its genuine contribution. Explaining HRDD as being generally about mitigation of impacts is least helpful in the human rights context and obscures the rightholder-centered risk management approach that the GPs genuinely put forward.

In sum, this analysis pinpoints the applicability of mitigation (aim of reduction of impact) to one organizational context only: that of third party conduct, which comprises the “contribute” and “linkages” scenarios.¹³⁷ Only in this context can mitigation remain consistent with the elimination aim of RtR, as stated in Principle 11. The value mitigation has added to the GPs follows from the two specific functions discernable in Principle 19. First, the function to pinpoint—together with the notion of leverage—a key HRDD step, and a stop gap towards the aim of elimination.¹³⁸ Second, the function to expand—again, together with the notion of leverage—the scope of RtR by having the company play a role in securing rightholders’ access to remedies.¹³⁹ Finally, the analysis herein points out that *mitigation of impacts* is a charged and multidimensional notion that can confuse and water down the elimination aim of the RtR stated in Principle 11. The watering down of RtR from a language emphasizing mitigation is generated by drafting imperfections in the GPs and mainly by the weight of the HRDD notion relative to the abstract and normative RtR—less in the economy of the GPs

137 See *id.* Principle 13, at 14.

138 *Guiding Principles*, *supra* note 1, Principle 19 Commentary, at 18–19.

139 *Id.*

themselves, but more in the way that GPs are read by stakeholders. Clarifying mitigation in the GPs ensures consistency between the RtR and HRDD, and affirms HRDD as a rightholder-centered risk-management approach geared towards elimination of impacts.

The next section draws attention to a general parameter of RtR and HRDD. Arguably a discussion about *root causes* of impacts and about using a purpose-built methodology to identify and address deep causes would have been well placed among the parameters in Principle 17. Furthermore, this parameter is consistent with the GPs and is observable in post-mandate documents involving Ruggie and his team.

V. “Root Causes” of Adverse Impacts

One danger hovering over an instrument that places so much weight on the notion of HRDD is that this risk management process is rather indeterminate and might ultimately not be effective due to the flexibility and discretion it affords companies. This is not only because mitigation used in HRDD created ambiguities that could be exploited to lower compliance, but also because the GPs lack a centralized monitoring or dispute resolution mechanism, are a general instrument devoid of specific guidance for specific rights and specific contexts, and are silent on the amount of effort expected from companies implementing HRDD. These limitations can be explained against the strengths of the GPs as a foundational treatment for the BHR field,¹⁴⁰ but arguably it makes it even more important for HRDD to be explicitly geared towards tackling root causes of adverse impacts rather than mere symptoms and contributing factors.

This section presents options for tightening HRDD to ensure meaningful rightholder-centred risk-management, highlights references to root cause analysis in the GPs-inspired documents from Ruggie and Shift, and presents implications for prevention and remediation that follow from this analysis of mitigation and root causes.

140 Radu Mares, *A Rejoinder to G. Skinner’s Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries’ Violations of International Human Rights Law*, 73 WASH. & LEE L. REV. ONLINE 117, 117–58 (2016), <http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1045&context=wlulr-online> (explaining the evolution of regulatory thinking in the BHR field through three ‘baselines’).

A. Options for Tightening HRDD

With no centralized oversight mechanism and no specificity of expected measures, there is an inbuilt looseness in the HRDD, which can result in a HRDD that is largely symbolic, generates limited improvements, and fails to address underlying issues.¹⁴¹ A good starting point for analysis is the definition of HRDD, which in the GPs emphasizes the steps of the management process a business should employ.¹⁴² However, in a report preceding the GPs, Ruggie covered a different dimension of HRDD: “Due diligence is commonly defined as ‘diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation.’”¹⁴³

Subsequently, the OHCHR more precisely linked HRDD to the “reasonable person” which is the notion commonly used in the law of negligence.¹⁴⁴ Actually, the Guide offered two definitions. A general due diligence definition indicated that:

Due diligence has been defined as “such a *measure of prudence*, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent [person] under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.”¹⁴⁵

Specifically for HRDD, the Guide wrote: “In the context of

141 Judy Gearhart, *Global supply chains: time for a new deal?*, OPENDEMOCRACY (June 2, 2016), <https://www.opendemocracy.net/beyondslavery/ilc/judy-gearhart/global-supply-chains-time-for-new-deal> (considering that “[t]he problem with the UNGPs as they are currently conceptualised, however, is that they risk simply creating a new generation of voluntary programmes because they do not define minimum performance requirements or set regulatory standards.”).

142 *Guiding Principles*, *supra* note 1, Principle 17, at 16. See also *supra* text accompanying note 77.

143 John Ruggie (Special Representative to the Secretary General), *Business and Human Rights: Towards Operationalizing the “Protect, Respect and Remedy” Framework*, ¶ 71, U.N. Doc. A/HRC/11/13 (Apr. 22, 2009).

144 Mayo Moran, *The Reasonable Person: A Conceptual Biography In Comparative Perspective*, 14 LEWIS & CLARK L. REV. 1233, 1238 (2010).

145 *Interpretive Guide*, *supra* note 14, at 6 (emphasis added)(citation omitted) (quoting *Due Diligence*, BLACK’S LAW DICTIONARY (6th ed. 1990)).

the Guiding Principles, human rights due diligence comprises an *ongoing management process* that a reasonable and prudent enterprise needs to undertake, in the light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights.”¹⁴⁶ The necessity to have two definitions could be explained by the different emphasis: the first definition indicates a “measure of prudence” while the second indicates “management process.” This is significant given that the GPs are a type of instrument unable to specify the amount of effort expected from companies; it can only depict the risk-management process that has some obligatory steps.¹⁴⁷ This is the contribution of the GPs, as well as their limitation. The looseness comes from the impossibility to specify the amount of effort beyond generalities like: the process has to be “effective,” companies should “take the necessary steps,” take “every reasonable step,” and that the diligence used to address impacts is “due.”¹⁴⁸ This is expected from the reasonable person whose compliance can only be determined by investigating the particular circumstances.

The HRDD notion in the GPs does not prejudge the amount of effort question in either paragraph 13a or 13b contexts. Paragraph 13a has a more stringent formulation for own conduct (cause and contribute scenarios);¹⁴⁹ however, that does not imply that the company is, or could be, asked by the GPs to adopt the highest levels of responsiveness (akin to a zero-tolerance approach) for all human rights risks. The fact that paragraph 13a is not worded with the qualifier “seek to” that accompanies paragraph 13b,¹⁵⁰ should not be seen as a mark of higher stringency of effort. Indeed, Principle 19 still speaks of “take the necessary steps to cease or prevent” own harmful conduct.¹⁵¹ Noteworthy though, the GPs do indicate a

146 *Id.* (emphasis added).

147 *Guiding Principles, supra* note 1, Principles 17–22, at 16–22 (detailing the steps of the risk management process).

148 *Id.* Principle 19 Commentary, at 18–19.

149 *See supra* text accompanying note 67.

150 *See supra* text accompanying note 67.

151 *Guiding Principles, supra* note 1, Principle 19 Commentary, at 18. *See also* Occupational Safety and Health Convention (No. 155), art. 16, June 22, 1981, 1331 U.N.T.S. 279 (asking employers “to ensure that, so far as is reasonably practicable, the workplaces, machinery, equipment and processes under their control are safe and without risk to health.”) (emphasis added).

higher stringency for severe impacts and gross abuses.¹⁵²

The GPs were not meant to settle the amount of effort appropriate in specific circumstances. Instead, they were meant to arrive at a widely accepted understanding of corporate responsibilities (e.g. wide scope expanding throughout value chains, essential components of RtR) and move the BHR field beyond deadlock and polarization. Based on these achievements, further specification and remedial mechanisms would more easily arise. To its critics, the GPs were a missed opportunity precisely because new oversight mechanisms and more precise responsibilities did not emerge from the SRSG mandate.¹⁵³ To its supporters, the strength of the GPs came from proposing this new polycentric governance approach to dealing with regulatory gaps in the globalized economy, further augmented by HRDD parameters and insights that created a new rightholder-centred risk management approach.¹⁵⁴ These parameters are important for reducing the indeterminacy of the HRDD notion and for facilitating stakeholder dialogues around strategic and specific measures companies should undertake.

One such parameter is an emphasis on root causes. HRDD would be an effort oriented towards root causes rather than symptoms.¹⁵⁵ Thus while the amount of effort still remains open, the correct orientation of that effort towards deeper causes is added. An emphasis on root causes, which could well be one general parameter among others mentioned in Principle 17 and on Level 6 of the RtR, is one option to further tighten HRDD. Other options are review mechanisms, specification of concrete measures in specific contexts, and theories of strict liability. These three other options are essential

152 *Guiding Principles*, *supra* note 1, Principle 14, 23, at 14, 18 (stating that businesses should prioritize addressing severe impacts and treat gross abuses as a matter of legal compliance).

153 See Chris Albin-Lackey, *Without Rules: A Failed Approach to Corporate Accountability*, HUMAN RIGHTS WATCH (2013), https://www.hrw.org/sites/default/files/related_material/business.pdf.

154 Mares, *supra* note 48.

155 For example, the Fair Labor Association developed its “Sustainable Compliance methodology” which “is designed to move the field of social compliance beyond policing and band-aid fixes [and toward] uncovering root causes of problems and providing systemic, sustainable solutions so that problems are fixed in a lasting way.” *Our Methodology*, FAIRLABOR.ORG, <http://www.fairlabor.org/our-methodology> (last visited Sept. 9, 2017).

for the BHR field and attracted attention and activity before and after the SRSG mandate;¹⁵⁶ however, none of these options seemed feasible for Ruggie to act on at the time and instead he chose to add value with the GPs as a short, foundational, non-legally binding instrument in a polarized BHR field.

Review Mechanism

An authoritative reviewer is indispensable to determine whether a sufficient amount of diligence is exercised. Such determination can only be made with a view to specific circumstances. Indeed, an authoritative reviewer (e.g. court) assesses whether the company displayed the diligence and prudence needed in the circumstances as measured against a legal standard of “reasonable person.”¹⁵⁷ However, Ruggie approached his mandate persuaded not to repeat the failure of the UN Norms,¹⁵⁸ which envisaged a monitoring mechanism as well as a national remedial mechanism, in addition to proposing an expansive corporate responsibility.¹⁵⁹ The GPs, therefore, were not only more cautious about the scope of corporate responsibility, but Ruggie also did not risk sinking the entire instrument by making it dependent on establishing a monitoring and enforcement mechanism for their implementation. Instead, the GPs affirm the necessity of a remediation and grievance mechanism for the polycentric governance system to work and map the types of remedial mechanisms (containing judicial and non-judicial mechanism).¹⁶⁰

Ex Ante Specification (Action Plans)

Having the GPs outline specific measures to specific human rights in specific industries and geographies would have possibly been beyond the capacity of a SRSG mandate and impossible to concentrate in a HRC report. It would have also been premature if the general conceptual foundation of the field was lacking and stakeholders were in disagreement over fundamentals in a contested field like BHR. Still, the SRSG mandate conducted targeted research

156 See Mares, *supra* note 140, at 118–20.

157 Moran, *supra* note 144.

158 John Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. OF INT'L L. 819, 822 (2007) (explaining the failure of the Norms).

159 Sub-Commission on the Promotion and Protection of Human Rights, Res. 2003/16, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2, arts. 16–18 (Aug. 13, 2003).

160 *Guiding Principles*, *supra* note 1, Principles 25–31, at 22–26.

and published more specific guidance on a variety of issues such as impact assessments,¹⁶¹ non-judicial grievance mechanisms,¹⁶² state-investor contracts,¹⁶³ and other topics.¹⁶⁴ The quest for specifying corporate responsibilities has defined the CSR movement, before and since the GPs; it increasingly delivers indicators, tools, and guidance in specific contexts and for specific HRDD steps.¹⁶⁵ The ISO 26000 is another guideline that goes more in-depth to specify expected action on a number of human rights issues.¹⁶⁶

Action plans are a method increasingly employed in business and human rights to specify HRDD actions.¹⁶⁷ This method is appealing as it can work in the absence of legal requirements but can also be supported or even mandated through law.¹⁶⁸ Such

161 See John Ruggie (Special Representative to the Secretary General), *Human Rights Impact Assessments – Resolving Key Methodological Questions*, U.N. Doc. A/HRC/4/74 (Feb. 5, 2007).

162 John Ruggie (Special Representative to the Secretary General), *Piloting Principles for Effective Company/Stakeholder Grievance Mechanisms: A report of Lessons Learned*, A/HRC/17/31/Add.1 (May 24, 2011).

163 John Ruggie (Special Representative to the Secretary General) *Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations: Guidance for Negotiators*, U.N. Doc. A/HRC/17/31/Add.3 (May 25, 2011).

164 For a complete list of reports issued by the SRSG mandate, see *U.N. Secretary-General's Special Representative on Business & Human Rights*, BUSINESS & HUMAN RIGHTS RESOURCE CTR., <https://business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights> (last visited Sept. 8, 2017).

165 See THE DANISH INSTITUTE OF HUMAN RIGHTS, *supra* note 6; Global Compact Network Germany, *supra* note 6; Shift & Mazers LLP, *supra* note 7; European Commission, *supra* note 8; GWENDOLYN REMMERT ET AL., *supra* note 9.

166 INT'L ORG. FOR STANDARDIZATION, ISO 26000: GUIDANCE ON SOCIAL RESPONSIBILITY 19-69 (2010) (providing “[g]uidance on social responsibility core subjects”).

167 See, e.g., Claire Methven O'Brien et al., DANISH INST. FOR HUMAN RIGHTS & INT'L CORP. ACCOUNTABILITY ROUNDTABLE, *National Action Plans On Business And Human Rights: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks* (June 2014), <https://static1.squarespace.com/static/583f3fca725e25fcd45aa446/t/5865d59fe6f2e17f4f0cb629/1483068841826/DIHR-ICAR-National-Action-Plans-NAPs-Report3.pdf>

168 For example, France has passed legislation imposing a duty of vigilance on French companies, which requires them to establish and implement a ‘vigilance plan’. Sarah A. Altschuller & Corentin Chevallier, *French National Assembly Adopts Corporate Duty of Vigilance Law*, FOLEY HOAG LLP: CORPORATE

action plans happen at multiple levels. First, even in the absence of a reviewer or detailed legal requirements, companies adopt “corrective action plans” (CAPs) detailing the targets, measures, timelines, and resources, as needed, to address adverse impacts in local circumstances.¹⁶⁹ This applies to a company’s own operations as well as third parties where lead firms agree with suppliers on CAPs.¹⁷⁰ Such CAPs are a modality to settle the specific amount of effort expected in specific circumstances of individual companies.¹⁷¹ Second, at higher levels, states adopt National Action Plans (NAPs) for BHR that are expected to specify further regulatory and business measures fitted for that jurisdiction. In August 2017, there were 13 NAPs that states have adopted even though this is not a legal obligation under an international treaty.¹⁷² Third, a recent trend and outgrowth of such NAPs are industry-level compacts where public and private stakeholders in a specific industry agree on plans and concrete measures to address typical impacts in that industry.¹⁷³ In sum, such action plans bring specificity to HRDD at

RESPONSIBILITY AND THE LAW (Feb. 28, 2017), <http://www.assemblee-nationale.fr/14/pdf/ta/ta0924.pdf>. See also ASSEMBLÉE NATIONALE, *supra* note 10.

169 See *Remediation*, THE ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH, http://bangladeshaccord.org/remediation_ (last visited Sept. 8, 2017) (providing an explanation on the inspection and remediation process under the The Accord on Fire and Building Safety in Bangladesh).

170 See, e.g., FAIRLABOR.ORG, *supra* note 155.

171 See, e.g., MICROSOFT, *Citizenship Report*, 84 (2013), http://admin.csrwire.com/system/report_pdfs/1323/original/Microsoft_Citizenship_2013_v2.pdf (explaining the company “works closely with suppliers on corrective action plans to resolve issues. We require suppliers to identify the root cause, the corrective course of action, and future preventive actions for all the issues found. Suppliers must correct issues within specific deadlines based on the severity of the non-conformance found to avoid restrictions on new Microsoft business or the possibility that we’ll terminate our business with them.”).

172 The Office of the United Nations High Commissioner for Human Rights (OHCHR) maintains a repository of NAPs. *State National Action Plans*, UNITED NATIONS HUMAN RIGHTS: OFFICE OF THE HIGH COMMISSIONER, <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx> (last visited Sept. 8, 2017).

173 The Netherlands government aims to conclude International Corporate Social Responsibility (ICSR) covenants with companies in 13 Dutch sectors, identified as high risk: agriculture, chemicals, construction, electronics, energy, finance, food, metals, oil and gas, retail, textiles/apparel, wholesale, and wood and paper products. *Progress on Voluntary Agreements and Legislation*, MVO PLATFORM, (Sept. 12, 2016), <http://mvoplatfom.nl/news-en/developments-in-the-netherlands>. The Dutch government adopted a root-

company, industry, or jurisdiction levels. Finally, should there be legal obligations, prosecutors and judges may compel companies to set up compliance systems and plans with a view to a company's specific circumstances and in order to bring itself into compliance with law.¹⁷⁴ The French Parliament has recently passed legislation to make HRDD mandatory; this would require large companies to adopt and implement systems in line with the GPs.¹⁷⁵

Theories of Strict Liability

A way to bypass the entire *amount of effort* difficulty is to make companies liable for harm irrespective of fault. Determining whether the company was prudent in preventing harm and exercised effort would become unnecessary.¹⁷⁶ Such theories of strict liability—as opposed to fault—or negligence-based liability—would be applicable for own operations as well as third party operations, covering all scenarios in Principle 13.¹⁷⁷ Conceivably, even lead firms that outsourced production would be deemed liable for suppliers' harmful operations. However, new legislation would be needed to create such liability, which could furthermore still allow for a defense for a company that demonstrated it undertook rigorous HRDD.¹⁷⁸

cause approach with its NAP when it wrote: “the challenge in the next few years will be timely identification of risks in Dutch companies’ supply chains. The government wants to work on structural solutions within international chains, not incident management.” Ministry of Foreign Affairs, *National Action Plan on Business and Human Rights*, 14 (2014), <https://business-humanrights.org/sites/default/files/documents/netherlands-national-action-plan.pdf>.

174 For instance, under anti-trafficking US Federal Acquisition Regulation (2015), federal contractors are required to develop compliance plans with minimum components such as an “awareness program,” “a reporting process for employees to use,” “a recruitment and wage plan,” “a housing plan,” and “procedures . . . to monitor, detect, and terminate agents; and subcontractors.” Sarah A. Altschuller, *Federal Acquisition Regulation: Amendments to Strengthen Prohibitions Against Trafficking*, FOLEY HOAG LLP: CORPORATE SOCIAL RESPONSIBILITY ALERT (Feb. 2, 2015), <http://www.foleyhoag.com/publications/alerts-and-updates/2015/february/federal-acquisition-regulation-amendments-to-strengthen-prohibitions-against-trafficking>.

175 ASSEMBLÉE NATIONALE *supra* note 10. FAIR LABOR ASSOCIATION *infra* note 211.

176 See 3 LEAH HECTOR, CORPORATE COMPLICITY AND LEGAL ACCOUNTABILITY: CIVIL REMEDIES — REPORT OF THE INTERNATIONAL COMMISSION OF JURISTS EXPERT LEGAL PANEL ON CORPORATE COMPLICITY IN INTERNATIONAL CRIMES, 10 (2008).

177 See *supra* Section III.A.

178 See, *eg.*, Proposition De Loi Relative Au Devoir De Vigilance Des Sociétés Mères Et Des Entreprises Donneuses D’ordre, Texte Adopté n°708, 23 mars

Allowing a HRDD defense, of a narrow or broad scope, would in effect position liability on a continuum between the no-fault and fault-based liability.

This new legal regime would result in further specification of what HRDD entails because companies would be pressed to urgently specify what compliance with the law entails and case-law would progressively specify what concrete HRDD is acceptable under the law. This solution would eschew difficulties regarding offering ex ante specification of HRDD. However, this liability theory would be of exceptional application as it overturns the rule in civil and criminal liability legal regimes: fault-based liability (as opposed to strict liability) and limited liability based on separate corporate personhood (as opposed to joint and several liability).¹⁷⁹

The GPs are silent on theories of liability as Ruggie indicated his mandate was never aimed to arrive at a grand theory of corporate responsibility.¹⁸⁰ Should he have built the GPs on theories of strict liability, the opposition to the entire project would have been guaranteed. In fact, the UN Norms proposed a broad corporate responsibility formulated in a manner assuming a stricter form of liability and indicating the primacy of human rights law over other “lesser” bodies of law.¹⁸¹ This clearly contributed to the defeat of the Norms in the UN. The GPs being agnostic on theories of liability leaves the decision to regulatory processes at the national level,

2016, www.assemblee-nationale.fr/14/pdf/ta/ta0708.pdf.

179 HECTOR, *supra* note 176, at 10, 45–49.

180 Ruggie indicated he never intended to put forward “a robust moral theory or a full scheme for the attribution of legal liability to underpin the Framework.” RUGGIE, *supra* note 47 at 107. He further wrote, “I did not set out to establish a global enterprise legal liability model. That would have been a purely theoretical exercise”. *Id.* at 189.

181 Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nations’ Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 COLUM. HUMAN RIGHTS L. REV. 336, 357, 363-64 (2005) (writing that “[s]ince the definition of TNC does not recognize the distinct legal personalities of the corporations that together constitute the TNC, the Norms essentially pierce the corporate veil . . . The Norms produce a standard incompatible with the domestic corporate laws of a majority of states. Yet the Norms make little effort either to recognize or resolve this conflict . . . The problem, of course, is that, as a matter of the domestic law of most states, the autonomous legal personality of a corporation matters. Most states have developed very strong public policies in favor of legal autonomy.”) (references omitted).

where regulators should design the appropriate liability regime. Notably, the GPs do not exclude any form of liability. Thus, while the GPs emphasize HRDD, there is a warning for businesses that undertaking HRDD is not automatically a defense:

Conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse. However, business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses.¹⁸²

Root Cause Orientation

The twofold definition of the Guide indicates a concern for HRDD as a “process.”¹⁸³ The GPs are not about *amount* of effort but about the *type* of effort wherein certain steps are expected. A further emphasis, as proposed herein, on the *direction* of efforts towards deeper underlying causes of harm would impress the idea that superficial measures to mitigate impacts are inconsistent with HRDD and the GPs. Orienting HRDD towards root causes could be incorporated as one of the parameters of HRDD highlighted in Principle 17. It would be in tune with the general but valuable observations that are appropriate in a foundational and generic instrument like the GPs. This is consistent with lessons from supply chain management where efforts of brands to address suppliers’ harmful operations have not achieved expected results because root causes—such as own purchasing decisions and insufficient worker empowerment—have not been addressed properly or at all.¹⁸⁴ Such root causes put the spotlight on both the lead firm’s blameworthy conduct (paragraph 13a, “contribute”)¹⁸⁵ as well as on the complexities of exercising

182 *Guiding Principles*, *supra* note 1, Principle 17 Commentary, at 17.

183 *See Interpretive Guide*, *supra* note 14, at 6 (“human rights due diligence comprises an ongoing management process”).

184 *See, e.g.*, FAIR LABOR ASSOCIATION, *supra* note 155.

185 Mark Anner et al., *Toward Joint Liability in Global Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks*, 35 COMP. LAB. L. & POL’Y. J. 1-3 (2013) (examining the sourcing practices of the brands and retailers that coordinate these supply chains as a root cause of sweatshop conditions in international subcontracting networks).

influence over third parties (paragraph 13b, “linkages” and Principle 19 on “leverage”).¹⁸⁶ Mitigatory measures would then have to be assessed for their ability to address such root causes with a view to eliminating human rights harms from value chains.

There are methodologies, such as Root Cause Analysis (RCA) that are purpose-built for thoroughness of assessments and corrective measures to prevent (re)occurrence of harm.¹⁸⁷ Their necessity derives from well known problems, as Duke Okes writes: “People and organizations often don’t believe they have the time to perform the in-depth analyses required to solve problems. Instead, they take remedial actions to make the problem less visible and implement a patchwork of ad hoc solutions they hope will prevent recurrence”¹⁸⁸

This article uses the notions of root causes and root cause analysis to convey the importance of a thorough investigation—in-depth and comprehensive—of visible and less visible factors leading to infringements of human rights. It is not essential for the current purposes to define root causes precisely and distinguish them clearly from contributing factors. Indeed, HRDD should be able to tackle both root causes—without which the impact would not take place—and contributing factors—without which the impact would still occur but to a reduced degree—through appropriate action. What matters is for the HRDD process, namely the impact assessment¹⁸⁹ and tracking stages,¹⁹⁰ to not stop prematurely in identifying and addressing deeper causes.

As summarized by James Rooney, the RCA is a four-step process involving: (1) data collection; (2) causal factor charting (“a sequence diagram . . . that describes the events leading up to an occurrence, plus the conditions surrounding these events. . . . Causal factors are those contributors . . . that, if eliminated, would have either prevented the occurrence or reduced its severity”); (3) root cause identification (a “Root Cause Map to identify the underlying reason or reasons for each causal factor”); and (4) recommendation

186 See *Interpretive Guide*, *supra* note 14, at 49; see also *Guiding Principles*, *supra* note 1, Principle 13(b), at 14, Principle 19, at 18.

187 See *infra* note 193 and accompanying text.

188 DUKE OKES, *ROOT CAUSE ANALYSIS: THE CORE OF PROBLEM SOLVING AND CORRECTIVE ACTION 1* (2009).

189 See *Guiding Principles*, *supra* note 1, Principle 18, at 17–18.

190 See *id.* Principle 20, at 19.

generation and implementation.¹⁹¹ For instance, RCA was fruitfully used in the area of public health. This method was chosen for its ability to pinpoint the underlying causal relationships associated with a global health incident and to propose recommendations for preventing recurrence:

RCA allows a comprehensive system-wide perspective that breaks down complex global health problems into increasingly smaller components, enabling in-depth analysis from one level and dimension to the next. RCA rests on the premise that getting at the root cause of a problem is more effective than addressing “immediately obvious” symptoms, and that a problem typically has more than one root cause. [The] central features of the methodology include recursive questioning to identify causal factors and root causes related to a problem, and identifying effective solutions to prevent recurrence.¹⁹²

The GPs, especially Principle 17, missed the opportunity to impress that a root cause orientation should be an explicit and indispensable parameter of HRDD. The question is whether other provisions in the GPs hint in this direction, even if maybe only obliquely so. Further reference will be made to subsequent documents to which Ruggie is related, such as the Interpretive Guide and Shift reports. Such subsequent materials are a useful interpretive aid in an attempt to compensate for this oversight in the GPs themselves.

B. “Root Causes” in the GPs and Subsequent Documents

Nowhere do the GPs use the notion of root causes. The Interpretive Guide however explicitly indicates that:

[W]herever a significant human rights impact has occurred, the enterprise is well advised also to undertake a root cause analysis or equivalent process to identify how and why it occurred. This kind of process can be important if the enterprise is to

191 James J. Rooney & Lee N. Vanden Heuve, *Root Cause Analysis for Beginners*, 37 *QUALITY PROGRESS* 45, 46–49 (2004).

192 Jennifer Prah Ruger, *Control of Extensively Drug-Resistant Tuberculosis (XDR-TB): A Root Cause Analysis*, 3 *GLOBAL HEALTH GOVERNANCE*, April 2010, at 2–3.

prevent or mitigate its continuation or recurrence. A root cause analysis can help pinpoint what actions by which parts of the enterprise, or by which other parties related to the enterprise, played a role in generating the impact, and how.¹⁹³

This is the only reference to root cause in the Guide and it is confined to Principle 20, which captures one out of the four stages of HRDD, namely tracking policy effectiveness. A range of other reports issued by Shift, the non-profit organization chaired by Ruggie and dedicated to the implementation of the GPs, refer repeatedly to root causes.¹⁹⁴ A report written for the European Commission promotes “a Systematic Approach to Tracking” and mentions RCA among the “Possible Approaches”:

Where a severe human rights impact has occurred, or lesser impacts occur repeatedly, O&G [oil & gas] companies should consider a deeper analysis of the underlying or “root” causes of the incident. Initial impressions may suggest that the company’s own actions or decisions had nothing to do with the impacts; but in some cases a deeper analysis might reveal that it did in fact play a role, and show how it could help prevent the same thing from recurring. Many O&G companies already have experience of applying root cause analysis to major health and safety or environmental incidents. They may be able to adopt and adapt these methodologies for human rights issues as well.¹⁹⁵

This report also addresses the supply chain context. There, despite monitoring and auditing systems currently being used by many lead firms, “[t]hey often miss issues due to their brief nature; [and] may fail to grasp the bigger picture or root cause of repeated human rights impacts.”¹⁹⁶ More collaborative approaches between

193 *Interpretive Guide*, *supra* note 14, at 54 (emphasis omitted).

194 See e.g., SHIFT, RESPECTING HUMAN RIGHTS IN GAP INC.’S GLOBAL SUPPLY CHAIN, 2 (2013), <http://gapinc.com/content/attachments/sersite/Shift-UNGP.pdf>.

195 *Oil and Gas Guide*, *supra* note 116, at 55.

196 *Id.* at 59.

brands and suppliers include “[s]upporting or analysing the root cause(s) of significant impacts. This can test the conclusions drawn from audits and find any underlying problems.”¹⁹⁷

Another Shift report comments on the clothing company GAP’s approach to supply chain management and commends its use of RCA:

Notably, root cause analysis is an integral part of Gap Inc.’s processes. This helps Gap Inc. understand the underlying causes of failures to respect workers’ human rights and helps Gap Inc. see where its own actions might contribute to negative human rights impacts. Gap Inc.’s transparency in recognizing the relevance of purchasing practices for its vendors’ ability to respect human rights is commendable, and provides a powerful example to other companies.¹⁹⁸

This statement reflects well the emphasis the GPs place on RtR in value chains and recognizes that brands are not only linked, but contribute to suppliers’ non-observance of labor rights. These purchasing decisions of brands are a “contribution” under paragraph 13a;¹⁹⁹ they are a significant contributing factor, if not a root cause, to sweatshop practices in supplier factories.²⁰⁰ For a long time, this was a contributing factor that had not been acknowledged by companies and by much of the CSR discourse, which emphasized the auditing efforts of brands as a commendable but seemingly doomed effort in front of determined non-compliance from suppliers.²⁰¹ Indeed, there has been “an implicit assumption that most non-compliances occur in spite of the efforts of Participating Companies.”²⁰² This

197 *Id.*

198 SHIFT, RESPECTING HUMAN RIGHTS IN GAP INC.’S GLOBAL SUPPLY CHAIN, 2 (2013), <http://gapinc.com/content/attachments/sersite/Shift-UNGP.pdf>.

199 *See supra* Section III.A.

200 *See, eg.,* RUGGIE, *supra* note 47, at 1 (referring to Apple’s decision to change product specifications on short notice creating difficulties for its supplier and its workforce).

201 *See* Helle Bank Jørgensen et al., *Strengthening Implementation of Corporate Social Responsibility in Global Supply Chains*, WORLD BANK GROUP [WBG] 53–54, 101 (2003).

202 SHIFT, IMPLICATIONS OF THE UN GUIDING PRINCIPLES ON BUSINESS

position of brands as contributors to non-compliance is now openly and belatedly acknowledged by leading companies, including Nike, where its own procurement decisions appeared as a root cause, or at least a key factor of risk, for supplier non-compliance—a risk factor of staggering size: 68%.²⁰³ The same happens when suppliers' workers are deprived of freedom of association; the Fair Labor Association (FLA) and the Ethical Trading Initiative (ETI) have been emphasizing this since mid-2000s,²⁰⁴ and the Bangladesh Accord involves unions in its governance and has supported a strengthening of freedom of association regulations.²⁰⁵ The failure to identify and address such root causes in global value chains explains the failure (or limited success) of mitigation measures during the last 20 years.²⁰⁶ These mitigation measures cannot be made more effective by simply enhancing audits and offering training for management on labor rights.

In another report, Shift reviewed the FLA, which started in the 1990s and is one of the flagship initiatives on labor rights in supply chains.²⁰⁷ Shift commended FLA for emphasizing the abovementioned risk that brands contribute to human rights abuses through their sourcing practices. It added: “Also noteworthy is the FLA’s recent move away from pure compliance auditing towards

AND HUMAN RIGHTS FOR THE FAIR LABOR ASS'N, 18 (July 2012).

- 203 Nike indicates that, “During FY11, more than two-thirds (68 percent) of the excessive overtime incidents identified and analyzed through audits of 128 factories were attributable to factors within Nike’s control, primarily forecasting or capacity planning issues, shortened production timelines and seasonal spikes.” NIKE, INC., FY10/11 SUSTAINABLE BUSINESS PERFORMANCE SUMMARY 53 (2012).
- 204 See ETHICAL TRADING INITIATIVE, FREEDOM OF ASS'N IN COMPANY SUPPLY CHAINS – A PRACTICAL GUIDE, (2013), http://s3-eu-west-1.amazonaws.com/www.ethicaltrade.org/files/shared_resources/foa_in_company_supply_chains.pdf?j11porNelxmYq49FHPmB3IMLySLe54k8.
- 205 The governance of the Accord involves companies and trade unions in equal numbers with the ILO being a neutral Chair. Bangladesh Accord Secretariat, *Introduction to the Accord on Fire and Building Safety in Bangladesh*, THE ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH, (Jan. 2015), <http://bangladeshaccord.org/wp-content/uploads/Brochure-about-the-Accord.pdf>.
- 206 Int'l Labor Org., *Decent work in Global Supply Chains*, at 47-51 (2016) (analyzing the potential and limitations of private governance and CSR).
- 207 SHIFT, *supra* note 183. Fair Labor Association is ‘a collaborative effort of socially responsible companies, colleges and universities, and civil society organizations’ started in 1999. FAIR LABOR ASS'N, <http://www.fairlabor.org> (last visited Oct. 16, 2017).

the incorporation of more root cause analysis and capacity building approaches, aimed at more effective and sustainable mitigation of risks to workers' rights."²⁰⁸ The report also remarked on FLA's own assessment of a switch "from 'Independent External Monitoring' visits and reports—which followed classic auditing approaches—to a new approach of 'Sustainable Compliance', which involves Independent External Assessments focused on 'uncovering root causes of problems and providing systemic, sustainable solutions so that problems are fixed in a lasting way.'"²⁰⁹ Currently, the FLA uses its Sustainable Compliance methodology,²¹⁰ which emphasizes root causes, and its reports on affiliate companies include "a description of the root causes of violations, recommendations for sustainable and immediate improvement, and the corrective action plan for each risk or violation as submitted by the company."²¹¹

Shift also noted the increasing use of RCA by brands. The clothing company Phillips-Van Heusen (PVH) indicates that they

Now engage factories in corrective action planning (CAP) development earlier in the assessment process so more time is spent on implementing the action plans. During this process, our team works with factories to identify root causes, offer suggested actions, and develop feasible remediation plans. This dialogue also provides an opportunity to understand how our purchasing practices may hinder our factories' abilities' to comply.²¹²

Finally, a Shift report places RCA in the context of building credibility with stakeholders by enhancing transparency and demonstrating a rigorous approach:

Many complex human rights challenges within supply

208 SHIFT, *supra* note 183, at 4.

209 *Id.* at 7.

210 See Mares, *supra* note 123, at 118–20.

211 FAIR LABOR ASS'N, INDEPENDENT EXTERNAL ASSESSMENT REPORT: HUGO BOSS (2015), <http://www.fairlabor.org/affiliate/hugo-boss>.

212 SHIFT, EVIDENCE OF CORPORATE DISCLOSURE RELEVANT TO THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS 12 (2014), https://www.shiftproject.org/media/resources/docs/Shift_EvidenceCorporateDisclosureUNGPs_2014.pdf.

chains do not have immediate or easy solutions. Time may be required for root cause analysis, for industry-wide collaboration, for increasing company leverage to enable action with a supplier, and for identifying appropriate and effective remediation measures. In such instances, increased transparency can be particularly beneficial, enabling a company to convey internally and externally the seriousness with which it is treating challenging issues²¹³

Nike indicates that to address excessive overtime, the company is focusing on a “continued analysis of root causes, which has led us to identify and address key business processes upstream from the factory.”²¹⁴ The search for root causes can go as far as challenging business models, such as overly flexible supply chains. Nike speaks of optimizing its factory base: “We have moved toward establishing long-term relationships with fewer factories as trusted partners, rather than having short-term transactional relationships with a larger number of factories.”²¹⁵ Indeed, short-term relationships appear as a risk factor, and clearly are a contributing factor of high importance if not a root cause:

When supply chains consolidate, it is an opportunity to align shared values. Several companies participating in the research detected a growing trend to consolidate supply chains. Companies are creating deeper relationships with fewer suppliers, particularly strategic ones. In the process, purchasers focus on long-term value, grounded in expertise more than price. This implies closer and longer-term relationships, and sharing of standards and systems. It may be that this process will make it easier to integrate human rights, ethical values and good practices in supply chains.²¹⁶

213 SHIFT, RESPECTING HUMAN RIGHTS THROUGH GLOBAL SUPPLY CHAINS, 18 (2012).

214 NIKE, INC., *supra* note 184.

215 *Id.* at 31.

216 THE INST. FOR HUMAN RIGHTS AND BUS. & THE GLOB. BUS. INITIATIVE ON HUMAN RIGHTS, STATE OF PLAY: THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS IN BUSINESS RELATIONSHIPS 109 (2012).

In his writings, Ruggie took note of Professor Richard Locke's work dedicated to improving labor standards in supplier factories.²¹⁷ Employing a root cause orientation, Locke's approach was developed as a response to the auditing/compliance approach.²¹⁸ The focus of Locke's approach is on uncovering, analyzing, and correcting root causes.²¹⁹

In 2010, three prominent organizations active in CSR issued the Guide to Human Rights Impact Assessment and Management, with an introductory quote from Ruggie.²²⁰ This work introduces the "mitigation hierarchy" concept (avoid, reduce, restore, compensate). Companies are expected to develop Appropriate Mitigation Action Plans in order to "accurately address previously identified human rights risks and impacts" by employing the "mitigation hierarchy."²²¹ The Guide leaves companies discretion in adopting measures suitable to the four levels in the mitigation strategy.²²² For instance, the wording emphasizes reduction of impact: "Guided by the mitigation hierarchy, companies may consider designing measures that reduce any negative human rights impact."²²³ Even for severe impacts, companies seem to retain some discretion on measures falling short of the goal of elimination (*avoid* impacts): "The severity and magnitude of the human rights risk and impact will determine which type of mitigating approach to pursue. Human rights impacts that pose significant and immediate risk to the health, safety and the lives of stakeholders will benefit from avoidance, reduction and/or restoration measures."²²⁴ The Guide also indicates that "appropriate actions" should be based on the "technical and financial feasibility of

217 See RUGGIE, *supra* note 47, at 206 n.12.

218 RICHARD LOCKE, THE PROMISE AND LIMITS OF PRIVATE POWER: PROMOTING LABOR STANDARDS IN A GLOBAL ECONOMY 2, 174 (2013).

219 *Id.* at 78, 123–25.

220 DÉSRÉE ABRAHAMS & YANN WYSS, GUIDE TO HUMAN RIGHTS IMPACT ASSESSMENT AND MANAGEMENT (HRIAM), 5 (2010).

221 *Id.* at 49.

222 See *id.* at 12–13; See also DANISH INST. FOR HUMAN RIGHTS & IPIECA, INTEGRATING HUMAN RIGHTS INTO ENVIRONMENTAL, SOCIAL, AND HEALTH IMPACT ASSESSMENTS 17 (2013) (seeking to "apply a human rights lens to impact mitigation and management" and promoting the same hierarchy).

223 ABRAHAMS & WYSS, *supra* note 201, at 49.

224 *Id.*

the actions and measures required.”²²⁵ That technical and financial aspects are relevant is indisputable, but such acknowledgement should be doubled by an explicit prescription to identify and address root causes, especially for severe potential impacts (high risk to human rights). In sum, the mitigation hierarchy concept is useful because it explicitly mentions the aim of avoidance (elimination) under the umbrella term of mitigation, which otherwise could have been misconstrued as requiring reduction only. However, the Guide speaks casually of companies moving among the levels of the hierarchy to *reduce* impacts (for “financial feasibility” reasons,²²⁶ for example) and does not impress the importance of designing mitigatory measures capable of identifying and addressing root causes.

Overall, the Guide does not appear fully attuned to the human rights context and able to explain the specificities of HRDD as a rightholder-centred risk management process. By contrast, other instruments issued by the International Labor Organization employ a more precise formulation. Thus, the ILO Safety and Health in Mines Convention refers to the responsibilities of employers to take preventive and protective measures:

[T]he employer shall assess the risk and deal with it in the following order of priority: (a) eliminate the risk; (b) control the risk at source; (c) minimize the risk by means that include the design of safe work systems; and (d) in so far as the risk remains, provide for the use of personal protective equipment, having regard to what is reasonable, practicable and feasible, and to good practice and the exercise of due diligence.²²⁷

A final remark is reserved for the relevance of a root cause orientation at both the *ex ante* and *ex post* stages of HRDD. HRDD should address deeper underlying causes in order to be genuinely capable of reaching the elimination goal of RtR. This prescription applies at the *ex ante* stage of human rights potential impacts, which

225 *Id.* at 50.

226 *Id.*

227 Int'l Labor Org., Safety and Health in Mines Convention, art. 6, June 22, 1995, No. 176.

is human rights impact assessments (HRIAs),²²⁸ as well as the ex post stage of actual impacts, which is tracking the effectiveness of measures taken.²²⁹ As shown, the Interpretive Guide refers expressly to RCA in relation to “tracking” so that a company analyzes root causes to prevent re-occurrence.²³⁰ It is an investigation with hindsight. Is there an equivalent notion to root causes identifiable in Principle 18 dealing with HRIA? Given that there are no impacts that occurred it follows that there are no root causes of damage for a RCA to investigate. At the ex ante stage, where risks of harm are to be identified, one properly speaks of *factors of risk*. It is an investigation that requires foresight. Identifying these factors of risk—some more hidden than others—and their interrelations requires a thorough analysis likeminded with the RCA’s search for root causes and contributory factors. Is there a dedicated notion in the GPs that impresses the importance of deeper factors of risk and of special methodologies to identify them?

In the GPs, there are no explicit references to significant factors of risk equivalent to root causes as the terminology is uniformly about “risk of adverse human rights impacts” and “potential adverse human rights impacts.”²³¹ Rather, the GPs expect HRIAs to identify all factors of risk.²³² However, the GPs explicitly refer to importance of foresight efforts and methods: HRIAs should be “projecting how the proposed activity and associated business relationships could have adverse human rights impacts on those identified.”²³³ As early as 2007, Ruggie issued a report dedicated to HRIA methodologies where he emphasized foresight efforts: “After describing those baseline conditions, HRIAs should put forth a view of what is likely to change because of the business activity. This is a difficult and subjective exercise; one approach is to construct multiple scenarios, while another might predict outcomes based on varying levels of intervention.”²³⁴ Thus, Ruggie highlighted some methods able to

228 See *Guiding Principles*, *supra* note 1, Principle 18, at 17–18.

229 *Id.* Principle 20, at 19.

230 *Interpretive Guide*, *supra* note 14; *Oil and Gas Guide*, *supra* note 116, and accompanying text.

231 *Guiding Principles*, *supra* note 1, Principle 17–18, at 16–18.

232 *Id.* Principle 18, at 17 (“business enterprises should pay special attention to any particular human rights impacts on individuals . . .”).

233 *Id.*

234 John Ruggie (Special Representative to the Secretary General), *Human Rights Impact Assessments – Resolving Key Methodological Questions*, ¶ 14 U.N. Doc. A/

address root causes at the ex ante stage of HRDD. Even in 2017 there is no authoritative methodology dedicated to HRIAs, while efforts are on-going.²³⁵

In addition to methodology, the GPs offer another angle to get to the deeper factors of risk: emphasizing the level of effort placed in HRIAs. Thus, as Shift noted in high-risk contexts, where there are significant risks to human rights, the company should pursue a deeper impact assessment. The level of effort of the inquiry needs to be enhanced to match the severity of adverse impacts and this should also bring to the surface deeper factors of risk. “Operating in high risk contexts . . . requires greater attention, effort and resources at every step of the process [of assessing human rights impacts].”²³⁶ Thus companies, for example, should seek “to understand the root causes of a conflict (for example ethnic tensions or access to resources) and their implications for human rights and for company operations.”²³⁷

Both these ex ante and ex post investigations of human rights impacts seek to uncover hidden and less understood elements—factors of risk or root causes—that, if overlooked, reduce or cancel the effectiveness of HRDD efforts. As the Guide states, “the processes for assessing human rights impact should be systematic so that the various elements add up to a coherent overview of actual and potential human rights impact associated with an enterprise’s activities and relationships and can accurately inform the subsequent steps in the due diligence process.”²³⁸ This emphasis on root causes also permeates the efforts of regulators in high-risk sectors, such as conflict minerals. The European Commission wrote:

One of the objectives of the EU’s proposal is to break the link between minerals extraction, minerals trading, and the financing of armed conflicts. The root causes of the problems must be identified, as

HRC/4/74 (Feb. 5, 2007).

235 Dylan Tromp, *Assessing Business-Related Impacts on Human Rights - Indicators and Benchmarks in Standards and Practice*, INEF-Report, (2016), <http://inef.uni-due.de/cms/files/report110.pdf>.

236 *Oil and Gas Guide*, *supra* note 116, at 29.

237 *Id.*

238 *Interpretive Guide*, *supra* note 14, at 41.

should the triggers of conflicts and structural fragility, their dynamics, and the roles of the various actors involved.²³⁹

Such emphasis on root causes orientation of HRDD allows some final observations regarding operational measures expected under the GPs.

C. *Implications for HRDD*

The analysis so far has clarified when mitigation (reduction of impacts) exceptionally is a legitimate aim (i.e. third party operations), and highlighted the peril that mitigatory measures could be misdirected if root causes are not addressed. In the latter case, HRDD would be less effective or could be used strategically—with negative effects for the credibility of the GPs—to create a semblance of compliance with the GPs, an illusion that a company’s efforts address impacts rigorously. The emphasis on deeper causes prevents HRDD from becoming a partial and misdirected response and from disguising the absence of more demanding measures needed to achieve the aim of RtR of elimination. This subsection brings together the *mitigation* and *root causes* characteristics of the HRDD effort so it does not succumb to easy compliance and inadequate risk-management techniques.

The goal of elimination is neither about offering a guarantee that impacts will not occur nor about aiming to avoid activities that might have adverse impacts. These clear-cut prescriptions are neither feasible nor achievable in practice, except for exceptional situations.²⁴⁰ As Linda Spedding notes, “[i]t may not be cost effective, or just unachievable, to remove risk altogether by risk management.”²⁴¹ Risk avoidance can be achieved “through strategic decisions such as withdrawing from a market sector or region,” but this form of risk treatment—by avoiding risks—is deemed “very

239 EUROPEAN COMMISSION, FREQUENTLY ASKED QUESTIONS - RESPONSIBLE SOURCING OF MINERALS ORIGINATING CONFLICT-AFFECTED AND HIGH-RISK AREAS: TOWARDS AN INTEGRATED EU APPROACH (March 5, 2014), http://europa.eu/rapid/press-release_MEMO-14-157_en.htm.

240 For example, in case of grave abuses, the risks would be better shouldered by companies, from a policy point of view.

241 LINDA S. SPEDDING, *DUE DILIGENCE AND CORPORATE GOVERNANCE* 158 (Butterworth-Heinemann, 1st ed. 2005).

limited” in practice.²⁴²

HRDD is not simply about reduction of adverse impacts, but about reduction with a view to full elimination—not only with the view, but also with the capacity to achieve this. Given that avoidance is a limited option in practice,²⁴³ addressing root causes becomes the main option to minimize impacts with a view to their elimination. It is about the reasonable person’s design of corrective measures that have the intrinsic capacity to eliminate rights abuses from its operations. Thus, compliance is not merely a function of effort (enough resources) and time (fast enough)—it is the design of measures and their intrinsic capacity to eliminate or not harm that also matter. So, reduced impacts—through mitigatory measures—can actually constitute an abuse of human rights when prevention (factors of risk unaddressed) and correction (root causes unaddressed) were substandard due to misdirected effort, insufficient amount of effort, or inappropriate risk tolerance level. There are implications for HRDD both in terms of prevention and remediation, at both the *ex ante* and *ex post* stages of HRDD.

At the prevention stage, there is rarely the chance to offer guarantees that human rights impacts will not occur throughout their operations, or even that they will not reoccur. What can be reasonably done in terms of prevention, in terms of managing risks (potential impacts) of occurrence and/or reoccurrence? The definition in the Interpretive Guide that prevention refers to “actions taken to *ensure* such impact does not occur”²⁴⁴ appears aspirational. How can a company ensure non-occurrence? At first sight, the only way that prevention, so defined, can be achieved is through avoidance of operations in a risky environment. At a second glance, however, prevention can be achieved by addressing root causes. It is even possible to remove some root causes from the chain of factors causing harm. For example, to prevent harm to Amazonian tribes, an oil company in Camisea, Peru, flies personnel to the site instead of building roads through the forest; these measures were chosen because those roads were previously used by illegal loggers

242 *Id.* at 284–85.

243 *Id.* at 157–58.

244 *Interpretive Guide*, *supra* note 14 (emphasis added); *see also supra* text accompanying note 14 (emphasis added).

to expand operations and affect tribes with deadly consequences.²⁴⁵ Another example could refer to inherently dangerous technological processes; for the sake of argument, instead of using cyanide in large scale mining, other chemicals could be used and could thus altogether remove the hazards generated by that specific chemical. Such an emphasis on tackling root causes gives a fuller meaning to prevention as defined by the Guide and does not severely confine the applicability of this concept to either a—still rare—prescription to avoid altogether planned activities in risky environments, or to a—still exceptional—prescription to offer guarantees (insurance) to rightholders.²⁴⁶ Attention to root causes and deeper factors of risk should be an essential trait of rightholder-centred risk-management in the GPs.

Regarding remediation, the presence of effective grievance mechanisms that enterprises might offer guarantees, at best, that impacts do not turn into unremedied impacts (abuse). Actual impacts get addressed. However, all grievance mechanisms—judicial or non-judicial—have obstacles that reduce access to justice for rightholders.²⁴⁷ So, setting up effective remedial mechanisms and reducing such obstacles becomes the main option to minimize actual impacts with a view to their elimination at the ex post stage of HRDD. It is as close as one gets to a guarantee that impacts—or abuses—are eliminated. Parenthetically, the GPs explain RtR in terms of adverse “impacts” but also refers to “abuses” of human

245 *Drilling in the Wilderness - Energy Extraction can Coexist with Native Peoples and Forests*, THE ECONOMIST, (Apr. 26, 2014), <http://www.economist.com/news/americas/21601267-energy-extraction-can-coexist-native-peoples-and-forests-drilling-wilderness>.

246 Both are of limited applicability: the former because business, developmental and even human rights considerations make such avoidance undesirable and/or unfeasible, and the latter because asking lead firms to offer guarantees by assuming responsibility for harm in supplier operations is at odds with foundational business law principles of separate corporate personality and limited liability. See Radu Mares, *Legalizing Human Rights Due Diligence and the Separation of Entities Principle*, in BUILDING A TREATY ON BUSINESS AND HUMAN RIGHTS: CONTEXT AND CONTOURS (S. Deva & D. Bilchitz eds., Cambridge Univ. Press, forthcoming Oct. 2017).

247 *Guiding Principles*, supra note 1, Principle 26, at 23–24. (speaking of such obstacles). See also United Nations High Commissioner for Human Rights, *Improving accountability and access to remedy for victims of business-related human rights abuse*, U.N. Doc. A/HRC/32/19 (May 10, 2016).

rights.²⁴⁸ When does impact turn into abuse? A right might have been infringed, but as long as reasonable prevention and full remediation are offered, impact does not turn into abuse. Abuse is unprevented and/or unremedied impact. So, it is correct for Pillar 2 to speak of impacts as the entire pillar is about preventive and remedial measures.

The goal of elimination is not about an aspiration contained in an abstract RtR that in practice, in real life, boils down to mitigating (reducing) impacts, which would appear as a worthwhile step forward anyway. This is not the way to judge the adequacy of HRDD and is inappropriate in a human rights context. This is not how the relationship between the RtR and HRDD in the GPs should be understood. The GPs are about a correctly designed HRDD that aims and has the potential to avoid impacts, even if in practice such HRDD might fall short. The GPs are grounded in human rights normativity and cover a special type of adverse impact. Although the GPs speak of “impacts” and not of “abuses,” and employ a risk-management language colored by mitigation terminology hinting at a reduction of impact, the GPs do not tolerate residual abuse of human rights as the accepted cost of doing business in a global economy riddled by governance gaps. The RtR aim of reduction is tolerated in one context only—third party operations—based on the understating that summoning the leverage of lead firms is a strategic opportunity for the human rights system to deliver enhanced protection. Thus, the GPs as a governance framework and as a corporate risk-management framework are geared towards elimination of abuses and require a HRDD concept that is designed to deliver that operationally.

VI. Conclusions

Mitigation was a notion not used once in the 2008 Protect-Respect-Remedy Framework.²⁴⁹ In 2011, the GPs explained the RtR and HRDD by making repeated references to mitigation. Mitigation of adverse impacts means *reduction* of impact, which potentially entails that residual impact is tolerated. This opens the troublesome possibility that businesses will understand the RtR as demanding

248 See *Guiding Principles*, *supra* note 1, Principles 11–15 at 17–22 (containing many references to “impacts”); *Guiding Principles*, *supra* note 1, Principles 17, 19, 23 Commentaries (referring to “abuse”).

249 See *Protect, Respect and Remedy*, *supra* note 26.

something less than *elimination* of human rights impacts from their operations. This article started from the concern that having HRDD refer to mitigation might result in redundancy—no value added to what prevention and remediation already say—or misunderstanding—water down the RtR aim of elimination—and thus reduce the persuasive force of the GPs. Therefore, the article sought to clarify mitigation in terms of application to organizational contexts, its functions, its meanings, and the specificities of the human rights context.

This analysis pinpoints the applicability of mitigation (aim of reduction of impact) to one organizational context only: that of third party conduct, which comprises the “contribute” and “linkages” scenarios in Principle 13. Second, mitigation of impacts is a notion overlapping two meanings—aim and measures. Mitigation measures is just another term for preventive and remedial measures. However, mitigation is a charged concept introduced into a context where residual abuse cannot be accepted as the normal price of doing business, as the entire human rights system pursues the aim of elimination of infringements of human dignity. Therefore, as a difference from other contexts, some traditional risk-management strategies are illegitimate. Businesses and risk management professionals do not have the liberty to choose among different risk management techniques that they have for other risks—to simply take the risk, or to insure against it, or to reduce the risk/impact. The aim here is to eliminate adverse human rights impacts from a business’ operations. Clarifying mitigation helps HRDD become a genuine rightholder-centred risk management approach to human rights. HRDD means taking measures that reduce impact with an aim to its elimination and with the capacity to achieve that aim too. Third, mitigation together with the notion of leverage, serves two specific functions in the GPs, both in the context of third party operations. On the one hand, mitigation pinpoints a key HRDD step—leverage first, termination of relationship second—in dealing with non-compliant third parties, a stop-gap towards the aim of elimination. On the other hand, mitigation expands the scope of RtR regarding remediation by making it imperative for the company press for securing rightholders’ access to remedies.

The GPs offer numerous parameters and insights into what a DD approach entails in a human rights context. One that is missing from the GPs is an emphasis on *root causes* of adverse impacts. It is

essential for risk management to tackle the root causes of impacts, rather than the symptoms and contributing factors. Mitigatory measures that are misdirected indicate measures that lack the capacity, if not the declaratory aim, to eliminate human rights abuses from business operations. Tackling root causes should be a parameter of HRDD in Principle 17. Subsequent documents released by Ruggie and his colleagues refer explicitly to root causes and root cause analysis methodologies designed to ensure a systematic and thorough pursuit of deeper causes. This parameter is also important because of the silences in the GPs on “amount of effort” (impossible to define in abstract, *ex ante*), the absence of a centralized reviewer to monitor and enforce the GPs (unattainable politically at the time), and the unfeasibility of strict liability theories under the RtR (of exceptional application only due to conflict with default principles of civil and criminal liability). Therefore, insisting that the HRDD effort gets at least directed correctly towards root causes allows the assessment of whether effort has been misdirected or not and thus whether mitigatory measures inherently lacked the very capacity to achieve elimination.

This analysis helps alleviate the problem of complacency of HRDD and the potential misalignment of HRDD and RtR in the GPs. On the one hand, businesses routinely insist they make effort, that it takes time, that impacts have been reduced, and that they are not perfect but trying hard. The peril of complacency is there, as companies design their actions to demonstrate reduction in negative impacts and claim credit for the results for their efforts. So, is the danger that stakeholders witness an elaborate display of preventive and corrective actions with little indication that the root causes of impacts are actually being considered and addressed. There are already concerns from CSR—and GPs-skeptics that the GPs have put forward an overly process-oriented and risk-management approach that leaves companies too much flexibility and discretion. On the other hand, HRDD and RtR might get out of sync if the notion of mitigation is not clarified and understood in the economy of the GPs. In the GPs, RtR, which carries the aim of elimination, appears as the abstract, general, and aspirational part, might be overlooked with attention going to HRDD, which speaks of mitigation and appears operational, more specific, and more familiar to risk managers and decision-makers. Indeed, the HRDD terminology

has gone mainstream following the GPs, is recognizable in other CSR instruments and in casual explanations that companies have to mitigate human rights impacts. In sum, preventing complacency and misalignment within the GPs, helps ensure the internal consistency of the GPs, clarify HRDD as a rightholder-centred risk management approach appropriate to the human rights context, and ultimately enhance the persuasive power of the GPs.