

SCHOLARLY ARTICLE

## Business and Human Rights in a Changing World Order: Beyond the Ethics of Disembedded Liberalism

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### Abstract

The UN Guiding Principles (UNGPs) and their concept of human rights due diligence (HRDD) cannot succeed in their current form, because they reify neoliberalism's public/private divide. This article establishes this argument across historical, theoretical, and normative dimensions, and charts a new way forward. 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. This is a problem because harm is often invisible, even when taking an active due-diligence approach. To resolve this, HRDD practices must also be based on the positive value of equality. However, businesses are more than mere agents; they also coordinate production and enable social connections. These structural features reveal a 'missing fourth pillar' of the UNGPs: a collective political responsibility to challenge and change our current world order.

**Keywords:** Business and human rights; due diligence; ethics; equality; harm; public and private; responsibility

### 1. Introduction

The UN Guiding Principles on Business and Human Rights (UNGPs) and their central idea of human rights due diligence (HRDD) have made a surprisingly rapid impact on policies and practices of global business governance. For example, mandatory human rights due diligence legislation has already been implemented in countries such as France, Germany, the Netherlands, Norway and Switzerland, and countries such as Australia and the UK have included companies within recent anti-slavery legislation.<sup>1</sup> The European Union's 2014 non-financial reporting directive and its 2022 proposal for a directive on corporate sustainability due diligence show the Principles' broader impact at a regional level.<sup>2</sup> The 2019 due diligence guidance of the Organisation for International Cooperation and Development (OECD)

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<sup>1</sup> Nicolas Bueno and Claire Bright, 'Implementing Human Rights Due Diligence Through Corporate Civil Liability' (2020) 69 *International & Comparative Law Quarterly* 789; Amy Sinclair and Justine Nolan, 'Modern Slavery Laws in Australia: Steps in the Right Direction?' (2020) 5 *Business and Human Rights Journal* 164; Surya Deva, 'Mandatory Due Diligence Laws in Europe: A Mirage for Rightsholders?' (2023) *Leiden Journal of International Law*, doi: 10.1177/016934411603400403.

<sup>2</sup> Maddalena Neglia, 'The UNGPs – Five Years On: From Consensus to Divergence in Public Regulation on Business and Human Rights' (2016) 34 *Netherlands Quarterly of Human Rights* 289; European Commission, 'Proposal for a

demonstrates an international effect.<sup>3</sup> At least 50 countries across the global North and South either have or are developing a national business and human rights (BHR) action plan.<sup>4</sup> Beyond these more formal fields of hard and soft legal obligation, many large companies now engage in dedicated HRDD practices that are performed separately from broader risk management: ranging from external operational impact assessments, to internally focused training that familiarizes employees with ‘what human rights are and how they work’.<sup>5</sup> These developments underscore this article’s broader significance. In parallel with the UNGPs’ development in the late 2000s and early 2010s, there was an early wave of BHR scholarship that began to critique the negative, ‘do no harm’ basis of corporate human rights obligations that had emerged.<sup>6</sup> One thing that this first wave of theoretical and normative scholarship did not foresee – and therefore could not account for in its analysis – is how quickly and forcefully global social forces would work to undermine the hegemony of the neoliberal world order that gave the UNGPs their salient international-political context. In this article, I locate the emergent BHR framework within this historical context, and I use this to establish a new direction for change.

The mid- to late-2010s brought Brexit, Trump, Modi and Bolsonaro, but also COVID-19, the declaration of the climate emergency, Black Lives Matter and #MeToo. From different directions, these factors are reconfiguring the relationship between the public and the private. The UNGPs fit perfectly into the zeitgeist of neoliberalism. A context of neoliberal world order made the ‘do no harm’ basis of the corporate responsibility to respect human rights seem like a pragmatic concession needed to generate consensus. Through their separation of state duties from corporate responsibilities, the UNGPs re-instantiate neoliberalism’s public/private divide. According to this divide, states set a context for action, and companies are free to act as they wish within that context, subject to doing no harm. HRDD has a central place within this as a way that business actors can operationalize their fundamental responsibility to abide by the harm principle. In hindsight, however, HRDD may come to be seen as a pragmatic solution to set of problems for a neoliberal world order whose gravitational pull we are moving beyond. This possibility creates new opportunities to reconsider the ‘do no harm’ foundation of the corporate responsibility to respect. The responsibility not to harm is one part of the puzzle, but not its only piece, when it comes to the normative basis of corporate human rights obligations. This article argues that to count as respecting human rights, HRDD needs also to be based on an underlying commitment to human equality. Moreover, this commitment can be only partly realized by treating companies and states as the main duty-bearers. The

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Directive on Corporate Sustainability Due Diligence’ (2022), <[https://commission.europa.eu/publications/proposal-directive-corporate-sustainability-due-diligence-and-annex\\_en](https://commission.europa.eu/publications/proposal-directive-corporate-sustainability-due-diligence-and-annex_en)> (accessed 27 March 2023).

<sup>3</sup> Catie Shavin, ‘Unlocking the Potential of the New OECD Due Diligence Guidance on Responsible Business Conduct’ (2019) 4 *Business and Human Rights Journal* 139.

<sup>4</sup> Humberto Cantú Rivera, ‘National Action Plans on Business and Human Rights: Progress or Mirage?’ (2019) 4 *Business and Human Rights Journal* 213.

<sup>5</sup> Robert McCorquodale et al., ‘Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises’ (2017) 2 *Business and Human Rights Journal* 195, 206–208. See also Alvisé Falvotto and Kelly Kollman, ‘When Rights Enter the CSR Field: British Firms’ Engagement with Human Rights and the UN Guiding Principles’ (2022) 23 *Human Rights Review* 21.

<sup>6</sup> Florian Wettstein, *Multinational Corporations and Global Justice: Human Rights Obligations of a Quasi-Governmental Institution* (CA: Stanford University Press, 2009); David Bilchitz, ‘The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?’ (2010) 7 *Sur: International Journal on Human Rights* 199; Florian Wettstein, ‘CSR and the Debate on Business and Human Rights: Bridging the Great Divide’ (2012) 22 *Business Ethics Quarterly* 739; Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge: Cambridge University Press, 2013); David Jason Karp, *Responsibility for Human Rights: Transnational Corporations in Imperfect States* (Cambridge: Cambridge University Press, 2014).

UNGPs are missing an account of the fundamental responsibilities of the individuals and groups whose intersubjective beliefs create and maintain our social institutions. To this end, this article introduces the concept of a ‘missing fourth pillar’ of the UNGPs: the collective responsibility of individuals and groups to challenge our current world order, and to act politically to change it to enable human rights to be better respected, protected and fulfilled.

This argument is developed in three parts. The first part situates the UNGPs within the historical context of the shift to a neoliberal world order that accelerated in the early 1980s. Neoliberalism involves eliminating the national social purposes that had formed a part of corporate identity in a period that Ruggie, writing as an International Relations theorist in 1982, famously called ‘embedded liberalism’.<sup>7</sup> It reduces these purposes to a mono-dimensional, disembedded, consequentialist ethic of calculating costs and benefits. This neoliberal world order is one in which a transnational private sphere (so constituted), insulated from public intervention, and governed by an ethos of maximizing shareholder value, had become a significant social fact. In the same period, the international human rights system shifted in the opposite direction, from its early internationalism in the 1940s, towards the post-1970s emphasis on states’ responsibilities for actions and outcomes within their borders. As a response to this context, the UNGPs establish an authoritative set of standards beyond nation-state level, which aim to limit companies’ harmful impacts on individuals: even those with whom they are not contractually connected. By making visible and foregrounding this context, the article also makes visible the extent to which the UNGPs constitute a specific response to it.

The article’s second part argues that the UNGPs do not represent a meaningful shift away from this neoliberal form of world order. To do this, I evaluate two aspects of the UNGPs: their structural separation of the ‘state duty to protect’ from the ‘corporate responsibility to respect’; and their substantive conceptualization of HRDD within the ‘corporate responsibility to respect’. HRDD involves the need to take positive action: to investigate and remediate causes of, contributions to, and connections with, human rights impacts. However, these are grounded in a fundamental negative duty not to harm. The harm principle at the core of HRDD represents an ethic of disembedded liberalism. Within this ethic, companies are constituted as private actors who are free to value what they wish, and to act as they wish, subject to doing no harm. This theorization tends to obscure that the creation of a transnational private sphere is a political choice, tied to a specifically neoliberal world order, rather than a necessary or inevitable feature of business actors. The UNGPs treat this structure of world order, with these clear demarcations of public and private, as an unalterable context to work within. They then turn to the question of how harm, as an ethical foundation for BHR within this structure, can be minimized. However, it is exactly this way of constituting the public and the private in the business field which makes certain forms of ‘harm’ and certain forms of ‘human rights impact’ invisible, or at least very difficult to see. For example, private actors, so constituted, may choose to produce or to consume skin-bleaching cosmetic products, because of autonomous choices about which values and ends to pursue. However, these choices occur in a structural context of racism and colourism as forms of discrimination. The rendering of companies as ‘private’ makes it difficult for them to see that their core economic activity, or indeed their very existence, may be *inherently* harmful to human rights, because of the structural context in which this activity occurs. Companies do not need to be viewed as purely private actors. This impacts on how we should conceptualize their responsibility for human rights.

<sup>7</sup> John G Ruggie, ‘International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order’ (1982) 36 *International Organization* 379. Ruggie explicitly draws the concepts of ‘embedded’ and ‘disembedded’ from Karl Polanyi, *The Great Transformation* (Boston: Beacon Press, 1944).

The article's third part combines and builds on the insights of the preceding two sections. I develop alternative accounts of the public/private distinction, drawing from both critical theory and feminism, according to which businesses are not necessarily theorized as private actors. I furthermore argue that companies are best viewed simultaneously as agents, and as part of our global social structures. As moral agents, companies need to take more human rights factors than 'harm' or 'impact' into account when doing HRDD. They need to be guided by a normative foundation of human equality. However, companies are not *simply* moral agents. They are also key parts of the structural fabric of disembedded liberalism. This leads to the idea of the missing fourth pillar of the UNGPs, as introduced above, based on collective and political responsibility. These ideas provide a politically more flexible and normatively stronger starting point, compared with staying tied to the notion that companies are entirely private actors, operating outside of the public fields of moral and legal obligation, who therefore can only have negative duties not to harm.

## II. Business, Human Rights and World Order

The existing literature contains several attempts to historicize and periodize policy responses to businesses' impact on human rights. First, Wettstein sees three 'waves' of intersection between the BHR agenda and broader practices of corporate social responsibility (CSR). The first wave involved attempts to include businesses in the anti-Apartheid movement in the 1980s, with a special focus on workplace discrimination and other labour rights, in a national context of systemic human rights violations in states such as South Africa.<sup>8</sup> The second wave involved campaigns against sweatshops and child labour in the mid-1990s, including brands such as Nike, with a special focus on structural and transnational relationships; these are eventually institutionalized in instruments such as the UN Global Compact.<sup>9</sup> The third wave involved the work since 2005 of developing the UNGPs, focused on corporate obligations for all human rights beyond labour rights.<sup>10</sup> Second, Muchlinski's recent historical overview contains a similar periodization to Wettstein, while also including further details of international organizations and institutions (such as the OECD) that form part of the story, and covering significant empirical examples such as Shell's connection to the execution of Ken Saro-Wiwa in Nigeria in the 1990s.<sup>11</sup> Third, the historical timeline in my own research goes back further, and starts with the period of colonial governance, in which organizations such as the British East India Company saw themselves as extensions of the economic and foreign policies of their home states.<sup>12</sup> This is then followed by sovereigntist (from the mid-twentieth century), neoliberal and consumer-activist (from the 1980s), and global-governance-based (from the mid-2000s) changes in dominant conceptions of corporations' moral, political and legal responsibilities.<sup>13</sup>

Instead of re-inventing the wheel, this article starts from a different angle. It evaluates Ruggie's own recent chapter-length contribution to an edited volume on the future of the

<sup>8</sup> Wettstein (2012), note 6, 746–747.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Peter Muchlinski, 'The Impact of the UN Guiding Principles on Business Attitudes to Observing Human Rights' (2021) 6 *Business and Human Rights Journal* 212. See also Karp, note 6, 16–35.

<sup>12</sup> David Jason Karp, 'Business and Responsibility for Human Rights in Global Governance' in Hannes Hansen-Magnusson and Antje Vetterlein (eds), *The Routledge Handbook on Responsibility in International Relations* (Abingdon: Routledge, 2022).

<sup>13</sup> Ibid.

America-led world order, which comes at the same question from a different angle.<sup>14</sup> Rather than starting with either ethics or law, that chapter is grounded in Ruggie's own earlier seminal contribution to International Relations and global political economy scholarship on the concept of 'embedded liberalism'.<sup>15</sup> In 1982, Ruggie contrasted the kind of world order that emerged after the Second World War (WWII) with the *laissez-faire* liberal approach – states agreeing to rely entirely on markets to set commodity prices and currency rates – that had existed for most of the nineteenth and early twentieth centuries before it.<sup>16</sup> This *laissez-faire* liberal order had been decimated by the nationalist protectionism of the interwar period. After WWII, multilateral coordination of a liberal international economy was restored, at least in the West. But it was restored in a different way. It became normal for each state to use macroeconomic policy (for example, agricultural subsidies) to interfere with market outcomes, thereby enabling national policy objectives such as full employment and the welfare state to be pursued without the need to resort to socialist central planning. 'Embedded liberalism' is the name that Ruggie gives to this fusion of an international economic order, based on international markets, with domestic social purpose.<sup>17</sup> It is worth remembering that whatever else Marx said about capitalism, he defines it fundamentally as a mode of production.<sup>18</sup> In embedded liberalism, Ruggie posits a shared understanding of the purpose of this production. Goods and services are produced *because* they have underlying social value that goes beyond their simple exchange price.<sup>19</sup> Because of this intersubjectively shared sense of purpose, markets that end up inhibiting rather than contributing to the possibilities for a society to produce or to purchase what it needs can be legitimately regulated and shaped through state intervention. This then affects the possibilities and limits of action within those markets: including for corporations, whose existence and activities represent one way of organizing production within this kind of system.

Forty years later, in 2022, Ruggie synthesizes several discrete strands of his by-then distinguished scholarly and practitioner career into a single big idea. This idea is that since the early 1980s, post-WWII liberal capitalism had subsequently become *disembedded* by neoliberalism, 'the primary aim of which was to create deep private economic integration at the global level and transform national public regulatory systems in support of that aim'; and it is now being *newly re-embedded* at a global level.<sup>20</sup> As evidence of this re-embedding, he points to the authoritative status of the UNGPs, as well as to emerging changes in corporate self-identity towards a renewed sense of stakeholder accountability.<sup>21</sup> The first half of this argument, about the disembedding of embedded liberalism, is certainly correct. It is supported from a different theoretical perspective by Whyte's overview of the twentieth-century history of neoliberal thought.<sup>22</sup> Whyte draws together insights from thinkers as diverse as Wendy Brown, Milton Friedman, Michel Foucault and Friedrich Hayek, to define neoliberalism as the active reconfiguration of state policy and international order, to

<sup>14</sup> John G Ruggie, 'Corporate Globalization and the Liberal Order: Disembedding and Reembedding Governing Norms', in Peter J Katzenstein and Jonathan Kirshner (eds), *The Downfall of the American Order?* (Ithaca: Cornell University Press 2022).

<sup>15</sup> Ruggie, note 7.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> Karl Marx, *Capital: A Critique of Political Economy* (London: Penguin, 1990).

<sup>19</sup> Ruggie, note 7.

<sup>20</sup> Ruggie, note 14, 163.

<sup>21</sup> *Ibid.* See also John G Ruggie, Caroline Rees and Rachel Davis, 'Ten Years After: From UN Guiding Principles to Multi-Fiduciary Obligations' (2021) 6 *Business and Human Rights Journal* 179. See also R Edward Freeman, Kirsten Martin and Bidhan Parmar, 'Stakeholder Capitalism' (2007) 74 *Journal of Business Ethics* 303.

<sup>22</sup> Jessica Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (New York: Verso, 2019).

facilitate deregulated and borderless global economic competition between private market actors.<sup>23</sup> Her book's most significant insight for the purpose of the current article is to show how these policies are grounded by their proponents in a reduction of human nature to *homo economicus*: the rationally calculating individual, who should be left free to value whatever he wishes as long as his actions do not cause harm to others.<sup>24</sup> This approach to both ethics and economics became globally hegemonic from the 1980s; this was achieved through the successful international pursuit of neoliberal policies championed by the Reagan and Thatcher governments, including (but not limited to) the imposition of neoliberal development economics in the global South.<sup>25</sup>

Strikingly, at the same time as this shift from nationally embedded to globally disembedded liberal economic order occurred, the international human rights system's notion of responsibility was moving in the opposite direction: from the international to the national. From its inception in the 1940s through to the calls for a New International Economic Order in the 1970s, the idea of international human rights had always implied an element of international responsibility: obligations of the world's political authorities, to the world's peoples.<sup>26</sup> For example, Article 28 of the Universal Declaration of Human Rights (UDHR) famously says that 'Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.'<sup>27</sup> After WWII, it seemed self-evident that any obligations corresponding to the principles laid out in the UDHR must be significantly international in order to be meaningful for human rights realization. In the 1980s, the formulation and adoption of the Limburg Principles marked a turning point away from this and toward the nationalization of responsibility for human rights.<sup>28</sup> Beginning with the implementation of the International Covenant on Economic, Social and Cultural Rights, and eventually extending out to other treaties, the mid- to late-1980s began a new period in which obligations for all human rights – transcending a false binary between civil-political and socio-economic rights – were more thoroughly legalized and more exclusively allocated to specific governments, in relation to what was happening inside of their borders.<sup>29</sup>

When Ruggie claims that liberalism is being 're-embedded' in today's world, he is essentially claiming that these two systems, the international economic order and the international human rights system, are being brought back into alignment. Global markets and actions by transnational companies had effectively escaped the ability of any one government to regulate, despite the continued structural power of the United States (or perhaps even exactly because of the way that this power was exercised).<sup>30</sup> This gives the correct context to understand Ruggie's frequently stated claim that the UNGPs are not a 'silver bullet' to transform our global order; they are, instead, a pragmatic attempt to establish an equivalently global source of authority for the private sector, incorporating but

<sup>23</sup> Ibid, 1–34. See also Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (Cambridge, MA: MIT Press, 2015); Mitchell Dean, 'Michel Foucault's "Apology" for Neoliberalism' (2014) 7 *Journal of Political Power* 433; Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962); Friedrich August Hayek, *The Road to Serfdom* (Abingdon: Routledge, 1944).

<sup>24</sup> Whyte, note 22, 6; Brown, note 23, 31. I use the gendered pronoun intentionally.

<sup>25</sup> Gillian MacNaughton and Diane F Frey (eds), *Economic and Social Rights in a Neoliberal World* (Cambridge: Cambridge University Press, 2018).

<sup>26</sup> Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Cambridge, MA: Belknap, 2018), 89–118.

<sup>27</sup> Natasha Saunders, 'Beyond Asylum Claims: Refugee Protest, Responsibility, and Article 28 of the Universal Declaration of Human Rights' (2018) 22 *International Journal of Human Rights* 847.

<sup>28</sup> UN Document E.CN.4/1987/17 (8 January 1987).

<sup>29</sup> Daniel J Whelan, *Indivisible Human Rights: A History* (Philadelphia: University of Pennsylvania Press, 2010), 176–206.

<sup>30</sup> Susan Strange, *States and Markets* (Pinter Publishers, 1988).

going beyond the human rights framework based on state obligations.<sup>31</sup> Ruggie thinks that despite its pragmatic *strategy*, the *outcome* of this, ten years after the fact, counts as a transformation of the neoliberal world order.<sup>32</sup> In this article, I disagree. This is not a transformation. Instead, it is an attempt to make that same hegemonic order operate 'better' from a normative perspective. To substantiate this argument, the article now needs to turn to the UNGPs themselves.

### III. Human Rights Due Diligence: The Ethics of Disembedded Liberalism

As regular readers of this journal will know very well, the UNGPs are based on the three conceptual pillars of 'protect, respect and remedy', which in full are the 'state duty to protect' human rights (Principles 1–10), the 'corporate responsibility to respect' human rights (Principles 11–24), and the state and non-state actions linked to 'access to remedy' (Principles 25–31).<sup>33</sup> The first pillar, the state duty to protect, has two significant dimensions. The first dimension involves state action at the domestic level to operationalize existing international human rights obligations that pertain to BHR; for example: regulating the private sector effectively, fostering corporate cultures in which human rights are respected, and ensuring BHR policy coherence across different governmental departments. The second dimension involves state duties to work with other actors to ensure an internationally coordinated approach to BHR, thereby avoiding a race to the bottom between states for the worst standards. The second pillar, the corporate responsibility to respect, is defined as the responsibility of businesses to 'avoid infringing on the human rights of others and [to] address adverse human rights impacts in which they are involved' (Principle 11). Principle 13 lays out three facets of this. To meet the corporate responsibility to respect, businesses must avoid *causing* human rights impacts through their own activities; they must avoid *contributing* to human rights impacts through their own activities; and they must seek to prevent or to mitigate human rights impacts that are in any way *linked* to their broader operations and relationships.<sup>34</sup> This responsibility translates into four specific actions: first, to make a meaningful policy commitment to human rights stemming from the most senior level of an organization; second, to engage in HRDD; third, to engage in remediation processes when violations do occur; and fourth, to seek to prioritize human rights issues (especially the most severe or time-sensitive ones) when faced with conflicting requirements, irrespective of where in the world a company operates, while also complying with the law (Principles 15–24).

The response to a neoliberal context can be seen most clearly and immediately in the way the UNGPs separate the state duty to protect from the corporate responsibility to respect: a structural feature of the UNGPs that is rarely challenged in the literature. The first dimension of the state duty to protect, the regulation of the domestic sphere, is a reassertion of the nationalized, statist approach to responsibility for human rights that was introduced in the 1980s and had become the mainstream international-legal understanding from the 1990s: a period coinciding with the disembedded-liberal political-economic structure that allows companies to escape any single state's control. It is well understood that state duties, on their own, are insufficient to address the real-world human

<sup>31</sup> John G Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: W.W. Norton 2013), xlii, 37.

<sup>32</sup> Ruggie et al, note 21.

<sup>33</sup> UN Document A/HRC/8/5 (7 April 2008); UN Document A/HRC/17/31 (21 March 2011). All references to Principles in the current paragraph are analyses of the latter document.

<sup>34</sup> See also John G Ruggie and John F Sherman III, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale' (2017) 28 *European Journal of International Law* 921, 927.

rights impacts caused by transnational actors, hence the need for the rest of the Principles. However, this point about the reason that the UNGPs are needed in the first place is sometimes badly misinterpreted. Many assume that advanced liberal states typically have 'legal systems where states enact and enforce laws that guarantee protection from human rights abuses'; and conversely, the rest of the UNGPs beyond their first few Principles only become necessary because there are non-advanced, non-liberal states in the world that 'violate human rights or fail to protect human rights through adequate legal protection'.<sup>35</sup> However, it is a myth to think that the states most responsible for neoliberalism are the ones that are keenest to regulate their own companies nationally. The reason that the world needs the UNGPs is not that some states are human rights heroes and others are human rights villains. Neoliberalism structures the relationship between markets and *all* states at an international level. The striking fact about the inclusion of the first, domestic dimension of the 'state duty to protect' is that it is bound to be ineffective on its own in a neoliberal world order, even a counter-factual one made up entirely of fully industrialized liberal states.

What about the second dimension of the 'state duty to protect': the one centred on international coordination? This dimension closely resembles Wettstein's second 'wave' of intersection between BHR and CSR: the 1990s period that witnessed a race to the bottom in working standards to attract foreign direct investment, which resulted in an outpouring of consumer activism followed by voluntary standard-setting.<sup>36</sup> However, global coordination, as led, for example, by inter-state organizations such as the OECD and the International Labour Organization (ILO), was also insufficient. It led some public-facing brands to make upstream changes in their transnational supply chains. But it did not even begin to scratch the surface of issues such as corporate complicity in extrajudicial killing, or forced relocation, or suppression of freedom of speech and freedom of conscience, which were about to become the primary focus of BHR activism in the 2000s. Through a different path, this analysis of the second dimension of the 'state duty to protect' leads to the same conclusion as the analysis of its first dimension. The UNGPs' innovation – aside from pulling this all together into a single framework – is their aim to go beyond a failed over-reliance on the assumption that states will meet their protection obligations. The UNGPs aim to do something different, and this 'something' is the respect pillar.

Before moving to the substance of the respect pillar, it is worth dwelling for a moment on the first two pillars' structure. The sharp separation of the 'state duty to protect' from the 'corporate responsibility to respect' replicates the same divisions between the political and the economic, between the public and the private, between states and markets, which have characterized neoliberal world order since the 1980s. Instead of two interpenetrating spheres, states and corporate actors are modelled by the UNGPs as existing in separate and distinct fields in terms of their obligations. According to the UNGPs, states need to think about how to regulate, how to structure social action, and how to coordinate. Companies need to think about how to act ethically, given that states will often fail to do this fully and properly. The most significant point at which the interpenetration of the two fields is explicitly foregrounded is in Principle 23, which raises the spectre of a situation where respecting human rights can only be achieved by breaking a domestic law.<sup>37</sup> However, the

<sup>35</sup> 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 of Business Ethics* 800.

<sup>36</sup> Wettstein (2012), note 6.

<sup>37</sup> Principle 4, which is about the 'state-business nexus', also appears at first glance to blur the boundaries between public and private. According to Principle 4, the closer a company is to a state, the more straightforward it is to assume that the state violates its 'protect' obligations when a company fails to respect; and the greater the state's 'rationale' becomes for 'ensuring that the enterprise respect human rights'. This ends up replicating the



tension is never fully resolved. The text encourages companies to prioritize human rights standards ‘to the greatest extent possible’ over national and legal obligations to states when conflicts of obligation arise (Principle 23).<sup>38</sup> This essentially makes the most of, rather than problematizes, some companies’ power to choose where they operate and whose rules they follow. It takes for granted the structural features of disembedded liberalism.

This incompleteness of the ‘state duty to protect’ on its own helps to explain why so much scholarly and practitioner attention has been drawn to the ‘corporate responsibility to respect’ pillar of the UNGPs, and especially to its concept of HRDD. What is HRDD? Bonnitca and McCorquodale highlight how the idea of HRDD combines a concept familiar to business managers, namely, an approach to the active investigation and subsequent analysis of facts to manage business risk (HRDD as a business process), with a concept familiar to lawyers, namely, a standard of conduct for torts (HRDD as a standard of liability).<sup>39</sup> According to the latter, HRDD asks not simply whether one caused harm oneself (a standard notion of fault), or whether one had a duty of care irrespective of any causal link to harm (strict liability). Instead, the concept posits something in-between: whether a reasonable or prudent person could have foreseen that harm could result from one’s actions or omissions.<sup>40</sup> On the business-process end of this, HRDD has different contours from the standard due diligence that companies do before taking investment decisions: first, because the nature of human rights risk is different from the nature of business or social risk; second, because it is something that needs to be always ongoing rather than occurring in a discrete moment (such as before an investment decision); and third, because it needs to be done retrospectively, so that existing harms can be mitigated or remediated, rather than only prospectively, which is the standard mode in which corporate due diligence operates.<sup>41</sup> Ruggie and Sherman have clarified that the UNGPs do not exactly ‘conflate’ the notion of a business process with a legal liability standard; the UNGPs are not intended to rely on any legal categories.<sup>42</sup> HRDD is intended as a concept for businesses to use to understand their own connections to human rights impacts, not as a concept for lawyers to use to produce defences. However, when Ruggie and Sherman say, as a part of this clarification, that ‘Merriam-Webster Dictionary’s first definition of due diligence is “the care that a reasonable person exercises to avoid harm to other persons or their property”’,<sup>43</sup> it becomes somewhat untenable to deny any conceptual or normative link between this and ‘the tort law language of a reasonable or prudent person’.<sup>44</sup>

The most innovative and important aspect of HRDD, as a way to operationalize the corporate responsibility to respect human rights, is the way that it identifies a role for positive action within an idea, do no harm, that is typically linked to negative duties. Ignorance about human rights impacts –the fact that they are invisible because no one has looked for them in a thoughtful or well-structured way – is delegitimized by the UNGPs as a good excuse for causing, contributing, or being linked to a human rights violation. This is a positive development, which aligns with important recent scholarship in global ethics that emphasizes how a failure to act (when action is possible) may be just as harmful as going out

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protect/respect separation, with the former being the field of the state and the latter being the field of the business. UN Document A/HRC/17/31 (21 March 2011).

<sup>38</sup> UN Document A/HRC/17/31 (21 March 2011).

<sup>39</sup> Jonathan Bonnitca and Robert McCorquodale, ‘The Concept of “Due Diligence” in the UN Guiding Principles on Business and Human Rights’ (2017) 28 *European Journal of International Law* 899.

<sup>40</sup> *Ibid.*

<sup>41</sup> Björn FASTERLING, ‘Human Rights Due Diligence as Risk Management: Social Risk Versus Human Rights Risk’ (2017) 2 *Business and Human Rights Journal* 225; McCorquodale et al, *note 5*.

<sup>42</sup> Ruggie and Sherman, *note 34*.

<sup>43</sup> *Ibid.*, 924.

<sup>44</sup> McCorquodale et al, *note 5*, 198.

of one's way to cause harm.<sup>45</sup> However, HRDD is still fundamentally based on a consequentialist 'do no harm' principle. Therein lies a clear and under-appreciated connection to neoliberalism. Neoliberal order constitutes separate public and private spheres, and it removes borders and regulation to the maximum extent possible to facilitate private actors' freedom to transact across multiple publics. However, the concept of 'harm', especially harm that affects other private counterparts' ability to enjoy the same rights and freedoms as oneself, has always remained as the final limit that political authorities are entitled – indeed obligated – to enforce. This is what distinguishes neoliberal (and related libertarian) social and political philosophies from a prescription for outright anarchy.<sup>46</sup> Public authorities are needed by neoliberals to enforce rights; to enable unimpeded economic action; and to prevent private actors from harming each other in a way that violates the criminal law or the terms of their contracts. The power differential between individuals (who may be vulnerable) and large, powerful companies is not a significant feature of this model. Each actor is equally 'private', equally 'individual', and each cannot harm the other. The UNGPs add 'harming human rights' – alongside crimes, contract violations, and torts – to this list of harms that no private actor can commit whilst pursuing its freedom.

Fasterling correctly says that 'the assessment of human rights risk not only requires analyzing potential harm, but also makes necessary a normative judgement about whether such harm qualifies as a human rights violation'.<sup>47</sup> Many ways of harming individuals' ability to enjoy their human rights do not appear visible either as 'harm' or as a 'human rights violation'. For example, the climate emergency, systemic racism and other forms of structural injustice are all now emphasized in human rights practice as significant forms of harm, which count as human rights violations when public authorities breach their duties to respect, to protect and to fulfil in connection with these outcomes. However, these would have been invisible to companies engaging in HRDD not long ago. The identification of harm is not merely an empiricist project. The success of HRDD as a concept relies on critical engagement with the question of what *counts as* harm, what *counts as* a 'human rights impact', and why. There are some forms of economic activity that arguably should not be engaged in at all for human rights reasons, for example: selling tobacco, mining coal, marketing skin-bleaching cosmetic products, or manufacturing cluster munitions. It is tempting to frame this as simple choice between different jurisdictions in which to operate, given that some states may ban such practices whereas others do not: conduct due diligence, then choose the 'good' jurisdictions and avoid the 'bad' ones. However, actors that have already been constituted as private – as having the right to a private self that sets and pursues its own values within the boundaries of the law – may be incapable of seeing or accepting when it is not simply their choices, but their very existence that is detrimental to human rights. The creation of a renewed sense of stakeholder accountability will not be much good in these circumstances. It may simply give a veneer of legitimacy to a business that should not be operating at all, because its core economic activity itself enables and produces human rights violations.

The UNGPs pre-suppose the notion of a private, potentially transnational economic actor, free to invent (or at least to choose) its own source of value, which then needs to understand and mitigate/remediate its links to harm. They pre-suppose companies that start off free to produce any product or service that a host state or home state has not banned, and these companies are then encouraged to consider the human rights impact. The UNGPs assume that the structural questions about the neoliberal world order that underpin these

<sup>45</sup> Andrew Linklater, 'The Harm Principle and Global Ethics' (2006) 20 *Global Society* 329.

<sup>46</sup> Hayek, note 23.

<sup>47</sup> Fasterling, note 41, 231.

assumptions are settled: beyond question or challenge, on pragmatic grounds. This may have been politically necessary and strategically wise between 2005 and 2011. However, in 2023, the hegemony of neoliberalism is being more forcefully challenged. This challenge stems from social forces from both its right and its left. From its right comes the ‘embedded illiberalism’, if I may call it that, of nationalist populism. From its left comes a renewed social-democratic questioning of whether markets can best provide public goods, in an era of climate emergency, and during the COVID-19 pandemic. It is these factors, not an acceptance of the global authority of HRDD standards or a shift from a ‘shareholder value’ to ‘stakeholder accountability’ conception of corporate identity, that represent the true possibility for structural change.

#### IV. The Responsibility to Respect Human Rights Beyond ‘Do No Harm’

The idea that the corporate responsibility to respect human rights is grounded in an ethics of ‘do no harm’, whereas states have a broader range of obligations to respect, protect and fulfil human rights, is premised on an essentially contestable distinction between public and private, combined with an assumption that businesses fall on the private side of such a divide.<sup>48</sup> On this interpretation, the proscription and regulation of ‘private’ action needs to be carefully justified by something like the harm principle, because private actors should otherwise be free to do whatever they want to the maximum extent possible. By contrast, obligations assigned to public actors can be much more extensive and demanding, because these public actors are seen as service providers for the private actors. Of all the ways that this could be contested, I now provide three examples that illustrate the possibility of different interpretations of the public/private distinction, and therefore of the place of companies within it.

First, Marx and Engels famously argued that the state reflects and enacts the interests of the owners of the means of production.<sup>49</sup> In terms of the public/private distinction, this idea has two contrasting implications. On the one hand, the people in general who tend to be exploited by this system, can be defined as the real ‘public’, with the state and capital thought of as working together on the same ‘private’ side of the coin. On the other hand, this analysis can be inverted by connecting it to Young’s ‘social connection’ model of responsibility, which she applies to transnational supply chains:

The social connection model of responsibility says that individuals bear responsibility for structural injustice because they contribute by their actions to the processes that produce unjust outcomes. Our responsibility derives from belonging together with others in a system of interdependent processes of cooperation and competition through which we seek benefits and aim to realize projects. [...] Responsibility in relation to injustice thus derives not from living under a common constitution, but rather from participation in the diverse institutional processes that produce structural injustice. In today’s world [...] many of these structural processes extend beyond nation-state boundaries to include globally dispersed persons. The structure and relationships of the global apparel industry illustrate starkly and concretely such transnational social connections.<sup>50</sup>

<sup>48</sup> On the idea of an ‘essentially contested’ concept, see W B Gallie, ‘Essentially Contested Concepts’ (1956) 56 *Proceedings of the Aristotelian Society* 167.

<sup>49</sup> Karl Marx and Frederick Engels, *The German Ideology* (London: Lawrence & Wishart, 1970).

<sup>50</sup> Iris Marion Young, ‘Responsibility and Global Justice: A Social Connection Model’ (2006) 23 *Social Philosophy and Policy* 102, 119.

This is put forward as a middle way between the cosmopolitan view about the normative basis of responsibility for injustice (that all moral agents owe duties of justice to all others) and the statist view (that duties of justice are bounded by state borders).<sup>51</sup> It is a middle way because it requires some tangible basis – other than simply existing as an adult human on the planet – to ground these obligations, but that basis goes beyond the social connections that are generated by being part of a national community. This theory of responsibility involves not only the prevention and remediation of harm. It also involves prospective and positive duties to work towards more just social structures.

Young talks about ‘individuals’ bearing this responsibility, but what about corporate actors? It is tempting to view them primarily as agents (in their own right) who are responsible to the extent that they are connected. This is partly correct. However, they are also a significant part of the architecture and infrastructure that *enables* these domestic and transnational social connections to happen. They are part of the structure. In this ontology, being ‘public’ in the sense that is ethically relevant to the harm principle – being especially liable for the assignment of fundamental positive duties – is linked to an actor not only in their role as an authority, but also to actors who *coordinate* social action: especially when this involves the coordination of the production. There are some (private) agents who are connected to others; and other (public) agents, including business actors, who *enable* these relationships and connections to happen. This is clearly a different way to see the public/private distinction and the role of companies within it.

Second, when Habermas first defined the concept of a ‘public sphere’, he linked its origins to bourgeois civil society, not to the state.<sup>52</sup> For him, it is a space where dialogue, debate and deliberation can occur amongst political equals. In doing so, he rejects the public/private binary, replacing it with a private/public/state trichotomy. The ‘private’ sphere is equated here with what Hegel described in *Philosophy of Right* as the family or the household.<sup>53</sup> Habermas thereby locates the public *in between* the state and the private. In this way, business actors and civil society can be understood as ‘different publics’ operating on – and sometimes competing with one another – on this same, intermediate plane.<sup>54</sup> This nicely aligns with an emerging consensus in BHR scholarship that businesses are somewhere in between the fully public and the fully private; they do not obviously or necessarily fall on the ‘private’ side of such a divide.<sup>55</sup> It also helps to highlight that contemporary business actors cover a broad range across all three points on this spectrum, from a self-employed worker operating out of their own home, to large global brands that effectively govern the other actors lower down in their supply chains.

Third, consider the second-wave feminist slogan: ‘the personal is political’.<sup>56</sup> Feminists emphasize that the public/private distinction serves to demarcate a domestic sphere of human life, in which freedom to set one’s own values and act in accordance with them is absolute. This contrasts with the public sphere, outside of the household, which can more easily and appropriately be regulated by the state. However, decades of feminist theory and

<sup>51</sup> *Ibid*, 103–107.

<sup>52</sup> Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry Into a Category of Bourgeois Society* (Cambridge: Polity, 1989). See also Seyla Benhabib, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* (Abingdon: Routledge, 1992).

<sup>53</sup> Georg Wilhelm Friedrich Hegel, *Elements of the Philosophy of Right* (Cambridge: Cambridge University Press, 1991).

<sup>54</sup> Kimberly Hutchings, ‘From Morality to Politics and Back Again: Feminist International Ethics and the Civil-Society Argument’ (2004) 29 *Alternatives: Global, Local, Political* 239, 248.

<sup>55</sup> Wettstein (2009), *note 6*; Karp, *note 6*; Janne Mende, ‘Business Authority in Global Governance: Companies Beyond Public and Private Roles’ (2022) *Journal of International Political Theory*, doi: [10.1177/17550882221116924](https://doi.org/10.1177/17550882221116924).

<sup>56</sup> Shulamith Firestone and Anne Koedt (eds), *Notes from the Second Year: Women’s Liberation* (Radical Feminism, 1970).

activism since the 1960s have shown that areas of human life thought to be ‘private’, such as reproduction, and the division of (unpaid) labour inside of households, are just as politically salient as what happens in the supposedly separate ‘public’ sphere. The very purpose of the public/private distinction can be to render harm invisible: to make it harder or even impossible to see, especially when it occurs in spaces that have been constituted as ‘private’. Feminists therefore have aimed to re-orient this political picture – even for private actors and in private spaces – away from an ethics of unlimited *prima facie* freedom conditional on doing no harm, towards alternative, relational, approaches such as the ethics of care: within which fundamental positive duties apply even to private actors.<sup>57</sup>

The fact that corporations do not straightforwardly fall on the ‘private’ side of a public/private divide – especially outside of a neoliberal theoretical paradigm – challenges the normative basis for limiting their obligations to respect human rights to solely those that can be tied to an ethics of ‘do no harm’. This has important implications for the idea of human rights due diligence. Viewing businesses as agents, as the second pillar of the UNGPs does, leads to the following insights. When doing HRDD, companies need to think more widely and deeply than currently prescribed about the effects of their social connections. As discussed above, certain economic activities, such as marketing skin-bleaching cosmetic products, are inconsistent with respect for human rights. This remains true regardless of *how* one does them, and also regardless of the philosophical debates that might be generated if one asks whether and why these truly count as ‘harmful’. The question of ‘harm’ might take a company engaged in HRDD through a set of questions such as: what is the long-term significance of any physical damage being done to the skin, and how is this to be balanced against the autonomous choices of consumers who are demanding such products? This is not a lens that makes racism or colourism immediately visible, because the analysis occurs while taking for granted the social structure that gives those forms of discrimination their meaning. A renewed focus on invisible, hidden, and structurally mediated harm – going beyond interactionally defined links to a company’s ‘activities’, ‘operations’ or ‘business relationships’ – is one important way forward for HRDD.<sup>58</sup> Beyond this, a more complete form of HRDD needs to include within its scope a business’s causes of, contributions to, and broader links with, structural inequalities. Philips eloquently defines the idea of the human, which underpins contemporary human rights practice, as a ‘claim and commitment’ to equality.<sup>59</sup> Companies who make a high-level policy commitment to respecting human rights, whether as an acceptance of the authority of the UNGPs or for any other reason, are also by extension committing to the ideal of equality, as this is what gives human rights their normative force. In contrast to the concept of harm, which typically presents itself as an objective and context-independent notion, ‘equality is relational, [and] it directs us more urgently to differential power and capabilities’.<sup>60</sup> A company engaged in the reconstructed form of HRDD established by this article should consider its role in and responsibility for sustaining structural differences in power and capabilities across individuals and groups. This need not be an all-encompassing commitment across all areas of human life. It could,

<sup>57</sup> Fiona Robinson, *The Ethics of Care: A Feminist Approach to Human Security* (Philadelphia: Temple University Press, 2011).

<sup>58</sup> This language is taken directly from Principle 13 of the UNGPs. UN Document A/HRC/17/31 (21 March 2011).

<sup>59</sup> Anne Phillips, *The Politics of the Human* (Cambridge: Cambridge University Press, 2015), 8.

<sup>60</sup> Anne Phillips, ‘Feminism and Liberalism Revisited: Has Martha Nussbaum Got it Right?’ (2001) 8 *Constellations* 249, 264. See also Martha C Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge: Cambridge University Press, 2000).

instead, be targeted toward the civil, political, economic, social and cultural areas outlined as focal points by the nine major international human rights treaties.<sup>61</sup>

However, businesses are not only agents. They are also part of our global social structure. They are part of the fabric of disembodied liberalism. When viewing businesses as a part of the structure that connects people to each other within the current world order, the question changes. This lens takes businesses' own responsibilities as agents out of focus, and instead directs one's attention to the structural and political responsibilities of those who have become thus connected. This leads to the idea that there is a missing fourth pillar of the UNGPs: the collective responsibility of individuals and groups to challenge our current world order, and to act politically to change it. This is a natural extension of Young's theory of political responsibility, as discussed above.<sup>62</sup> The idea also aligns with Shue's groundbreaking book *Basic Rights*, originally published in 1980, which provided the inspiration for the UN's 'respect, protect and fulfil' framework of state obligations upon which the UNGPs are explicitly based.<sup>63</sup> This book is well known for two reasons. First, it is thought to provide a theoretical basis for human rights minimalism: a partial representation of Shue's argument, but one that really stuck.<sup>64</sup> Second, it is the original source of the famous tripartite distinction of human rights duties to 'avoid depriving', to 'protect from deprivation' and 'aid the deprived'.<sup>65</sup> As the 'aid' pillar explicitly includes historical responsibility to remedy past failures, this framework will look very familiar to those who study the UNGPs.<sup>66</sup> However, the legal and historical literature sometimes overlooks Shue's more fundamental argument is that there is a collective responsibility – conceptually prior to his three-part duty framework – to put in place social arrangements that guarantee human rights against 'standard threats'.<sup>67</sup> To illustrate this point, Shue contrasts a private neighbourhood watch programme based on a rota system, with a public, professional, taxpayer-funded policing system.<sup>68</sup> One set of arrangements does not automatically fail to guarantee the right to physical security because it is private, and the other does not automatically succeed because it is public. The public/private distinction does not provide a yardstick with which to measure human rights realization across different institutional orders. Instead, human rights are only real when they are meaningfully and perpetually guaranteed (and resourced), to all people within the scope of the arrangements, by whichever system a society sets up. If a society's practices are not guaranteeing human rights – if human rights are not routinely respected, protected and fulfilled despite an existing system of institutions and obligations – then this triggers the fundamental responsibility to challenge and to act politically to re-order that system.<sup>69</sup> It is not

<sup>61</sup> United Nations, 'The Core International Human Rights Instruments and their Monitoring Bodies' (2023), <<https://www.ohchr.org/en/core-international-human-rights-instruments-and-their-monitoring-bodies>> (accessed 23 February 2023).

<sup>62</sup> Iris Marion Young, *Responsibility for Justice* (Oxford: Oxford University Press, 2011).

<sup>63</sup> Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (2nd edn) (Princeton: Princeton University Press, 1996); Henry Shue, 'The Interdependence of Duties', in Philip Alston and Katarina Tomaševski (eds), *The Right to Food* (Leiden: Martinus Nijhoff, 1984); Ruggie, note 31, 83.

<sup>64</sup> Moyn, note 26, 164–172. Shue's argument is that duty-bearers need to do quite a lot in relation to at least a central cluster of high-priority rights, not that minimal action is sufficient, or that non-basic rights are unimportant (note 63, 127–130).

<sup>65</sup> Shue, note 63, 52, emphasis in original.

<sup>66</sup> *Ibid.*, 57.

<sup>67</sup> *Ibid.*, 13–34. Jack Donnelly, 'Human Rights and Social Provision' (2008) 7 *Journal of Human Rights* 123.

<sup>68</sup> Shue, note 63, 16–17.

<sup>69</sup> See also Charles R Beitz, 'Justice and International Relations' (1975) 4 *Philosophy and Public Affairs* 360. Compare Joseph Hoover and Marta Iñiguez De Heredia, 'Philosophers, Activists, and Radicals: A Story of Human Rights and Other Scandals' (2011) 12 *Human Rights Review* 191, 214 and Laura Valentini, 'On the Natural Duty of Justice in

enough to take the existing actors and institutions for granted and to divide up Shue's three kinds of duties between them.<sup>70</sup> Agents committed to respecting human rights need to start by asking: which fundamental social structures can best guarantee and realize these human rights, and which political actions can be taken collectively to bring us closer to such structures?

This article has argued that actors and spaces have been demarcated in today's world as public or private in a way that disrupts the social guarantee of human rights. There is therefore a collective responsibility falling upon individuals and groups to challenge and to change this order. Not all change is progressive. Not all actors who seek to undermine neoliberalism's hegemony are doing so with human rights or justice in mind as their purpose. The missing fourth pillar calls on BHR scholars, activists and practitioners to take a side in this debate. A commitment to respecting human rights means aiming for something beyond the negative ethics of 'do no harm': the ethics of disembedded liberalism. It means aiming towards a more positive ethics of seeing and treating each other as equals. There is a collective responsibility to work toward the social structures – including the economic and financial structures that shape business – that best enable us to live in accordance with these ethics. This is the most significant way in which the theory, policy and practice of business and human rights can move beyond human rights due diligence.

## V. Conclusion

This article established the need for significant changes to the theory, policy and practice of business and human rights. The most valuable normative development within the existing idea of human rights due diligence is the need for companies to take positive action. Doing nothing – remaining ignorant of one's causal and operational connections – is no longer a valid excuse for causing, contributing to, or being connected with a human rights impact. However, the UNGPs ground HRDD in the fundamental negative duty to do no harm. The theory of BHR needs to move beyond this. Many variants of liberalism constitute individuals as private actors who should have maximum scope to determine their own values. They can freely act (and transact) in accordance with these values, subject to doing no harm to others. Even for those who accept this theory, it is important to point out that companies are not individuals in this sense. The public/private distinction obscures an effective consideration of whether a company's very existence – or whether its core economic activity itself – is harmful to human rights. This further strengthens this article's case for rejecting the harm principle as the *sole* normative basis for corporate HRDD. The latter can also be grounded in the fundamental responsibility to see and to treat each person as equally human. Companies who do HRDD need to consider the ways in which their strategy and operations may contribute to human inequality, understood as a relational notion especially focused on power and capability differentials across people and groups who should otherwise be social and political equals. To equalize 'up' in this way is fundamental to human rights, yet not currently emphasized in BHR practice. Business actors can operationalize this by identifying, reducing, and working to eliminate structural inequalities with which they are connected. By contrast, HRDD based solely on the harm principle risks equalizing 'down' to the level where each person is reduced to a thin conception of a worker, consumer or resident. Finally, this article established the idea of a missing fourth pillar of the UNGPs: a collective and political responsibility of individuals and groups to challenge and change the

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Non-Ideal Circumstances: The Moral Demands of Institution-Building and Reform' (2021) 20 *European Journal of Political Theory* 45.

<sup>70</sup> Compare Onora O'Neill, 'Agents of Justice' (2001) 32 *Metaphilosophy* 180.

nature of our current world order. This needs to go alongside, rather than replace, the BHR responsibilities that fall on companies and/or on states.

The UNGPs were an exercise in ‘principled pragmatism’.<sup>71</sup> They start from the premise that world order is the way it is, and they ask how to make things better for human rights within that order. This imperative to accept the reality of disembedded liberalism to count as pragmatic was understandable in historical context, looking at the period in which the conceptual framework behind the UNGPs was first developed. However, in 2023, it no longer needs to be accepted. With its incorporation of positive obligations – the need to take action to make sure to do no harm – HRDD represents a particularly enlightened version of the ethics of disembedded liberalism. It is an improvement on the idea that ignorance, or the lack of a direct and demonstrable causal connection, are excuses for being connected to harm. But we can and should aim higher. In 1982, Ruggie reflected on the nature of authority in world order by saying that ‘international regimes limit the discretion of their constituent units to decide and act on issues that fall within the regime’s domain’.<sup>72</sup> The authoritative *form* of the UNGPs is broadly the correct one. This form removes discretion from both states and companies, socializing them into deferring to a set of human rights obligations that come from a source beyond themselves. However, the UNGPs’ *content* is broadly neoliberal. One thing that Ruggie and I agree on intensely is that world order is in a constant (if sometimes gradual) process of change. Concepts of responsibility within BHR practice need to evolve alongside this change, instead of being framed as grounded in a universal and timeless negative duty.

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<sup>71</sup> Ruggie, note 34, xlii.

<sup>72</sup> Ruggie, note 7, 380.