

DO THE UNITED NATIONS' GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS REQUIRE A FOURTH PILLAR TO BETTER RESPECT HUMAN RIGHTS? CONTRASTING KARP'S 'DISEMBEDDED LIBERALISM' THESIS AND HUMAN RIGHTS DUE DILIGENCE

*Gulsum Qane**

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* LLM International Commercial Law, University College London

A. INTRODUCTION

This paper considers whether the existing three-pillar framework of the United Nations Guiding Principles on Business and Human Rights (UNGPs) effectively combats human rights abuses, or whether the addition of a fourth pillar is necessary. Firstly, I provide a background to the UNGPs and explore the concept of ‘disembedded liberalism’ in a world shifting towards neoliberalism. Secondly, I critique David Karp’s theoretical framework for a “missing” fourth pillar of the UNGPs:

A collective political responsibility to challenge and change our current world order, and to act politically to change it to enable human rights to be better respected, protected and fulfilled (‘the Framework’)¹

Thirdly, I consider how the addition of this pillar could strengthen respect for human rights. Finally, I analyse the ‘do no harm’ principle within the UNGPs’ approach to human rights due diligence (HRDD) and draw on this analysis to propose Karp’s reconstruction of HRDD grounded in the positive value of equality (‘the Reconstruction’).

B. UNGPs AND THE ‘MISSING’ FOURTH PILLAR

The UNGPs were created by John Ruggie in 2008 and unanimously endorsed by the United Nations Human Rights Council in 2011.² The UNGPs’ ‘Protect, Respect, Remedy’ framework and its thirty-one constituent principles³ have been described as the most authoritative business and human rights framework,⁴ designed to prevent and remedy human rights abuses arising from corporate activity.⁵

¹ David Karp, ‘Business and Human Rights in a Changing World Order: Beyond the Ethics of Disembedded Liberalism’ (2023) 8(2) *Business and Human Rights Journal* 135, 135.

² David Birchall and Nadia Bernaz, ‘Business Strategy as Human Rights Risk: the Case of Private Equity’ (2023) 24 *Human Rights Review* 1, 3.

³ UNHRC ‘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.

⁴ ‘United Nations Guiding Principles on Business and Human Rights’ UNDP India <<https://www.undp.org/sites/g/files/zskgke326/files/migration/in/UNGP-Brochure.pdf>> accessed 23 February 2024; ‘What is the Right to a Healthy Environment?’ (UNDP) <<https://www.undp.org/sites/g/files/zskgke326/files/2023-01/UNDP-UNEP-UNHCHR-What-is-the-Right-to-a-Healthy-Environment.pdf>> accessed 4 April 2024.

⁵ Nicholas Griffin and Sian Lea, ‘The Modern Slavery Act 2015 and the Evolution of Supply Chain Transparency in the UK’ (2024) 35(1) *International Company and Commercial Law Review* 4, 14.

Karp contends that, although conceptions of HRDD focused on mitigating and accounting for human rights impacts within the UNGPs, they “cannot succeed in their current form.”⁶ A proposed fourth pillar may allow human rights to be more effectively “respected, protected and fulfilled”⁷ by working alongside business and human rights (BHR) as an effective mechanism.⁸ The idea of collaboration seems shared, as Karp’s proposal reflects Nadia Bernaz’s suggestion for a fourth pillar.⁹ I will present Karp’s criticism, which focuses on the ethics behind disembodied liberalism, by way of a twofold argument comprising: (1) the neoliberal derivation of the UNGPs, which consequently possess limited response capacity to combat BHR issues; and (2) the incompleteness of HRDD based on the do no harm principle.¹⁰ Thereafter, I shall discuss whether Karp’s fourth pillar is important in promoting greater respect for human rights, by analysing the ineffectiveness of the UNGPs’ three-pillar body framework.

(1) Neoliberalism and the Public-Private Divide

To understand the basis of Karp’s framework, it is important to explore the ethical theory of disembodied liberalism. Disembodied liberalism contradicts the theory of embedded liberalism, which Ruggie understands as combining “international economic order, based on international markets, with domestic social purpose”.¹¹ The distinction was developed by Karl Polanyi, who described the 1940s post-war order as a “great transformation” emphasising the reassertion of social control over the market.¹² This promoted the metaphorical idea of a “compromise of embedded liberalism” between domestic welfare states and international openness, causing the continuation of embedded liberalism in the domestic social order.¹³

The nineteenth-century *laissez-faire* policies promoted disembodied markets which were challenged by liberalism.¹⁴ This was followed by World War II liberal capitalism, which became disembodied by neoliberalism.¹⁵ This conveys the industrialisation of nineteenth-century political appearances and *laissez-*

⁶ Karp (n 1) 135.

⁷ Karp (n 1) 137.

⁸ *ibid* 150.

⁹ Nadia Bernaz, ‘International Cooperation and Solidarity: The Missing 4th Pillar of the UNGPs’ (*Rights as Usual*, 30 January 2024) <<https://rightsasusual.com/2024/01/30/international-cooperation-and-solidarity-the-missing-4th-pillar-of-the-ungps/>> accessed 21 February 2024.

¹⁰ Karp (n 1) 137.

¹¹ *ibid* 139.

¹² John Ruggie, ‘International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order’ (1982) 36(2) *International Organizations* 385; Robert Wolfe and Matthew Mendelsohn, ‘Values and Interests in Attitudes toward Trade and Globalization: The Continuing Compromise of Embedded Liberalism’ (2005) 38(1) *Canadian Journal of Political Science* 45.

¹³ Wolfe and Mendelsohn (n 12) 45.

¹⁴ *ibid*.

¹⁵ Ruggie (n 12) 381; Karp (n 1) 139.

faire capitalism¹⁶ into the twentieth century and beyond, instigating the deterioration of human rights and arguably simultaneously promoting Karl Marx's 'crisis theory'.¹⁷ Such a position was emphasised by Margaret Thatcher's adoption of neoliberalism, 'Thatcherism', which contradicted the belief that governments possessed responsibilities to provide a safety net for poverty-stricken individuals and employment opportunities.¹⁸ Thatcherism privatised national industries like British Airways and destroyed labour unions, thus undermining workers' rights under a neoliberal framework.¹⁹ Hence, disembedded liberalism conveys Karp's restatement that there is no compromise between workers and capitalists, widening the divide between state duties and corporate responsibilities. As Karp suggested, "the UNGPs' separation of the 'state duty to protect' from the 'corporate responsibility to respect' reflects a contestable conception of companies as private actors: free to act/transact in any way that is not harmful," and results in a disruption of the social guarantee of human rights.²⁰ This reveals the insufficiencies of the current three-pillar framework and suggests the need for a fourth pillar.²¹

The first pillar, concerning the state duty to protect (UNGPs 1 to 10), compels states to: (1) "...[take] action at the domestic level to operationalise existing international human rights obligations that pertain to BHR"; and (2) "... work with other actors to ensure an internationally coordinated approach to BHR."²² Under the first pillar, the state-business nexus claims to cover these areas by encouraging states to "take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State."²³ However, this does not directly emphasise states' responsibilities for enterprises as private actors and is ineffective, as states are merely 'welcome' to adopt action plans, particularly when they allocate responsibilities across actors; this is insufficient in ensuring respect for human rights. Furthermore, denoting companies as private actors makes it difficult for states to assign effective targets, as harm can be invisible.²⁴

Thus, regarding the first focus, Karp argues that the domestic scope of the UNGPs' state duty to protect is not entirely effective in a neoliberal world, characterised by limited government intervention within markets and 'private enterprise primacy', which benefits capitalism through the transfer of wealth

¹⁶ Thomas Piketty, *Capital in the Twenty-First Century* (Harvard University Press 2014); Duncan Bell, 'What is Liberalism?' (2014) 42(6) *Political Theory* 682, 685.

¹⁷ Claus Offe, "'Crisis of Crisis Management': Elements of a Political Crisis Theory' (1976) 6(3) *International Journal of Politics* 29, 34.

¹⁸ Hallie Spear, 'Disembedded Liberalism: The Global Pressure on Democracy' (BA thesis, Claremont McKenna College 2022) 68.

¹⁹ *ibid.*

²⁰ Karp (n 1) 135.

²¹ Karp (n 1) 149.

²² Karp (n 1) 141.

²³ UNHRC, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (n 3) 9.

²⁴ UN Committee on Economic, Social and Cultural Rights 'General comment No 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities' (10 August 2017) UN Doc E/C.12/GC/24; Karp (n 1) 135.

from the public to corporate entities in the private sector.²⁵ This can be demonstrated by events like globalisation, which has caused transnational corporations' subsidiaries to increasingly conduct cross-border operations in underdeveloped countries with corrupt governmental organisations, making the state duty to protect human rights increasingly challenging.

The second focus, which centres around international coordination, is similar to Wettstein's 'second wave': the intersection between BHR and corporate social responsibility, a period that experienced a race to the bottom in working standards and consumer activism, suggesting that we are re-experiencing this social phenomenon.²⁶ The 1990s confirmed that global coordination by interstate organisations, including the Organisation for Economic Co-operation and Development (OECD) and the International Labour Organization (ILO),²⁷ was not enough to combat BHR-related issues.²⁸ The proposed fourth pillar could enhance the first and second focuses of the first pillar,²⁹ urging activist individuals and groups to challenge current social structures. In contrast to contemporary society, where activists' freedom of speech can be suppressed, a fourth pillar based on BHR activists working alongside states would effectively promote better respect for human rights. Such a pillar could compel states to collaborate with activists who possess knowledge of human rights abuses, gained from victim interactions, to find solutions, allowing victims who are afraid to express their experiences directly to the state to be heard.

Finally, regarding the first and second pillars, the idea of working collectively could bridge the gap between the state duty to protect and the corporate responsibility to respect, reflecting the neoliberal public and private divide. For instance, companies are presently encouraged to implement ethical decision-making within their operations, even though states may lack this. This links to the third pillar, 'access to remedy,' as through collaboration and challenging the current world order, effective remedies can and should be increasingly accessible to victims. This analysis showcases that Karp's proposed fourth pillar is a beneficial step towards strengthening respect for human rights, as BHR activists could encourage states and companies alike to consider their ethics to avoid reputational and financial damage from claims.

²⁵ Robert Jupe and Warwick Funnell, 'Neoliberalism, Consultants and the Privatisation of Public Policy Formulation: The Case of Britain's Rail Industry' (2015) 29 *Critical Perspectives on Accounting* 65.

²⁶ Karp (n 1) 142.

²⁷ *ibid.*

²⁸ Jennifer Zerk, 'Corporate Liability for Gross Human Rights Abuses' (OHCHR, 2013)

<<https://www.ohchr.org/sites/default/files/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf>> accessed 3 March 2024.

²⁹ Karp (n 1) 142; 'Human Rights' (*United Nations*) <<https://www.un.org/en/global-issues/human-rights>> accessed 7 April 2024.

C. THE 'NO HARM' PRINCIPLE AND HRDD

A critique of the second element of Karp's argument will be made, considering the incompleteness of HRDD under the UNGPs due to their exclusion of an underlying commitment to human equality. Through this analysis, I shall determine whether 'the Reconstruction' could enhance the UNGPs' HRDD strategies.

HRDD is "a comprehensive, proactive attempt to uncover human rights risks, actual and potential, over the entire life cycle of a project or business activity, with the aim of avoiding and mitigating those risks."³⁰ As a continuous process, HRDD is expected to be implemented by companies in their operations to "identify, prevent, mitigate and account for how they address their impacts on human rights."³¹ As per the Office of the High Commissioner for Human Rights' (OHCHR) guidance on the corporate responsibility to respect, 'adverse' human rights impacts may occur "when an action removes or reduces the ability of individual(s) to enjoy their human rights."³² HRDD is important for companies, including parent companies with subsidiaries in foreign countries, to promote ethical practices and mitigate litigation.³³ However, questions remain regarding the effectiveness of the UNGPs' HRDD strategies in preventing harm.³⁴

The second pillar of the UNGPs currently encourages enterprises to conduct HRDD by: (1) considering "adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships";³⁵ (2) understanding that due diligence "will vary in complexity with the size of enterprises, the risk of severe human rights impacts, and the nature and context of operations";³⁶ and (3) "recognizing that the human rights risks may change" and that HRDD "should be ongoing".³⁷ HRDD under the UNGPs lacks the necessary completeness to operationalise the corporate responsibility to respect human rights,³⁸

³⁰ UNHRC 'Business and Human Rights: Towards Operationalizing the "Protect, Respect and Remedy" Framework' (22 April 2009) UN Doc A/HRC/11/13, para 71; UNGA, 'The Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (16 July 2018) UN Doc A/73/163, para 10; OECD, *OECD Due Diligence Guidance for Responsible Business Conduct* (2018) 16; Robert McCorquodale and Justine Nolan, 'The Effectiveness of Human Rights Due Diligence for Preventing Business Human Rights Abuses' (2021) 68 *Netherlands International Law Review* 455.

³¹ UNHRC 'Guiding Principles' (n 3) 15; Jonathan Bonnitcha and Robert McCorquodale, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights' (2017) 28(3) *European Journal of International Law* 899, 908.

³² Birchall and Bernaz (n 2) 3; UNHRC 'Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (22 June 2021) UN Doc A/HRC/47/39/Add.2; David Birchall, 'Any Act, Any Harm, to Anyone: The Transformative Potential of Human Rights Impacts Under the UN Guiding Principles on Business and Human Rights' (2019) 1 *University of Oxford Human Rights Hub Journal* 120.

³³ Lucas Roorda and Daniel Leader, 'Okpabi v Shell and Four Nigerian Farmers v Shell: Parent Company Liability Back in Court' (2021) 6(2) *Business and Human Rights Journal* 368, 374.

³⁴ Bonnitcha and McCorquodale (n 31) 455.

³⁵ UNHRC 'Guiding Principles' (n 3) 16.

³⁶ *ibid.*

³⁷ *ibid.*

³⁸ Karp (n 1) 143.

rather than requiring corporations to prevent human rights breaches through undertaking a positive human rights approach, the ‘do no harm’ principle merely places a negative obligation on corporations not to perpetrate such abuses.³⁹ Such an approach thus lacks the tools to cause corporations to effectively take active steps in actually preventing harms directly and indirectly caused by their operations. By way of example, Shell was ‘silently complicit’ when it failed to utilise its influence to stop the execution of Ken Saro-Wiwa, who protested against environmental destruction in the Niger Delta.⁴⁰

Furthermore, the UNGPs fail to clearly outline what constitutes a human right. By positioning human rights violations alongside criminal offences and breaches of tortious duties, they neglect to consider that harms may be jurisdictionally dependent.⁴¹ For instance, in certain states such as India, the sale of skin-bleaching products like ‘Fem’, which contain harmful chemicals such as hydrogen peroxide, continues to be regarded as unproblematic and has been promoted to consumers since the sixteenth century.⁴² Not allowing the existence of such products would remove the private divide’s “right to a private self that sets and pursues its own values within the boundaries of the law.”⁴³ Thus, the UNGPs assume that private actors are free to act as they please, so long as they remain within bounds and understand their human rights impacts.⁴⁴

Although Karp agrees that HRDD is a pragmatic solution for a world moving towards neoliberalism, he asserts that the UNGPs’ HRDD approach is not entirely successful in combating human rights abuses. To enhance ‘the Framework’, Karp proposes ‘the Reconstruction’. Firstly, the Reconstruction encourages companies to think more broadly about the negative implications arising from their social connections, rather than merely fixating on the current framework.⁴⁵ The Reconstruction enables companies to adopt a renewed focus on invisible and structurally mediated harms by going beyond the defined links to their operations and business relationships. This relates to the dispute regarding businesses being mere agents, as “they also coordinate production and enable social connections”.⁴⁶ In reference to the skin-bleaching example explored above, the Reconstruction would enable companies to implement effective decision-making regarding the negative implications that may arise from selling such products, including the potential health risks posed by their chemical composition and their role in perpetuating colourism.⁴⁷

³⁹ Karp (n 1) 144; Florian Wettstein, ‘Silence as Complicity: Elements of a Corporate Duty to Speak Out Against the Violation of Human Rights’ (2012) 22(1) *Business Ethics Quarterly* 37, 49.

⁴⁰ *ibid.*

⁴¹ *ibid.*

⁴² Antoine Petit, ‘Skin Lightening and its Motives: A Historical Overview’ (2019) 146(5) *Annales de Dermatologie et de Vénérologie* 399.

⁴³ Karp (n 1) 144.

⁴⁴ *ibid.*

⁴⁵ *ibid.* 147.

⁴⁶ Karp (n 1) 135.

⁴⁷ *ibid.* 147.

Secondly, to combat the incompleteness of the UNGPs' HRDD approach, the Reconstruction accounts for enterprises' "causes of, contributions to, and broader links with, structural inequalities."⁴⁸ Thus, instead of enterprises merely focusing on conducting no harm, businesses would be encouraged to respect human rights through a lens of equality, "as this is what gives human rights their normative force."⁴⁹ Anne Phillips contends that "equality is relational; [thus], it directs us more urgently to differential powers and capabilities."⁵⁰ As such, an equality-based HRDD system, like that embedded in Karp's proposals, would drive companies to consider their "[roles] in and [responsibilities] for sustaining structural differences in power and capabilities across individuals and groups,"⁵¹ thereby promoting better respect for human rights. The Reconstruction, embedded in the Framework, could strengthen the UNGPs' three-pillared structure and act as an effective guide for companies and states to address human rights.

The theoretical effectiveness of Karp's proposed fourth pillar will be tested via a case study regarding Zara's human rights abuses, focusing on labour rights, particularly in the case of sweatshops. Zara sourced clothes from Brazilian workshops under modern slavery conditions, hiding behind complex supply chains.⁵² The working conditions were egregious, as invisible workers were working sixteen - to eighteen-hour days and earning \$156 to \$290 monthly, despite the minimum wage being \$344.⁵³ Under the hypothetical situation where the four-pillar framework existed, Zara would have likely been placed in a better position to deeply consider the effects of its social connections and its lack of preventive measures in causing human rights abuses. While not obligated to follow the UNGPs, due to their global recognition and usage among competitors such as Abercrombie & Fitch, who have reflected the UNGPs in their 'Vendor Code of Conduct' in response to forced labour accusations, Zara could have viewed the issues broadly, beyond the 'do no harm' principle.⁵⁴ Thus, considering the UNGPs' increasingly global usage among corporations, through the fourth pillar, Zara could have felt pressured to collectively work alongside activist groups and individuals to address the implications arising from its operations by paying its workers appropriately, thereby better respecting human rights. This case study illuminates the need for a fourth pillar.

⁴⁸ Karp (n 1) 137.

⁴⁹ *ibid.*

⁵⁰ Anne Phillips, 'Feminism and Liberalism Revisited: Has Martha Nussbaum Got It Right?' (2001) 8(2) *Constellations* 249, 264; Karp (n 1) 147; Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge University Press 2000).

⁵¹ Karp (n 1) 147.

⁵² 'CASE STUDY: Zara Fights Sanctions for Forced Labour in Brazilian Supply Chain' (*Mind the Gap*, 6 July 2020) <www.mindthegap.ngo/harmful-strategies/constructing-deniability/hiding-behind-complex-supply-chains/zara-fights-sanctions-for-forced-labour-in-brazilian-supply-chain> accessed 7 March 2024.

⁵³ Stephen Burgen and Tom Phillips, 'Zara accused in Brazil Sweatshop Inquiry' *The Guardian* (Barcelona and Rio de Janeiro, 18 August 2011) <<https://www.theguardian.com/world/2011/aug/18/zara-brazil-sweatshop-accusation>> accessed 5 March 2024; 'CASE STUDY' (n 52).

⁵⁴ Abercrombie & Fitch, 'Vendor Code of Conduct' <<https://corporate.abercrombie.com/sustainability/policies-resources/vendor-code-of-conduct/>> accessed 7 November 2025.

D. CONCLUSION

Within this paper, I have investigated Karp's framework for a fourth pillar of the UNGPs, accounting for the disembedded liberal foundation of the current three-pillar structure and demonstrating its insufficiencies. Furthermore, I considered the incompleteness of HRDD within the UNGPs, which does not account for an underlying commitment to human equality. The distinction between private and public has disrupted the social guarantee of human rights and demonstrated the necessity of a fourth UNGP pillar: "a collective political responsibility to challenge and change our current world order."⁵⁵ I analysed how Karp's reconstruction of HRDD could allow for better respect for human rights, including for victims of invisible harms, by testing the Framework against a case study of Zara. Arguably, collective action by states, companies, activist individuals, and groups is a pragmatic solution to combat human rights abuses and enhance the UNGPs. Although worldwide government intervention may be required to precipitate significant global change, more sustainable and accountable businesses can be created if the UNGPs embrace the proposed reconstruction of HRDD through implementing Karp's framework for a fourth pillar.

⁵⁵ Karp (n 1) 135.