

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

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## A. Introduction

In 2008, John Ruggie, the Special Representative of the UN Secretary-General, proposed a 'conceptual and policy framework' to address the relationship between business and human rights.<sup>1</sup> The Framework articulated businesses' responsibility to respect human rights, which was said to be grounded in widely shared social expectations of appropriate business conduct.<sup>2</sup> The 2011 United Nations Guiding Principles on Business and Human Rights (the Guiding Principles),<sup>3</sup> were an attempt 'to provide concrete and practical recommendations for ... implementation [of the Framework]'.<sup>4</sup> The Guiding Principles were endorsed by the United Nations (UN) Human Rights Council,<sup>5</sup> and have since been incorporated in a range of international regulatory instruments addressing corporate responsibility for human rights violations.<sup>6</sup>

Due diligence is at the heart of the Guiding Principles. As Ruggie explained:

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

<sup>2</sup> Ibid, at para 54. On the logic of appropriateness, as opposed to the logic of consequences, see John Ruggie, *Just Business: Multinational Corporations and Human Rights* (Norton, 2013) p. 106.

<sup>3</sup> Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', UN Doc HR/PUB/11/04, available at [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

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

<sup>5</sup> UN Human Rights Council Resolution 17/4 (16 June 2011), UN Doc A/HRC/RES/17/4.

<sup>6</sup> The OECD Guidelines for Multinational Enterprises (<http://oecd.org/daf/inv/mne/48004323.pdf>), the International Finance Corporation's Sustainability Performance Standards ([http://www.ifc.org/wps/wcm/connect/7540778049a792dcb87efaa8c6a8312a/SP\\_English\\_2012.pdf?MOD=AJPERES](http://www.ifc.org/wps/wcm/connect/7540778049a792dcb87efaa8c6a8312a/SP_English_2012.pdf?MOD=AJPERES)) and the Equator Principles (on project finance requirements - <http://www.equator-principles.com/index.php/ep3>), all now incorporate human rights due diligence requirements based on the Guiding Principles.

To discharge the [corporate] responsibility to respect [human rights] requires due diligence. This concept describes the steps a company must take to become aware of, prevent and address adverse human rights impacts.<sup>7</sup>

Five of the 31 Guiding Principles appear under the heading ‘Human Rights Due Diligence’, reinforcing the centrality of the concept in Ruggie’s scheme.<sup>8</sup> Two other Guiding Principles (4 and 15) refer to due diligence, as does the Commentary to several other Guiding Principles.

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

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

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<sup>7</sup> Framework, note 1, at para 56.

<sup>8</sup> Guiding Principles 17-21.

<sup>9</sup> *Just Business*, note 2, pages 141-148.

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

parties.<sup>11</sup> In order to advance these arguments, we begin by clarifying the two different concepts of due diligence and the way in which they relate to each other.

## **B. Due Diligence as a Business Process**

In a business context, due diligence is normally understood to refer to a process of investigation conducted by a business to identify and manage commercial risks:

[The] main purpose [of due diligence] is to confirm facts, data and representations involved in a commercial transaction in order to determine the value, price and risk of such transactions, including the risk of future litigation.<sup>12</sup>

One example is in the area of mergers and acquisitions where ‘the purpose of due diligence is ... to enable a purchaser to find out all he [/she] reasonably can about what it is he [/she] is buying to help him decide whether to proceed’.<sup>13</sup> This might involve an analysis of assets, contracts, customers, employee agreements and benefits, environmental issues, facilities, plant and equipment, financial condition, foreign operations and activities, legal factors, product issues, supplier issues and tax issues.<sup>14</sup> While due diligence processes often include legal risks within their scope, the risk of legal liability is simply another commercial consideration to be identified and managed in the context of a particular transaction. For example, in order to make an informed commercial decision about whether to proceed with an acquisition, the acquirer may investigate the potential for legal liability arising from past acts of corruption,<sup>15</sup> or past environmental contamination,<sup>16</sup> even if no legal claims against the target have proceeded to final judgment at the time of the transaction.

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<sup>11</sup> For the purposes of this article, we accept Ruggie’s characterisation of businesses’ responsibility to respect human rights as a global norm grounded in ‘social expectations’, as opposed to a legal obligation under international law. Our aim is to clarify the extent and implications of this social norm, as articulated in the Framework and the Guiding Principles.

<sup>12</sup> Olga Martin-Ortega, ‘Human rights due diligence for corporations: From voluntary standards to hard law at last?’ 31 *Netherlands Quarterly of Human Rights* (2013) 44 at 51.

<sup>13</sup> Andrew Evans, ‘Due Diligence: the English Way’ (1995) 6 *International Company and Commercial Law Review* 195 at 195.

<sup>14</sup> See Slaughter and May, *Due Diligence and Disclosure in Private Acquisitions and Disposals* (2007), 8-10; and Wilson Chu, ‘Avoiding surprises through due diligence’, 6 *Bus. L. Today* 8 1996-1997.

<sup>15</sup> For example, the UK Bribery Act 2010 and UK Prevention of Crime Act 2002, and the US Foreign Corrupt Practices Act 1977. For the latter, see the US Department of Justice’s Foreign Corrupt Practice Review ‘Opinion Procedure Release No. 008-02’ issued to Halliburton (13 June 2008).

<sup>16</sup> For example, Part IIA of the UK Environmental Protection Act 1990.

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

### C. Due Diligence as a Standard of Conduct

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

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<sup>17</sup> There is a considerable literature setting out the benefits of well-designed due diligence processes in facilitating good business decision-making: see, for example, Linda Spedding, *The Due Diligence Handbook: Corporate Governance, Risk Management and Business Planning* (Elsevier 2009); Jeffery Perry and Thomas Herd, ‘Reducing M&A risk through improved Due Diligence’ (2004) 32 *Strategy & Leadership* 12.

<sup>18</sup> See Douglas Godfrey, ‘Transactional Skills Training: All About Due Diligence’ (2009) *Transactions Tenn. J. Bus. L.* 357 at 358.

<sup>19</sup> Martin-Ortega, note 12, 51.

<sup>20</sup> Reinhard Zimmerman, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press 1996) 1009.

<sup>21</sup> Charles Lobingier, *The Evolution of the Roman Law: From Before the Twelve Tables to the Corpus Juris* (2<sup>nd</sup> edn, Fred B Rothman & Co 1923) 105; cf Edward Arthur Whittuck, *Institutes of Roman Law by Gaius: with a Translation and Commentary* (tr Edward Poste, 4<sup>th</sup> edn, Oxford University Press 1905) at 429.

<sup>22</sup> Zimmerman, note 20, at 1008.

<sup>23</sup> Justinian, *The Digest of Roman Law: Theft, Rapine, Damage and Insult* (tr Colin Kolbert, Penguin 1979) 91.

The standard of the *diligens paterfamilias* influenced the development of the tort of negligence in many legal systems.<sup>24</sup> The tort of negligence has common elements across different legal systems – duty, breach, causation, and harm – although they are often classified differently.<sup>25</sup> In determining whether a defendant has been negligent, the central question is whether the defendant has met a standard of expected conduct.<sup>26</sup> The *diligens paterfamilias* standard was directly incorporated into Roman-Dutch tort law as the relevant standard of conduct.<sup>27</sup> It also became the basis for the development of the ‘reasonable man’ test in the English law of negligence,<sup>28</sup> and for similar standards in civil law legal systems.<sup>29</sup> As such, due diligence, understood as a standard of conduct, and negligence are closely related – ‘the opposite of negligence is diligence’.<sup>30</sup>

The concept of due diligence seems to have passed into international law through the writings of Grotius in the 17 century.<sup>31</sup> However, in contrast to its Roman law origins, in international law due diligence functions primarily as a standard of conduct that defines and circumscribes the responsibility of a state in relation to the conduct of third parties.<sup>32</sup> In the *SS Lotus Case*<sup>33</sup> before the Permanent Court of International Justice in 1927, Justice Moore observed that ‘[i]t is well settled that a State is bound to use due diligence to prevent the

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<sup>24</sup> Cees Van Dam, ‘Tort Law and Human Rights: Brothers in Arms – On the Role of Tort Law in the Area of Business and Human Rights’ (2011) *JETL* 221 at 237.

<sup>25</sup> Yousuf Aftab, ‘The Intersection of Law and Corporate Social Responsibility: Human Rights Strategy and Litigation Readiness for Extractive-Sector Companies,’ 60 *Rocky Mt. Min. L. Inst.* 19-1 (2014) at 23.

<sup>26</sup> Cees Van Dam, note 24, at 237.

<sup>27</sup> Robert Lee, *An Introduction to Roman-Dutch Law* (4<sup>th</sup> edn, Oxford University Press 1946) 324.

<sup>28</sup> Richard Meeran, ‘Tort Litigation Against Multinationals (‘MNCs’) for Violation of Human Rights: An Overview of the Position Outside the US’ (2011) available at <http://business-humanrights.org/sites/default/files/media/documents/richard-meeran-tort-litigation-against-mnccs-7-mar-2011.pdf>, at 8. See also Doug Cassel, ‘Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence’ (2016) 1 *Business and Human Rights Journal* 179.

<sup>29</sup> David Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press 1999) at 168.

<sup>30</sup> Whittuck, note 21, at 429. See, similarly, *Tesco Supermarkets Ltd v Natrass*, UK House of Lords, [1972] AC 153, 199 per Lord Diplock.

<sup>31</sup> Jan Arno Hessbruegge, ‘The Historical Development of the Doctrines of Attribution and Due Diligence in International Law’ (2004) 36 *International Law and Politics* 265.

<sup>32</sup> *Ibid.*, p. 268; See also Daria Davitti, ‘On the Meanings of International Investment Law and International Human Rights Law: the Alternative Narrative of Due Diligence’ (2012) 12 *Human Rights Law Review* 421, 445.

<sup>33</sup> *SS Lotus (France v Turkey)* 1927 PCIJ (Ser. A) No 10.

commission within its dominions of criminal acts against another nation or its people'.<sup>34</sup> Conversely, the tribunal in the *Wipperman* case explained that no state is responsible for acts of private individuals in its territory 'as long as *reasonable diligence* is used in attempting to prevent the occurrence or recurrence of such wrongs'.<sup>35</sup>

In *AAPL v Sri Lanka*, the Tribunal recognised that this obligation extended to the protection of foreign-owned property. Consistently with the Roman law origins of the concept of due diligence, the Tribunal equated due diligence with a duty to take reasonable steps to avoid harm.<sup>36</sup> The Tribunal contrasted this obligation of due diligence with:

[An] absolute obligation which guarantees that no damages will be suffered, in the sense that any violation thereof creates automatically a 'strict liability' on behalf of the host State.<sup>37</sup>

Similarly, in international environmental law, the basic position is that states are not strictly liable for transboundary environmental damage.<sup>38</sup> Rather, states are required to exercise due diligence to prevent significant transboundary harm emanating from their territory.<sup>39</sup>

The concept of due diligence plays an important role in international human rights law in defining the extent of a state's obligations to prevent and respond to infringements of human rights by private actors within its territory or jurisdiction. The UN Human Rights Committee (HRC) has expressed these obligations on the state in this way:

[T]he positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons

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<sup>34</sup> Ibid, Justice Moore, referencing the US Supreme Court case of *United States v Arjona* (1887) 120 US 479.

<sup>35</sup> John Bassett Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, Washington 1898-1906, III, 2947) vol III, 3041 (emphasis added).

<sup>36</sup> *Asian Agricultural Products Ltd. v Republic of Sri Lanka*, ICSID Case No ARB/87/3, Final Award, 27 June 1990, paras 75-77.

<sup>37</sup> Ibid, at para 86.

<sup>38</sup> Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (Oxford University Press 2009) 217-218.

<sup>39</sup> For example, International Law Commission (ILC), 'Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries' 53<sup>rd</sup> session (2001) Doc. A/56/10, II *Yearbook of the International Law Commission*, art 3, at para 7.

or entities. There may be circumstances in which a failure to ensure Covenant rights ... would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or *to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.*<sup>40</sup>

This is distinct from attribution of the conduct of private actors to the state.<sup>41</sup> Insofar as the conduct of private actors is not attributable to the state, the state is under an obligation to satisfy a certain standard of conduct – that of due diligence – in preventing and responding to the conduct of third parties.<sup>42</sup> These are ongoing obligations.<sup>43</sup> The role of due diligence as a standard of conduct defining states' obligations in relation to the infringement of human rights by third parties is uncontroversial, as shown by its recognition in Resolutions of the UN General Assembly,<sup>44</sup> human rights courts,<sup>45</sup> treaty monitoring bodies,<sup>46</sup> and academic commentators.<sup>47</sup>

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<sup>40</sup> HRC, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (29 March 2004), para 8 (emphasis added). Interestingly, Guiding Principle 1 articulates the state's responsibility to protect individuals' human rights from abuse by third parties using the same four words – states must take 'appropriate steps to *prevent, investigate, punish and redress* human rights abuse by third parties' (our emphasis).

<sup>41</sup> *Velasquez Rodriguez Case*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988) at para 172.

<sup>42</sup> Timo Koivurova, 'Due Diligence' (Feb 2010) *Max Planck Encyclopedia of Public International Law* at para 3: '[a] breach of these obligations [to exercise due diligence] consists not of failing to achieve the desired result but failing to take the necessary, diligent steps towards that end.'

<sup>43</sup> See, for example, the European Court of Human Rights' judgment in *Jordan v UK*, Application No. 24746/94 (2001), and the UN Committee Against Torture's finding in *Halimi-Nedzibi v Austria* (8/1991), 1(2) IHRR 190 at para 13.5 (1994).

<sup>44</sup> Article 4(c) of the Declaration on the Elimination of Violence against Women adopted by the General Assembly in 1993 requires states to 'exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women.' UN General Assembly Resolution 48/104, (20 December 1993), UN Doc A/RES/48/104.

<sup>45</sup> See *Velasquez Rodriguez Case*, note 41, para 172. See also, *Ergi v. Turkey* (App. 23818/94) (1998) 32 EHRR 388; *Timurtas v. Turkey* (App no 23531/94) (2000) ECHR 13 June 2000; and *Bevacqua and S v Bulgaria* (App no 71127/01) ECtHR 12 June 2008. See further Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006).

<sup>46</sup> See *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, African Commission on Human and Peoples' Rights, (1995) Communication No. 74/92.

<sup>47</sup> For example, Riccardo Pisillo-Mazzeschi, *Responsabilité de d'état pour violations des obligations positives relatives aux droits de l'homme*, (2008) 333 *Collected Courses of the Hague Academy of International Law* 2008, Chapter IV.

In contrast, if the conduct of private actors is attributable to the state, the state is liable as if that conduct were the conduct of the state itself. When a state itself interferes with an individual's human rights, the question of whether the state has breached its obligations under international human rights law does not turn on whether the state has acted with insufficient diligence.<sup>48</sup> Factors such as whether the interference is proportionate or necessary to protect a legitimate public interest may be relevant in determining whether the interference is, nevertheless, consistent with the state's obligations under international human rights law. But the concept of due diligence is not normally relevant.<sup>49</sup>

In summary, in international law 'due diligence is concerned with supplying a standard of care against which fault can be assessed' that is relevant in some circumstances but not in others.<sup>50</sup> As a standard of conduct, it defines the extent of states' responsibility, for example, for infringements of human rights, damage to foreign property and transboundary pollution.<sup>51</sup> It imposes an external, 'objective' standard of conduct to take reasonable precaution to prevent, or to respond to, certain types of harm specified by the rule in question.<sup>52</sup> What this standard of conduct requires in a given situation is dependent on the particular facts of the case, and may change over time.<sup>53</sup> Relevant factors in determining whether a state's conduct in a particular fact scenario has met the standard of due diligence

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<sup>48</sup> Steven Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 *Yale Law Journal* 443 at 523.

<sup>49</sup> Timo Koivurova, note 42, at paras 2 and 7; Björn Fasterling and Geert Demuijnck 'Human Rights in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights' (2013) 116 *Journal for Business Ethics* 799-814.

<sup>50</sup> International Law Association (ILA), Study Group on Due Diligence in International Law, Second Report, July 2016 available at <http://www.ila-hq.org/en/study-groups/index.cfm/cid/1045>.

<sup>51</sup> See, for example, Joanna Bourke-Martignoni, 'The History and Development of the Due Diligence Standard in International Law and its Role in the Protection of Women Against Violence' in Carin Benninger-Brudel (ed) *Due Diligence and its Application to Protect Women from Violence* (Martinus Nijhoff, 2008) at 49; Hessbruegge, note 31; International Tribunal for the Law of the Sea Advisory Opinion, Case No. 17: *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (1 February 2011), available at [http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_17/adv\\_op\\_010211.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf) at paras 72 and 110; and *Pulp Mills on the River Uruguay* (Argentina v Uruguay), [2010] ICJ Rep 14, at para 101.

<sup>52</sup> See Xue Hanquin, *Transboundary Damage in International Law* (Cambridge University Press, 2003) 162-165. See, contra, Virginie Barral, 'Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm' (2012) 23 *European Journal of International Law* 377, who argues, at 391, that 'due diligence' obligations in international law are obligations 'to employ best efforts'.

<sup>53</sup> See *Seabed Mining Advisory Opinion*, ITLOS (2011) 50 ILM 458, para 117.



include the degree of the risk of harm,<sup>54</sup> and the resources, both economic and technological, available to the state.<sup>55</sup> For the purposes of this article, one important conclusion is that, in the context of international human rights law, the concept of due diligence is primarily relevant in defining the extent of states' obligations in relation to the conduct of private actors that is not attributable to the state.

#### **D. Regulatory Schemes: Relationships between the Two Concepts of Due Diligence**

Some regulatory schemes link due diligence, understood as a standard of expected conduct, with prescribed processes of investigation. For example, section 11 of the US Federal Securities Act 1933 makes the directors of a corporation issuing securities liable for incorrect statements and omissions of material facts in the documentation accompanying a securities offering.<sup>56</sup> The Act also recognises a 'due diligence' defence to liability.<sup>57</sup> To benefit from this defence, directors must satisfy two requirements. First, the defendant must show that they carried out a process of 'reasonable investigation' in an attempt to establish that the statements were true and complete. The requirement to conduct an investigative process is akin to the way that the 'due diligence' is normally understood in business practice. Second, the defendant must have reasonably believed that the statements were true and complete.<sup>58</sup> The second requirement means that the defendant's liability is determined in light of an objective standard of prudent conduct – specifically, whether there were reasonable grounds to believe that the statements were true.<sup>59</sup>

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<sup>54</sup> See International Law Commission 'Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries' op cit, Vol II Part Two at 154 para 11, and *Case Presented on the Part of the Government of Her Britannic Majesty in Papers relating to Foreign Relations of the United States 1872* (United States Government Printing Office Washington 1872) part 2 vol I, 412.

<sup>55</sup> See Timo Koivurova, note 42, at para 19.

<sup>56</sup> See Mark Taylor, Luc Zandvliet and Mitra Forouhar 'Due Diligence for Human Rights: A Risk-Based Approach' (2010) *Corporate Social Responsibility Initiative Working Paper No. 53* (Cambridge, John F. Kennedy School of Government, Harvard University) 2.

<sup>57</sup> See *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983); William Sjostrom, 'The Due Diligence Defense under Section 11 of the Securities Act of 1933' (2005) 44 *Brandeis Law Journal* 549.

<sup>58</sup> See Sjostrom, *ibid*, 574.

<sup>59</sup> Similarly, Taylor, Zandvliet, Forouhar, note 56, p. 3: 'The due diligence process fuses two conceptually distinct processes; one is an investigation of facts, and the other is an evaluation of the facts in light of the relevant standard of care.'

Several other regulatory schemes – including those concerned with corruption<sup>60</sup> and consumer safety<sup>61</sup> – combine the two concepts of due diligence in various ways. A common feature of such regimes is that they are focused on the prevention of certain types of harm to stakeholders outside the business. They do this by establishing a basic principle that businesses are liable for certain forms of harm and then encouraging or requiring businesses to implement and maintain internal processes of investigation and control to avoid the harm.<sup>62</sup> The focus of such regulatory schemes contrasts to businesses' voluntary use of due diligence processes, where the focus is normally on the identification and management of commercial risks to the business itself.

In international law, courts are also recognising the distinction, and trying to clarify the relationship, between the two concepts of due diligence in particular contexts. In both the *Pulp Mills* and *Costa Rica v Nicaragua* cases,<sup>63</sup> the ICJ considered due diligence in context of transboundary harm. Jutta Brunnée argues that 'the ICJ distinguishes between a duty to take diligent steps to prevent significant transboundary harm, which it then deals with under the rubric of separate procedural obligations, and the duty to take diligent steps not to cause harm'.<sup>64</sup> The former is an obligation on the state to implement and maintain internal processes of investigation and control. The latter is a restatement of the principle that states are liable for transboundary environmental harm if the harm results from a failure to act diligently, understood as a standard of conduct. In the absence of harm, there is no breach of the latter obligation.

Although some regulatory schemes integrate both concepts of due diligence, the two do not necessarily go hand in hand. For example, the UK Modern Slavery Act 2015 requires companies to publish an annual statement documenting the steps they are taking to

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<sup>60</sup> Section 7(1) of the UK Bribery Act 2010 creates an offence where a company fails to prevent bribery committed by a person associated with the company. Section 7(2) provides for a defence where the company can prove that it had 'adequate procedures' in place to prevent such bribery. 'Due diligence' is recognised as an 'adequate procedure': UK Ministry of Justice, *Guidance on the Bribery Act 2010*, at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/181762/bribery-act-2010-guidance.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/181762/bribery-act-2010-guidance.pdf) at 20-31.

<sup>61</sup> The UK Food Safety Act creates a range of offences relating to the preparation and supply of food that is 'injurious to health'. It is a defence for the person charged to prove that they took all reasonable precautions and exercised all due diligence to avoid the commission of the offence by himself or by a person under his control UK Food Safety Act 1990, Section 21, and Regulation of the Food Hygiene (England) Regulations 2006.

<sup>62</sup> Taylor, Zandvliet and Forouhar, note 56, 2. See also judicial discussion in *London Borough of Croydon v Pinch A Pound UK Ltd* [2010] EWHC 3283 (Admin) at para 19.

<sup>63</sup> *Pulp Mills on the River Uruguay* (Argentina v Uruguay), [2010] ICJ Rep 14, at para 101; and *Costa Rica v Nicaragua/Nicaragua v Costa Rica*, ICJ Judgment, 16 December 2015.

<sup>64</sup> Jutta Brunnée, 'Procedure and Substance in International Environmental Law: Confused at a Higher Level (2016) 5 *ESIL Reflections* 6 (3 June, 2016).

eradicate slavery and human trafficking in their own operations and in their supply chains.<sup>65</sup> One of the purposes of the Act is to encourage companies to institute due diligence processes in relation to slavery and human trafficking,<sup>66</sup> and the Act specifies that the statement may include information about such processes.<sup>67</sup> However, the Act does not make a business legally liable for slavery and human trafficking within its supply chain and the concept of due diligence, understood as a standard of conduct, plays no role in the scheme established by the Act.<sup>68</sup>

Another example is the US Securities and Exchange Commission (SEC) requirement for publicly traded companies to report on the origin of certain minerals obtained from Democratic Republic of Congo. Instituting a process of due diligence to establish the origin of such minerals is mandatory in certain circumstances,<sup>69</sup> and SEC Regulations are highly prescriptive as to the form that the process of due diligence must take.<sup>70</sup> However, the Act does not make a company legally liable for using such minerals and due diligence, understood as a standard of conduct, plays on role. Such schemes impose reporting requirements on businesses with the objective of changing business practices, but they do not seek to provide remediation for victims.<sup>71</sup> These examples highlight the importance of understanding the relationship (if any) between the two concepts of due diligence in any given regulatory scheme.

#### **E. Meanings of Due Diligence in the Guiding Principles**

The term 'due diligence' is not used consistently in the Guiding Principles. Guiding Principles 17 to 21, which appear under the heading 'human rights due diligence', describe a range of

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<sup>65</sup> Section 54 of the UK Modern Slavery Act 2015. It applies to all companies supplying goods or services with an annual turnover of £36 million and which carry on business, or a part of their business, in the UK: Section 54(2)(b) read with Regulation 2 of the Modern Slavery Act (Transparency in Supply Chains) Regulations 2015.

<sup>66</sup> See 'Transparency in Supply Chains, a Practical Guide' (2015) [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/471996/Transparency\\_in\\_Supply\\_Chains\\_etc\\_\\_A\\_practical\\_guide\\_\\_final\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/471996/Transparency_in_Supply_Chains_etc__A_practical_guide__final_.pdf), para 1.8.

<sup>67</sup> UK Modern Slavery Act 2015, Section 54(5)(c).

<sup>68</sup> Insofar as the Act does establish certain criminal offences – for example, the offence of arranging or facilitating human trafficking – the concept of due diligence plays no role in clarifying when a person will be liable for such offences: see section 2.

<sup>69</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act 2010, Pub.L. 111–203, H.R. 4173, Section 1502 (p), I.A (i).

<sup>70</sup> Securities and Exchange Commission, 17 CFR Parts 240 and 249b, effective 13 November 2012, see especially 'Step Three – Conflict Minerals Report's Content and Supply Chain Due Diligence' at 166-235.

<sup>71</sup> Moreover, these schemes are narrowly focused on human rights abuse occurring within a particular context, sector or geographical region. For example, the Dodd-Frank Act is limited to the DRC.

processes and procedures that business should have in place to identify, avoid and monitor their human rights impacts. All of these procedures fit squarely within the understanding of due diligence as a set of business processes. Indeed, Guiding Principle 17 is explicit that due diligence refers to a “process” of investigation and control implemented by a business enterprise.<sup>72</sup> This emphasis on due diligence processes is consistent with the Framework’s explanation of *how* business enterprises should ensure that they respect human rights:

What is required is due diligence - a *process* whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it.<sup>73</sup>

This concept of due diligence is also reflected in Guiding Principle 15:

In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes... including... (b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights.

In contrast, in a 2009 report to the Human Rights Council during the development of the Guiding Principles, Ruggie defines due diligence as the ‘diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation’.<sup>74</sup> Taken in isolation, this definition clearly refers to a due diligence as a standard of conduct. However, the 2009 report then continues:

[t]he Special Representative uses this term [due diligence] in its broader sense: a comprehensive, proactive attempt to uncover human rights risks, actual and

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<sup>72</sup> Guiding Principle 17 states that business enterprises 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. The *process* should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed’ (emphasis added).

<sup>73</sup> Report UN Doc A/HRC/8/5 (2008), op cit, at para 25 (our emphasis).

<sup>74</sup> Report to the UN Human Rights Council ‘Business and Human Rights: Towards operationalizing the “protect, respect and remedy” framework’ (22 April 2009) UN Doc A/HRC/11/13 <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf>, para 71. This is quote from Black’s Law Dictionary, which was also used by Ruggie, as noted seen in note 10, in his first use of the term due diligence in the 2008 Report, UN Doc A/HRC/8/5, op cit, at para 25.

potential, over the entire life cycle of a project or business activity, with the aim of avoiding and mitigating those risks.<sup>75</sup>

This passage is unclear, but it appears to mix the two concepts of due diligence, suggesting that Ruggie may have had regulatory schemes that integrate both concepts in mind.<sup>76</sup>

Ruggie's final report to the Human Rights Council, which contains the Guiding Principles themselves accompanied by a brief introduction, suggests that due diligence is a standard of conduct businesses must meet to discharge their responsibility to respect human rights. The introduction explains that business enterprises' basic responsibility is to respect human rights, meaning that they 'should act with due diligence to avoid infringing the rights of others'.<sup>77</sup> However, the 'foundational' Guiding Principles that elaborate the meaning and scope of the corporate responsibility to respect human rights – namely, Guiding Principles 11, 12 and 13 – do not refer to due diligence at all. On the contrary, Guiding Principle 11 simply states that businesses' responsibility to respect human rights 'means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved'.

This formulation conspicuously avoids specifying a standard of conduct, suggesting that businesses breach their basic responsibility to respect human rights *whenever* they infringe human rights, triggering a correlative responsibility to provide a remedy.

## **F. Consequences of Confusion**

This conceptual slippage is not necessarily problematic. Scholarship in the fields of international law and political science suggests that constructive ambiguity can be a useful tool in building consensus on contested issues.<sup>78</sup> However, in the context of the Guiding Principles, confusion about the meaning of due diligence in the Guiding Principles causes two significant problems in practice. This section outlines these problems. Moreover, this confusion does not appear to be the result of intentional use of constructive ambiguity on Ruggie's part, a point to which we return in the following section.<sup>79</sup>

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<sup>75</sup> Ibid.

<sup>76</sup> cf Tineke Lamboody, 'Corporate Due Diligence As A Tool To Respect Human Rights' (2010) *Netherlands Quarterly of Human Rights* 404.

<sup>77</sup> Report UN Doc A/HRC/17/31 (2011), note 4, at para 6.

<sup>78</sup> See Christine Bell and Kathleen Cavanaugh, "Constructive Ambiguity' or Internal Self-Determination? Self-Determination, Group Accommodation, and the Belfast Agreement' (1998) 22 *Fordham International Law Journal* 1345

<sup>79</sup> See analysis in Section G.b.

The first problem is that confusion around the meaning of due diligence encourages the incorrect view that implementing due diligence processes is sufficient to discharge businesses' responsibility to respect human rights. An early guide on human rights due diligence process produced by the global oil and gas industry association for environmental and social issues illustrates this concern.<sup>80</sup> It asserts that '[a] human rights due diligence process is not a legal requirement, but rather a good industry practice to manage potential issues and impacts associated with business operations.'<sup>81</sup> Although the document purports to be based on the Guiding Principles, it says almost nothing about the foundational responsibility of business to respect human rights and nothing at all about businesses' correlative responsibility to provide a remedy for their adverse human rights impacts. A recent analysis of thirty large companies' statements suggests that business and human rights indicates that this is not an isolated phenomenon.<sup>82</sup> Other commentators have expressed concerns that an exclusive focus on due diligence processes that are not tethered to the foundational responsibility to respect human rights may encourage 'tick-box' exercises allow businesses to claim that they are compliant with the Guiding Principles.<sup>83</sup> This undermines Ruggie's objective to establish 'an authoritative focal point around which the expectations and actions of relevant stakeholders could converge'<sup>84</sup> and could also discourage the evolution of legal and regulatory measures at the national level that encourage or require businesses to respect human rights.<sup>85</sup>

Of course, Ruggie's emphasis on due diligence processes was a component of a deliberate strategy to shift the focus of debate business and human rights to the active steps

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<sup>80</sup> IPIECA 'Human rights due diligence process: A practical guide to implementation for oil and gas companies', 2012, available at <http://www.ipieca.org/publication/human-rights-due-diligence-process-practical-guide-implementation-oil-and-gas-companies>.

<sup>81</sup> *Ibid*, at 2.

<sup>82</sup> Ken McPhail and Carol Adams, 'Corporate Respect for Human Rights: Meaning, Scope, and the Shifting Order of Discourse' (2016) 29 *Accounting, Auditing & Accountability Journal* 650.

<sup>83</sup> See Fasterling and Demuijnck, note 49, at 805-806; and Ana Nacvalovaite, Alex Zapesochny and Margaret Jones 'Integrating Concern for Human Rights into the Mergers & Acquisitions Due Diligence Process' *Good Practice Note to the UN Global Compact Human Rights Working Group* (26 July 2013), available at [http://www.unglobalcompact.org/docs/issues\\_doc/human\\_rights/Human\\_Rights\\_Working\\_Group/MandA\\_GPN.pdf](http://www.unglobalcompact.org/docs/issues_doc/human_rights/Human_Rights_Working_Group/MandA_GPN.pdf), at 9.

<sup>84</sup> Report UN Doc A/HRC/17/31 (2011), note 4, at para 5.

<sup>85</sup> On the complementary role of such measures, see Mark Taylor, 'Due Diligence: A Compliance Standard for Responsible European Companies' (2014) *European Company Law* 86, 89.

businesses should take to *prevent* adverse human rights impacts.<sup>86</sup> He sought to build the case that businesses already implement similar processes to prevent other types of harm,<sup>87</sup> and that businesses themselves could benefit from adopting a more proactive approach to preventing adverse human rights impacts.<sup>88</sup> Both arguments are important in driving practical change within the business community. However, the Framework and the Guiding Principles were expressly intended to function as ‘an inter-related and dynamic system of preventative *and remedial* measures’,<sup>89</sup> not only a series of recommendations about improvements of business processes.

Second, and more importantly for our purposes, failure to distinguish between the two different meanings of due diligence creates confusion about the situations in which businesses that infringe human rights can be said to have breached their responsibility to respect human rights and, therefore, to have a responsibility to provide a remedy within the scheme established by the Guiding Principles. This confusion concerns the standard of conduct, if any, that defines the extent of businesses’ responsibility to respect human rights.

If due diligence, understood as a standard of conduct, applies, then a business is only responsible for adverse human rights impacts that result from its failure to act with reasonable diligence. On this interpretation, a business enterprise does not breach its responsibility to respect human rights if it has acted diligently in its attempt to avoid causing adverse human rights impacts but, due to unfortunate or unforeseen events, has caused serious adverse human rights impacts. In contrast, if businesses breach their responsibility to respect human rights whenever they infringe human rights – i.e. if the responsibility to respect human rights is akin to a strict liability standard and does not entail a fault element – then a business’s responsibility to redress situations in which it has infringed human rights is independent of any debate about whether the business acted with sufficient diligence or care. On this interpretation, a business enterprise is responsible for all its adverse human

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<sup>86</sup> Ibid.

<sup>87</sup> See ‘Business and human rights: Towards operationalizing the “protect, respect and remedy” framework’ A/HRC/11/13, 22 April 2009, at para 51: ‘Controllable or not, human rights challenges arising from the business context, its impacts and its relationships can pose material risks to the company and its stakeholders, and generate outright abuses that may be linked to the company in perception or reality. Therefore, they merit a similar level of due diligence as any other risk’.

<sup>88</sup> Ibid, at paras 82-83: ‘[D]one properly, human rights due diligence should precisely create opportunities to mitigate risks and engage meaningfully with stakeholders so that disingenuous lawsuits will find little support beyond the individuals who file them. Moreover, recent experience shows that other social actors are quite capable of concluding and stating publicly that a company facing criticism has undertaken good faith efforts to avoid human rights harm, and that transparency in acknowledging inadvertent problems can work in its favour’.

<sup>89</sup> Report UN Doc A/HRC/17/31 (2011), note 4, at para 6, emphasis added.

rights impacts regardless of whether those impacts were unexpected or costly to prevent. This distinction has significant practical implications both for businesses seeking to comply with their responsibilities, and for individuals and communities whose human rights are affected by business activity.

### **G. Clarifying Due Diligence in the Guiding Principles**

In our view, the Guiding Principles are best understood as imposing different responsibilities for a business enterprise's *own* adverse human rights impacts, and for the human rights impacts caused by *third parties* with which the business enterprise has relationships. Businesses have a strict – or no fault – responsibility for their own adverse human rights impacts. This means that businesses have a responsibility to provide a remedy whenever they infringe human rights; due diligence, understood as a standard conduct, is not relevant. However, due diligence, as standard of conduct, is relevant in defining the extent to which businesses are responsible for the adverse human rights of third parties. Due diligence processes are the means by which businesses should ensure that it discharge these responsibilities. This interpretation, we believe, clarifies how the two concepts of due diligence relate to each other within the scheme established by the Framework and Guiding Principles, and solves the two problems identified in the previous section. In addition, our interpretation: is the most internally coherent reading of the Framework and the Guiding Principle; is consistent with international human rights law; and is justified on other policy grounds. We address each of these three arguments in turn.

#### **a. Coherence between the Framework and the Guiding Principles**

The Guiding Principles establish that business enterprises have a responsibility not to infringe human rights by their own actions *and* a responsibility to exercise influence - 'leverage' in the lexicon of the Guiding Principles - over certain third parties to prevent them from infringing human rights.<sup>90</sup> This distinction is made explicitly in Guiding Principle 13, one of the foundational principles defining business enterprises' responsibilities. It provides that business enterprises have a responsibility to:

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

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<sup>90</sup> Wood labels this form of responsibility 'leverage-based negative responsibility' and distinguishes it from 'negative impact-based responsibility': Stepan Wood 'Four Varieties of Social Responsibility: Making Sense of the "Sphere of Influence" and "Leverage" Debate via the Case of ISO 26000' (2011) *Osgood Hall Law School Research Paper* No 14/2011.



(b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

Crucially, Guiding Principle 13 also suggests that different standards apply in relation to a business enterprise's responsibility for its own adverse human rights impacts and its responsibility for third party impacts. A business enterprise should '*avoid*' its own impacts, while the lesser standard of '*seek to prevent*' applies in relation to third party impacts. This distinction makes sense – it would be illogical and impractical for a business to be held responsible for the conduct of every one of its 'business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services'<sup>91</sup> to the same standard as it is held responsible for its own conduct.<sup>92</sup>

This distinction supports our argument that different standards of conduct apply in relation to businesses' responsibility for their *own* adverse human rights impacts and their responsibility for the human rights impacts caused by *third parties*.<sup>93</sup> However, beyond the distinction between the terms 'avoid' and 'seek to prevent', the Guiding Principles do not further define the relevant standards. The challenge is to clarify the relevant standards of conduct that apply in relation to each element of the responsibility.

In relation to a business's own conduct, the Guiding Principles 'operationalise' the 2008 Framework.<sup>94</sup> The Framework explains that businesses' responsibility to respect human rights 'means not to infringe on the rights of others - put simply, to do no harm.'<sup>95</sup> This 'do

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<sup>91</sup> This definition of 'business relationships' is contained in the Commentary to Guiding Principle 13. According to Guiding Principle 13 a business enterprise's responsibility for third parties adverse human rights impacts extends, in principle, to all entities with which it has 'business relationships'.

<sup>92</sup> Similarly, see UN Human Rights Council 'Clarifying the Concepts of "Sphere of Influence" and "Complicity"' (15 May 2008), UN Doc A/HRC/8/16, at para 13: 'However, companies cannot be held responsible for the human rights impacts of every entity over which they may have some leverage, because this would include cases in which they are not contributing to, nor are a causal agent of the harm in question'.

<sup>93</sup> cf Astrid Sanders, 'The Impact of the "Ruggie Framework" and the United Nations Guiding Principles on Business and Human Rights on Transnational Human Rights Litigation' (2014) *LSE Law, Society and Economy Working Papers* 18/2014 ,at 15-17, who argues that the responsibility to respect human rights entails a due diligence standard of conduct, so that a business breach its responsibility to respect human rights if it cause adverse human rights impacts *and* those impacts were attributable to a failure to act with sufficient diligence. This argument suggests that the same standard of conduct applies in relation to businesses' responsibility for their own impacts and for third party impacts.

<sup>94</sup> This purpose is explicit in the full title of the Guiding Principles – 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework'.

<sup>95</sup> Framework, note 1, at para 24.

no harm’ formulation implies that a business breaches its responsibility to respect human rights whenever it infringes it human rights. It does not limit a business enterprise’s responsibility only to infringements of human rights that arise from a failure to act diligently or to those infringements accompanied by some other fault element.

The view that business enterprises have a strict – or no fault – responsibility for their own adverse human rights impacts is also consistent with Guiding Principle 22, which states that:

Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.<sup>96</sup>

This formulation makes clear that a business’s responsibility to remedy its own adverse human rights impacts is not contingent on whether the infringement resulted from its failure to act diligently, or on any other fault element. That businesses breach their responsibility to respect human rights whenever they infringe human rights by their own conduct was subsequently made explicit in the Interpretive Guide to the Guiding Principles published in 2012.<sup>97</sup>

Our interpretation also finds support in the Commentary to Guiding Principle 17, which cautions that:

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.<sup>98</sup>

Although this passage refers to the relationship between due diligence processes and legal obligations that exist independently of the scheme established by the Guiding Principles, it indicates that taking all reasonable steps – i.e. satisfying a due diligence standard of conduct

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<sup>96</sup> Guiding Principle 22.

<sup>97</sup> Office of the High Commissioner for Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (UN, 2012), p 63: ‘Having systems in place to enable the remediation of such impact in no way implies that the enterprise does not intend to respect human rights. On the contrary, it demonstrates a recognition that *impact may occur despite its best efforts, and intent to ensure that respect for human rights is restored as swiftly and effectively as possible should this happen*’ (emphasis added).

<sup>98</sup> Commentary to Guiding Principle 17.

– is not, and should not be, sufficient to absolve businesses from accountability for their own adverse human rights impacts.<sup>99</sup>

In contrast, the Guiding Principles impose a different standard of responsibility insofar as they concern the adverse human rights impacts of *third parties*.<sup>100</sup> In our view, acting with due diligence to prevent and mitigate the adverse human rights impacts of entities with which it has business relationships is sufficient for a business to discharge this responsibility. This is for several reasons. First, as noted above, Guiding Principle 13 states that a business enterprise should ‘seek to prevent’ adverse human rights impacts of entities with which it has business relationships. This qualification clearly introduces a fault element in relation to third party impacts.

Second, the Framework repeatedly draws attention to the difference between a business’s responsibility for its own adverse human rights impacts and its responsibility for the impacts of third parties.<sup>101</sup> By positioning due diligence as an alternative to legal doctrines of ‘complicity’ and ‘sphere of influence’ – both of which attempt to define the scope of a business’s responsibility for the actions of third parties, but which were rejected as ‘greater rigor is necessary ... to provide companies with sufficient guidance in identifying specific actions they need to take’<sup>102</sup> – the Report implies that due diligence is the standard of conduct that qualifies a business’s responsibility for third party impacts.<sup>103</sup>

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<sup>99</sup> For example, in the 2010 Report to the Human Rights Council, ‘Business and human rights: further steps toward the operationalization of the “protect, respect and remedy” framework (9 April 2010) UN Doc A/HRC/14/27, it is stated at para 86: ‘the Special Representative would not support proposals that conducting human rights due diligence, by itself, should automatically and fully absolve a company Alien Tort Statute or similar liability.’

<sup>100</sup> Similarly, Radu Mares ‘Responsibility to Respect: Why the Core Company Should Act When Affiliates Infringe Human Rights’ in Radu Mares (ed) *Siege or Cavalry Charge? The UN mandate on business and human rights* (2012 Brill/Martinus Nijhoff) at 9, argues that ‘a core company’s responsibility to act [to prevent human rights infringement by a related entity] does not result naturally from a broad responsibility to respect, that is “to do no harm”; it is additional to that and needs to be justified separately.’

<sup>101</sup> See ‘Clarifying the Concepts of “Sphere of Influence” and “Complicity”’ (15 May 2008) UN Doc No. A/HRC/8/16, at para 12: ‘[The sphere of influence metaphor] conflates two very different meanings of “influence”. One is “impact”, where the company’s activities or relationships are causing human rights harm. The other is whatever “leverage” a company may have over actors that are causing harm or could prevent harm. Impact falls squarely within the responsibility to respect; leverage may only do so in particular circumstances’.

<sup>102</sup> *Ibid*, at para 6. See also Radu Mares, ‘A Gap in the Corporate Responsibility to Respect Human Rights’ (2010) 36 *Monash U. L. Rev.* 33.

<sup>103</sup> *Ibid*, at paras 6 and 71-72.

Third, the Guiding Principles use the concept of ‘leverage’ to define the extent of a business enterprise’s responsibility for the adverse human rights impacts of third parties. Leverage is understood as a business’s ability to exercise influence other the third party in practice.<sup>104</sup> According to the Commentary on the Guiding Principles, the exercise of ‘leverage’ requires a contextual judgment of what is reasonable in the circumstances. Relevant factors include how crucial the relationship is to the enterprise, the severity of the abuse, whether terminating the relationship in itself would have adverse human rights impacts, and whether capacity-building or other incentives may increase leverage.<sup>105</sup> Contextual judgments of this type are the essence of due diligence as a standard of conduct, as seen above. Subsequent paragraphs of the Commentary to Guiding Principle 19 acknowledge that, if a business enterprise has taken reasonable steps to acquire and exercise leverage, it will not necessarily be responsible for the third party’s adverse human rights impacts.<sup>106</sup> This, too, is consistent with a due diligence standard of conduct.

#### **b. Consistency with International Human Rights Law**

As previously noted, both the Framework and the Guiding Principles describe business enterprises’ foundational responsibility as a responsibility to respect human rights. In distinguishing businesses’ responsibility to *respect* human rights from states’ duty to *protect* human rights, the Guiding Principles adopts a taxonomy originally developed by Henry Shue, who proposed that the existence of human rights entails correlative duties to respect, protect and fulfil those rights.<sup>107</sup> His taxonomy of duties has had a profound impact on international human rights law, including through adoption by the Committee on Economic, Social and Cultural Rights (CESCR).<sup>108</sup> The obligation to respect a human right is an obligation ‘to avoid measures that hinder or prevent the enjoyment of the right’.<sup>109</sup> The obligation to

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<sup>104</sup> Commentary to Guiding Principle 19.

<sup>105</sup> Ibid.

<sup>106</sup> Ibid.

<sup>107</sup> Henry Shue, *Basic Rights* (Princeton University Press 1996) 52. The relevance of Shue’s typology to the Ruggie framework is discussed in David Bilchitz ‘The Ruggie Framework: an Adequate Rubric for Corporate Human Rights Obligations?’ *SUR International Journal on Human Rights* 12 (2010) 199, 205.

<sup>108</sup> CESCR ‘General Comment 12: The right to adequate food (art 11)’ (12 May 1999) UN Doc E/C.12/1999/5 para 15; CESCR ‘General Comment 13: The right to education (art 13)’ (8 December 1999) UN Doc E/C.12/1999/10 para 46; CESCR ‘General Comment 14: The right to the highest attainable standard of health (art 12)’ (11 August 2000) UN Doc E/C.12/2000/4 para 33. The development of Shue’s taxonomy by the CESCR, including minor shifts in terminology, is discussed in Mary Dowell-Jones, *Contextualising the International Covenant on Economic, Social and Cultural Rights: Assessing the Economic Deficit* (Martinus Nijhoff, 2004) 29.

<sup>109</sup> CESCR, ‘The right to education’, *ibid*, para 40.

protect human rights is an obligation to prevent third parties from interfering with individuals' ability to exercise that right.<sup>110</sup> In international human rights law, the concept of due diligence is not relevant in defining the extent of states' obligations to respect human rights. States' obligations to *respect* human rights are not generally qualified by any fault element, whereas states' obligations to *protect* human rights from interference by third parties involve a due diligence standard of conduct.<sup>111</sup>

In subsequent writing, Ruggie explains that he consciously modelled the corporate responsibility to respect human rights on states' obligation to respect to human rights in international human rights law.<sup>112</sup> However, it is clear that this corporate responsibility combines two different elements of Shue's taxonomy. Guiding Principle 13(a) concerns a business enterprise's responsibility for its own impacts – it is a true responsibility to *respect* in the sense in which that term is understood by international human rights law. On the other hand, Guiding Principle 13(b) concerns a business enterprise's responsibility to influence the conduct of third parties – a responsibility to *protect* human rights in the sense in which that term is understood in human rights discourse, albeit a circumscribed one.<sup>113</sup>

One attractive feature of our interpretation of the Guiding Principles is consistency with international human rights law. As is the case with states' obligation in international human rights law, we argue that businesses have a strict – or no fault – responsibility with their own adverse human rights impacts and that due diligence, understood as a standard of conduct, defines the extent of businesses' responsibilities for the adverse human rights impacts of third parties. In our view, the justifications for this distinction in international human rights law are equally relevant in defining businesses' responsibilities for adverse human rights impacts.<sup>114</sup> Both states and businesses are complex institutions. Notions of fault, which reflect ideas about the moral culpability of natural persons, are less relevant to harm caused by states and corporate actors.<sup>115</sup> As is the case with states, a scheme based on the principle that a business is strictly responsible for its own infringements of human rights creates stronger incentives for the business to establish systems of internal control –

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<sup>110</sup> CESCR 'The right to the highest attainable standard of health', note 108, para 33.

<sup>111</sup> See discussion in Section C.

<sup>112</sup> *Just Business*, note 2, at 83, 94-97.

<sup>113</sup> David Bilchitz, note 107, at 207.

<sup>114</sup> Similarly Steven Ratner, note 48, at 524.

<sup>115</sup> See, for example, Lord Chancellor Thurlow's comment: 'Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and nobody to be kicked?': J. Poynder, *Literary Extracts* (1844) Vol 1, at 268.

such as due diligence processes – to prevent such impacts.<sup>116</sup> Moreover, in subsequent writing Ruggie appears to confirm that businesses have a strict responsibility for their own adverse human rights impacts.<sup>117</sup>

To be clear, we are not arguing that businesses' responsibilities under the Guiding Principles are legally binding,<sup>118</sup> or that they are equivalent in scope to states' obligations under international human rights law. For instance, states have obligations to *fulfil* human rights. Businesses have no equivalent responsibilities within the scheme established by the Guiding Principles. Moreover, states' obligations to *protect* individuals' human rights require 'appropriate steps to prevent, investigate, punish and redress' all infringements of human rights within their territory.<sup>119</sup> The scope of a business's responsibility in relation to third parties is limited to the prevention and mitigation of the adverse human rights impacts of those entities with which the business has 'business relationships'. Our argument relates to

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<sup>116</sup> Similarly, Robert Barnidge. 'The Due Diligence Principles under International Law' (2006) 8 *International Community Law Review* 81, citing Malcolm Shaw, *International Law* (5<sup>th</sup> ed, Cambridge University Press 2003) at 700.

<sup>117</sup> Ruggie explains: 'I drew the scope of the corporate responsibility to respect human rights from the definition of respect [in international human rights law] itself: non-infringement of the rights of others: *Just Business*, note 2, at 97. He then describes (at p.98) the corporate responsibility to respect human rights by analogy to 'the warning sign in the pottery shop, YOU BREAK IT, OR CONTRIBUTE TO BREAKING IT, YOU OWN IT' (capitals in original). Both passages support the view that businesses breach their responsibility to respect human rights whenever they infringe human rights by their own conduct, regardless of whether the infringement results from insufficient diligence. This view finds further support in the writing of one of the lawyers who worked on Ruggie's team, who specifically rejected the argument that satisfying a due diligence standard of conduct should be a defence to a legal claim based on a business enterprise's failure to respect human rights: John Sherman and Amy Lehr, 'Human Rights Due diligence: Is it too Risky?', available at [http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper\\_55\\_shermanlehr.pdf](http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_55_shermanlehr.pdf)18, responding to a proposal made by Lucien Dhooge 'Due Diligence as a Defence to Corporate Liability Pursuant to the Alien Tort Statute' (2008) 22 *Emory International Law Journal* 455.

<sup>118</sup> The 2011 Report A/HRC/17/31, note 4, states, at para 14: 'The Guiding Principles' normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved'. This view is reflected in the Introduction to the Guiding Principles: '[n]othing in these Guiding Principles should be read as creating new international law obligations'. See Robert Blitt, 'Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embrasive Approach to Corporate Human Rights Compliance' (2012-2013) 48 *Texas International Law Journal* 33-62, at 43. However, this does not mean that there are not strong pressures to comply – see Robert McCorquodale, 'Pluralism, Global Law and Human Rights', (2013) 2 *Global Constitutionalism* 287-315.

<sup>119</sup> Human Rights Committee, General Comment 31 note 40, para 8.

the specific issue of the standards of conduct that attach to different types of human rights obligations and responsibilities.

**c. Justified on policy grounds**

There are additional policy justifications for understanding a business enterprise's responsibility for its own human rights impacts as a strict responsibility. One of Ruggie's central concerns was to provide a framework that discouraged strategic 'gaming' by business enterprises and states.<sup>120</sup> A strict responsibility for a business enterprise's own adverse human rights impacts establishes a clear line of accountability to victims under Guiding Principle 22. In contrast, if a business enterprise were only responsible for those adverse human rights impacts that flow from a failure to act diligently, there would be much greater room for dispute about whether the responsibility had been breached.

This would be undesirable for two reasons. First, the Guiding Principles rely to a significant extent on self-regulation by business enterprises, including through their own non-judicial grievance mechanisms, and in industry standards. So it would be easy for a business to assert that its adverse human rights were the result of unforeseeable events, rather than a failure to act diligently. Second, the evidence needed to determine whether a business enterprise acted diligently is likely to be in the possession of the business itself.<sup>121</sup> To give a concrete example, in a case like the Bhopal disaster in India, it would be inappropriate to require victims to show that the chemical leak was a result of insufficient diligence in the maintenance of the facility's safety systems in order to establish that Union Carbide had breached its responsibility to respect human rights.<sup>122</sup> For both reasons, individuals whose human rights have been infringed by a business enterprise should not have to establish that such infringement resulted from a lack of diligence on the part of the business enterprise in order to be entitled to a remedy.

A further implication of the interpretation we propose is that implementation of the due diligence processes required by the Guiding Principles is not sufficient to discharge the

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<sup>120</sup> See, for example, 'Business and Human Rights: Further Steps Toward the Operationalization of the "Protect, Respect and Remedy" Framework' Report A/HRC/14/27 (9 April 2010), at para 64.

<sup>121</sup> See the obstacles identified in accessing remedies in Gwynne Skinner, Robert McCorquodale, Olivier De Schutter and Andie Lambe, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business* (ICAR, 2013).

<sup>122</sup> This is especially so because it is possible to conceive of victims of business's infringements of human rights as 'involuntary creditors', who are not in a position to take steps to limit their own exposure to the risk of human rights related harm *ex ante*: Peter Muchlinski, 'Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation' (2012) 22 *Business Ethics* 145 at 152.

responsibility to respect human rights.<sup>123</sup> This does not diminish the importance of due diligence processes as the *means* by which businesses should discharge their responsibilities to respect human rights. Rather, our interpretation can improve the design of due diligence processes by clarifying the foundational responsibilities that due diligence processes should be directed towards discharging. For example, seeing due diligence processes as the means by which businesses should discharge foundational responsibilities to respect human rights provides clear justification for the observation in the Guiding Principles that due diligence processes should go ‘beyond simply identifying and managing material risks to the company itself, to include risks to rights-holders.’<sup>124</sup> Our interpretation also seems consistent with the developments in other international instruments dealing with business and human rights.<sup>125</sup>

## H. Conclusions

One of the achievements of the Guiding Principles was to shift the focus of debate about business and human rights away from controversies about *ex post* liability for corporate violations and toward encouraging the adoption of processes required to prevent adverse human rights impacts.<sup>126</sup> For this reason, the Guiding Principles emphasise the role of due diligence processes as the means by which businesses should discharge their responsibilities. However, we have argued that the Guiding Principles also invoke a different concept of due diligence – that of a standard of conduct required to discharge an obligation. Business people are generally more familiar with the former concept, whereas human rights lawyers are more familiar with the latter. In the first sections of this article we clarify these two different concepts of due diligence – and the relationship between them – and argue that the Guiding Principles use the two concepts in a way that is contradictory and unclear.

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<sup>123</sup> Similarly, Fasterling and Demuijnck, note 49, 805-806, argue that due diligence processes are not a ‘proxy for [businesses] meeting their responsibilities’.

<sup>124</sup> Commentary to Guiding Principle 17.

<sup>125</sup> See Katarzyna Kryczka, Sarah Beckers and Tineka Lamboody, ‘The Importance of Due Diligence Practices for the Future of Business Operations in Fragile States’ (2012) *European Company Law* 125, who note that the OECD Guidelines (note 6), were amended after the publication of Framework with Chapter IV on Human Rights provisions added to include: a risk-based due diligence recommendation to identify, prevent and mitigate actual and potential adverse impacts and account for how these impacts are addressed; a results-based recommendation to avoid causing or contributing to adverse impacts through one’s own activities and address such impacts when they occur; and an effort-based recommendation to seek ways to prevent and mitigate adverse impacts to which the company is directly linked.

<sup>126</sup> See Penelope Simons and Audrey Macklin ‘The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage’ (Routledge, 2014) at 315, who note that a governance gap still remains.



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

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