

The Consequentialism of the UN Guiding Principles on Business and Human Rights: Towards the Fulfilment of 'Do No Harm'

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Abstract

In this paper I demonstrate that the UN Guiding Principles on Business and Human Rights (UNGPs) leans heavily on consequentialism to inform the corporate responsibility to respect to human rights. Through the conception of 'human rights impacts', the UNGPs adopt a standard of human rights-based negative act consequentialism, capturing any business act that has the outcome of 'removing or reducing' an individual's enjoyment of human rights. Such a lens is necessary because deontological human rights rules inadequately capture the full scope of global business harm to human rights. Consequentialist responsibility offers a much wider scope, of particular use around systemic, macro-level, harm, for example, agri-business decisions that harm the right to food. The great pity is that this consequentialist element goes largely ignored in the literature. Through elucidation and demonstration of the consequentialist ethic therein, this paper hopes to contribute to more ambitious readings of the UNGPs.

Keywords: business and human rights; UN Guiding Principles on Business and Human Rights; consequentialism; corporate power; do no harm.

Introduction

The United Nations (UN) Human Rights Council adopted the UN Guiding Principles on Business and Human Rights (UNGPs) in 2011. The UNGPs elaborate three pillars: the state duty to protect human rights, the corporate responsibility to respect human rights, and access to remedy. Under the second pillar, business enterprises have a responsibility to respect 'all internationally recognized human rights', which are understood as at least those expressed in the International Bill of Human Rights.¹

Many scholars have criticized the construction of the second pillar. Critiques have included the instrumentalist rationale underlying business responsibility (Wettstein, 2015), the lack of an ethical framework (Cragg, 2012), the minimalism of reliance on negative responsibilities (Bilchitz, 2013), a lack of stakeholder engagement (Deva 2013), confusions within human rights due diligence (HRDD) (Fasterling, and Demuijnck, 2013; Bonnitcha and McCorquodale, 2017; Fasterling, 2017) and the non-binding approach (Nolan, 2013). In this paper I want to focus on the immanent consequentialism of the responsibility to respect, rooted in the terminology of 'human rights impacts'. I will argue that the UNGPs adopt explicitly consequentialist language, and that consequentialist responsibility for the harmful outcomes of non-violative business actions is a vital component of business and human rights (BHR) responsibility. This consequentialist element has gone largely unnoticed, with 'impacts' taken to mean 'violations' (McCorquodale et al., 2017), primarily consisting of breaches of deontological obligations, significantly re-

stricting the scope of the UNGPs. By reifying this consequentialist element, the UNGPs can be recast as an expansive and ambitious document. So ambitious, in fact, that it is clear why the drafter, John Ruggie, moved away from binding legal standards, and into softer 'social norms' (Ruggie, 2017a, 13).

The basic standard underlying the corporate responsibility to respect is stated in Principle 13 as to '[a]void causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur'. The United Nations Office of the High Commissioner on Human Rights (OHCHR) guidance states that: '[a]n "adverse human rights impact" occurs when an action removes or reduces the ability of an individual to enjoy his or her human rights' (OHCHR, 2012, 5). As I explain below, this terminology is explicitly consequentialist. It encompasses all actions with the sole judgement criterion being the consequence of 'removal or reduction' of rights' enjoyment. This therefore establishes that we are discussing a form of negative act consequentialism, wherein corporate responsibility is invoked whenever any 'action' results in harm to the human rights of an individual.

This is a significantly wider scope than that proffered by deontology, wherein universal, inviolable rules bind all parties, such as the prohibition on slavery. Deontology covers only certain prohibited acts, commonly understood in human rights terms as the 'violation'. Therefore, if one's rights are harmed by a non-violative act, the deontological approach will occlude that harm. The consequentialist alternative is necessary because a huge range of business activities that breaches no deontological rule may cause significant harm to human rights. For example, agri-business was a major driver of the 2008 global food crisis, with the industry-wide switch to growing biofuels particularly causative (De Schutter, 2008, para. 21; 28-31). Such business decisions – no matter how harmful – can never feasibly be the subject of deontological rules, and

¹ This is composed of the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the eight ILO core conventions of the Declaration on Fundamental Principles and Rights at Work. Other Conventions, such as the Convention on the Elimination of Discrimination Against Women (CEDAW) may also be relevant '[d]epending on circumstances' (UNGPs, Principle 12).

nor can regulation practicably keep pace with potentially harmful choices. Rather, a consequentialist framework, in which acts are contested solely on the harm they cause, best marries virtue and efficacy. Victims of the global food crisis could have used the 'impacts' framework to claim against companies. This alone is a transformative shift away from the deontological mores of most BHR instruments.

De Schutter (2006, 409; 443) argues that corporations should take 'economic responsibility' for the harm that their business decisions cause to human rights, and this is where consequentialism is most useful. Corporate control of global, transnational and national markets for food, housing, healthcare and work, corporate power stemming from investment choices, the ability to avoid tax, to cause climate change, and much more, causes harm to human rights, and yet is very poorly captured by a deontological outlook. The UNGPs, by covering any action which results in harm, offer a uniquely structuralized, macro-orientation on BHR problems.

I make four arguments in support of consequentialism. First, non-violative but harmful acts are profit-motivated, morally agential and intentional, and therefore legitimate areas of moral responsibility (Arnold, 2016). Second, these acts grow more significant with increasing corporate power under globalization, and it is therefore a temporally-appropriate conceptualization. This power brings corporations close to state-like, 'quasi-governmental' power (Wettstein, 2009). Third, states with such power have, through 'deliberately retrogressive measures' under the International Covenant on Economic, Social and Cultural Rights (ICESCR), negative consequentialist responsibilities (Ssenyonjo, 2013, 93; Courtis et al., 2014, 124). Fourth, such responsibilities are necessary to capture individual responsibility for systemic forms of harm, as occurs through global markets, for example.

The paper proceeds as follows: I will first discuss various forms of consequentialism. I then turn to the UNGPs, first describing the document, and then elaborating the forms of consequentialism adopted therein. I then argue why this consequentialist ethic is correct based on moral agency, power, human rights law, and harm, and finally I conclude.

Introduction to Consequentialism

I begin with a brief overview of consequentialist ethics. It is important to note at the outset that the UNGPs adopt a unique, pragmatic form of consequentialism applicable to global business and within the limits of Ruggie's UN mandate. Consequentialism consists of a 'family of theories that holds that acts are morally right, wrong, or indifferent in virtue of their consequences' (Jameson and Elliot, 2009, 241). This tells us we need to consider the final consequence of our action, even if the act itself is not morally wrong. Consequentialism stands in opposition to deontology, which states that we are morally obligated to act in accordance with a certain set of principles and rules regardless of outcome (McNaughton and Rawling, 2006). In religious deontology, the principles derive from divine commandment so that under religious laws, we are morally obligated not to steal, lie, or cheat. Deontology typically produces absolute constraints on the individual. Murder is always wrong, even if one murder may save two lives.

The best known form of deontology is probably that of the Kantian perfect obligation (ibid.). These are universal obligations, which state that duty bearer A must (not) do action B in relation to individual C. Domestic law operates in this way, as a list of prohibitions which citizens can easily understand and

follow, and of which no breach is generally permitted. The most obvious deontological forms within BHR are the code of conduct-based approaches, such as multi-stakeholder initiatives in value chains, which list a set of prohibited or necessitated actions which firms must follow, such as prohibitions on slavery and child labour, and requirements to pay national minimum wage (See e.g. FLA, 2015).

Odell (2004, 15-17) breaks consequentialism and deontology into four comparative forms. Absolute deontology holds that consequences are irrelevant. Moderate deontology holds the primacy of the moral rule but allows room for the consideration of consequences. Absolute consequentialism states that only consequences matter. Such a theory would have no deontological rules and can otherwise be stated as '(a)ctions themselves are never right or wrong (ibid., 15). So, for example, murder would always be permitted if it was for the greater good. Moderate consequentialism holds that consequences take priority, but that acts also matter.

One common framing is that '[c]onsequentialist theories define morality in terms of good consequences' (ibid., 16). Often consequentialism is understood in a positive and seemingly demanding way. The classic utilitarian statement of Jeremy Bentham is a common consequentialist grounding: 'it is the greatest happiness of the greatest number that is the measure of right and wrong' (cited in Hart and Burns, 1977, 393). This implies that every action should be evaluated on the basis on the overall 'pleasure' (pleasure minus pain) predicted to be generated (Burns, 2005, 48). This is highly demanding both regarding the sacrifices required and its complexity. McNaughton and Rawling (2006, 441-453) critique consequentialism on these grounds, bolstered by partiality (the advantage of retaining special relationships), and options (deontology allows more scope for freedom than consequentialism). The demands of consequentialism are too high, because the full repercussions of our acts cannot be entirely known.

More limited forms include 'satisficing consequentialism' (Slote and Pettit, 1984), wherein one's acts should produce 'good enough' consequences; 'progressive consequentialism' (Jameson and Elliot, 2009) seeking a perpetual improvement in good consequences; and 'negative consequentialism' seeking the avoidance of harm (Popper, 1945; Contestible, 2006). The basic macro-critique of a lack of specificity can still apply to each of these. The irreducible aspect of the debate is that deontologists claim that consequentialist theories have 'spurious precision' (O'Neill, 2001, 163). Because lines of causation from act to outcome cannot be precisely determined, a consequentialist ethic becomes elastic (ibid.). In BHR regulatory terms, this challenge reads much like the problem of legalism: we need concrete standards to 'bind' all actors and consequentialism struggles to map hard standards (Campbell, 2006, 14-16; Sen, 2005). Whether one seeks maximal, satisficing, progressive, or negative consequentialism, one does not overcome the difficulty in understanding the consequences of one's actions. Consequentialists rebut this argument through attempts at creating precision, as well as pointing out deontology may lead to illogical and immoral decisions, and the more basic argument that deontology permits too much (Mulgan, 2001, 25-49). Even if consequentialism may lack precision, falling back on deontology merely permits consequentialist harm, rather than addressing it.

A second delineation within consequentialism is also relevant to the analysis herein, between act and rule consequentialism (Hooker, 1990). Act consequentialism states that every action should be evaluated based on its consequences. Act consequen-

tialism, which was the variant discussed above, is especially difficult to implement because it fails to offer a concrete enough framework. It does not necessarily have to be overly demanding ethically (e.g. negative act consequentialism), but it is difficult to implement because actors cannot fully consider all repercussions of their actions. Rule consequentialism is to some extent between deontology and consequentialism. Under rule consequentialism, actors follow a set of rules that have been designed to create good consequences (ibid., 76). Here then, the consequences themselves are not evaluated, rather, rules are trusted to create good consequences. This remains distinct from deontology, however, because the rules are not themselves inalienable moral norms. Having briefly introduced the concept of consequentialism I will next lay out in more detail the various elements present in the UNGPs.

The Consequentialism of the UNGPs

The UNGPs state that corporations 'have a responsibility to respect' human rights. The content of this responsibility is elaborated through 'impacts'. Firms should '[a]void causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur,' and prevent or mitigate impacts linked to the firm (UNGP, Principle 13 (a) and (b)).

I will not discuss the question of linkages (part b) herein, instead focusing only on causal and contributory harm. As argued by Bonnitca and McCorquodale (2017, 912) and seemingly confirmed in a reply by Ruggie and Sherman (2017, 926), firms have 'strict responsibility' to prevent, mitigate and/or remedy all 'adverse impacts' on human rights to which they are causally linked². Strict responsibility is taken from the legal terminology of 'strict liability', meaning that firms are responsible for all impacts regardless of moral or legal fault (Bonnitca and McCorquodale, 2017, 912), and was adopted because '[b]oth 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' (Bonnitca and McCorquodale, 2017, 916). Because corporations are capable of harming rights in a variety of complex ways, they require strict responsibility of a form that would be impractical for individuals. All adverse impacts should be prevented, mitigated and/or remedied. The key question then becomes what constitutes an 'adverse impact'.

The OHCHR guidance (2012, 5) states that: '[a]n "adverse human rights impact" occurs when an action removes or reduces the ability of an individual to enjoy his or her human rights.' First, the phrase 'an action' is used. This must prima facie apply to any action. We not discussing only violations of human rights obligations, such as prohibitions on slavery or child labour. Rather, all actions are potentially within the scope. Alternatively framed, the act itself is not part of the judgement criteria. What matters is the consequence of the act.

The sole judgement criterion is that the action 'removes or reduces' an individual's enjoyment of human rights. This is unusual human rights language. Human rights treaties use the terminology of 'violation' and 'retrogression', in the negative/respect sense. The most logical way to understand the term is that 'removes' is akin to violation, covering those rights and

forms of harm that fit the either/or of deontological or legalistic compliance (this is itself a simplification, but adequate for current purposes, see discussion in De Schutter, 2014, 116-117). For example, one either is or is not being tortured or enslaved at any one time. If one is in either of these conditions, the correlated right has been 'removed'; in more common language, the deontological obligation has been violated.

The more important part for my argument is the term 'reduces'. 'Reduces', which means 'lessen the amount', appears synonymous with 'retrogresses', a term that means the 'de facto, empirical backsliding in the effective enjoyment of rights' (Courtis et al., 2014, 123). Both terms therefore have a quantitative element. The term 'retrogression' is found in the writings of the Committee on Economic, Social and Cultural Rights (CESCR, see General Comment 3, para. 9). A 'deliberately retrogressive measure' is one which quantitatively reduces access to a right (Courtis et al, 2014, 124). For example, a tariff on food could be deliberately retrogressive if quantitative proof was found that access to food in the state had retrogressed as a result. The essence of retrogression is that, for socio-economic rights particularly, it is important to measure how much access to food, healthcare, housing and education there is in a state, and to challenge state policies that retrogress this access. It is therefore, an innately consequentialist obligation, wherein only the outcome is judged.

The UNGPs adopt this same consequentialist and quantitative lens. An act that removes or reduces an individual's enjoyment of rights is an adverse impact. By the wording of impacts it does not matter what the initial act is. The act of torture is certainly covered, but so could be any number of rationale business decisions. The agri-business example, above, by definition 'reduced' individuals' enjoyment of rights. This could well also constitute a 'severe' impact on the grounds of scope, one of three judgement criteria of severity, defined as 'the number of individuals that are or will be affected' (OHCHR, 2012, 19). The wording of impacts means that any act is the legitimate subject of human rights critique, based solely on whether it has the consequence of a 'reduction' in an individual's enjoyment of rights. When it does, the firm has strict responsibility to prevent, mitigate or remedy.

Critics have argued that the UNGPs eschew a moral basis in favour social expectations, and Ruggie appears to agree, citing the 'social norms' underlying the business responsibility to respect (Ruggie, 2013, 103). Yet I would argue that the basic statement of 'impacts' does constitute an ideal moral norm. Simply, business should avoid undertaking any act that harms, in any way, the human rights of any individual. This highly ambitious moral norm is unlikely to be taken up by lawmakers or managers in the near future, and so, on pragmatic grounds, social expectations must guide its incremental embedding. As I explain below, the grounding in the social allows for public discussion over the extent and limits of consequentialist responsibility. This is sensible, because, as per the general problem with consequentialism described above, it can be difficult to provably link act and outcome, while at the same time it can be very easy to make reasonable arguments around such links.

The UNGPs do not discuss ethical concepts such as deontology and consequentialism. The reasons for replacing 'violations' with 'impacts' is also not fully elaborated. While many have assumed it is simply a normatively weaker synonym, this seems unlikely given its expansive definition (discussed in Deva, 2013, 97-98). It would not have been necessary to define 'impacts' in this way if this was the intention. The term 'abuse' is widely understood to be a less normatively binding synonym for

² Ruggie and Sherman do not explicitly confirm their agreement with this. They do however state that the authors' argument that HRDD can exculpate in the case of linkages 'falls short' of the language of the UNGPs, seeming to agree with strict responsibility for causal, contributory, and linked harm, with the distinction being that linked harm requires the use of leverage over the actor committing harm, rather than direct prevention and remedy.

'violation' applicable to non-state actors (Clapham, 2005, 49). Therefore, it appears *prima facie* reasonable that every aspect of 'impacts' was intentional and understood by Ruggie.

An understanding of Ruggie's normativity and academic background bolsters this argument. He developed the concept of 'embedded liberalism', which states that the post-war era was predicated on 'a grand bargain' between free trade and social wellbeing, in which states were permitted under trade law to significantly restrict trade in the national interest (Ruggie, 1982). The neoliberal era ruptured this, liberating trade, capital and corporations within transnational free markets and weakening social protections (Ruggie, 2008, 232). He has frequently voiced support for a renewed 'grand bargain' designed to limit business power in the social interest (Ruggie, 1998; Ruggie and Kell, 1999). He argues that 'policymakers [should] revisit the principles of embedded liberalism' by regulating corporations better, including balancing the risks and rewards of globalization (Abdelal and Ruggie, 2009, 153). He states that the 'macro-objective' of his UN mandate is to embed global markets in 'shared institutional values and social practices' (Ruggie, 2006, para. 18). Restricting an understanding of 'impacts' to mere non-violation would be only a very limited conceptualization an embedded liberalism-inspired set of 'values and social practices'. The consequentialist understanding proposes much greater limitations, particularly at the macro-structural level.

Ruggie's academic work focuses on political economy and global structures. He is concerned about rising corporate power and structural imbalances between business and society (Ruggie, 2017b) and the 'the widening gaps between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences.' (Ruggie, 2014, 6). He highlights concerns about inequality, the imbalance in global rulemaking powers, and growing 'economic instability and social dislocation' (Ruggie, 2008, 232). While many working on BHR issues adopted a legalistic, and therefore often deontological, focus, on accountability and remedy for violations (Ramasastry, 2015, 240), Ruggie's priorities lie in managing power. At the 2016 UN Forum on Business and Human Rights he argued that exploitative economic structures were linked to 'populist forces [that] involve people who have been left behind by the liberalization and technological innovations.' He is a staunch critique of 'liability legalism' (Ruggie, 2007, 839), adopting Iris Marion Young's broader model of responsibility (*ibid.*, and Human Rights Council, 2006, para. 34) and views human rights as 'mediators of social relations', rather than (only) progenitors of law (Ruggie, 2017a, 14-15).

This more macro, less legalistic and more socio-economic orientation, I believe, underlies Ruggie's adoption of a consequentialist ethic in the UNGPs, because contestation of socio-economic harm by business is precisely what consequentialism promotes. As to why Ruggie has not pronounced on the subject, we can see this as part of his constructivist indeterminacy (Mares, 2013, 23-24), in which he deliberately created a document that appeared minimal, and so acceptable to antagonistic forces, but could be mined for new meanings over time (*ibid.*).

Three Elements of Consequentialism in the UNGPs

In this section I will further describe the consequentialism of the UNGPs, elaborating four elements. First, they adopt negative act consequentialism. An outcome which fails to realise rights does not constitute an adverse impact. Second, there is an implicit progressive element, thanks to the grounding in the social norms. Third, human rights due diligence is a form of

rule consequentialism designed to promote the prevention and remediation of adverse impacts. I will elaborate each of these in turn.

Negative Act Consequentialism: Understanding Harm

The basic standard of human rights impacts is that of negative act consequentialism. An impact occurs when an act 'removes or reduces' rights enjoyment, and therefore, every act should be evaluated on this criterion. The wording is absolutely clear and, within the confines of negative responsibility for harm to human rights, there is no limit proposed: an act that removes or reduces an individual's enjoyment of rights is an adverse impact, for which corporations have strict responsibility to mitigate and/or remedy. Any act that causes any harm to anyone's rights, is covered. It is therefore not aimed at creating absolute good consequences, but at eliminating harm to human rights.

Negative consequentialism has some obvious downsides as a philosophy of individual morality. It is too weak, too demanding and too imprecise. It is too weak because individuals have many opportunities to do good. Particularly those in wealthier states and/or who have some spare time should, surely, do some good in the world. It is too demanding because many actions, such as driving a car, cause harm. Adding a caveat that one may do harm in order to do good is no longer negative consequentialism. It is too imprecise because many acts cannot be evaluated as a negative/positive dyad. Buying a t-shirt made in Bangladesh might contribute to child labour, and/or it might contribute to economic development.

These critiques also apply to business responsibility. Businesses can and should do good, businesses must perform some harmful acts, e.g. causing pollution, and businesses also cannot know all of their harmful impacts. It is reasonable to say that consequentialism is an impractical standard to which to hold businesses. However, there are three good reasons to support a consequentialist incursion into business responsibility. First, as above, if our rejection of consequentialism leads to reliance on deontology, we merely become permissive of a wide range of harms, ignoring, not addressing, the problem. Second, 'corporate responsibility' is already a rich field comprised of some hard and some soft human rights-based deontological rules, from laws to voluntary initiatives, while Corporate Social Responsibility encourages the fulfilment of imperfect obligations (Wettstein, 2012, 748-750). Therefore, unlike an ethical argument that individuals should live by negative consequentialist principles rather than another set of principles, here negative consequentialism is added to pre-existing governance arrangements. Consequentialism under the UNGPs merely fills in a gap, rather than eroding other responsibilities. Third, just because not every harm can be contested or even known should not mean that all such harm is excluded. Take climate change. A proposal to mitigate and remedy the harm caused to those in low-lying islands who lose their homes as a result of rising sea levels is not considered morally incoherent just because it excludes the harm suffered by another group, for example, those who suffer breathing difficulties in an urban environment. Consequentialist expansions of business responsibility must be allowed to evolve gradually.

The negative aspect has proved one of the most controversial elements of the UNGPs (Wettstein, 2015). Corporations, it is argued, require protect and/or fulfil responsibilities in addition to negative responsibilities. Through active negative responsibilities, and complimented by linkages and complicity, and UNGPs build some protective responsibility (Mares, 2012; Wettstein, 2013). Corporations do not, however, have protect

responsibilities beyond that linked to their operation, and they do not have fulfil responsibilities, although again, the lines can be rather blurred. The human rights element is a natural corollary of Ruggie's UN mandate. It does not necessarily provide a noticeable limit in itself, since any harm that business may do to individuals can be captured by human rights, assuming we understand them holistically. For example, harm to mental health is a particularly expansive area.

I do not deny the importance of positive responsibilities, but I do highlight the alternative expansiveness of consequentialist negative responsibility. The liability legalism model necessitates that the victim must be able to show that a specific business entity violated a specific legal right (Young, 2006, 116-118). The consequentialist model goes beyond this, because any reduction in enjoyment of rights stemming from a corporate act is covered. Darcy argues that tax avoidance harms human rights through reducing the state ability to protect (Darcy, 2017, 23). Food firms switching to biofuels did harm access to the right to food (De Schutter, 2008). Similar arguments could target mass automation (ICAR, forthcoming), and the right to just work and the on-demand economy (Natour, 2016). Philip Alston (2015) argues that extreme inequality harms human rights, and therefore any business act that contributes to rising inequality could be critiqued on consequentialist grounds. There is room for a great deal of debate around these impacts, but the expansive scope of negative consequentialism at least provides a starting point for that debate.

While the consequentialist ethic has gone largely ignored, there has been one important case brought under the 'impacts' framework that relies on consequentialist reasoning. Action Aid Denmark vs Arla Foods was a case filed at the Danish National Contact Point, a mechanism for handling complaints under the OECD Guidelines (OECD, 2011). This is distinct from the UNGPs but transplants the definition of 'impacts' and the tool of HRDD directly from the UNGPs. Specifically, the case was filed in relation to Chapter IV paragraph 5: 'Carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts' (ibid, 31). As the UNGPs lack a complaint procedure themselves, the OECD Guidelines are a useful tool to check implementation of the principles contained therein. Arla Foods was accused of failing to take into account the 'negative consequences' of its exportation of cheap milk products, 'which undermines the milk industry in the Global South and has negative consequences for the livelihoods of locals' (OECDWatch, 2014). The complaint alleged a failure to complete adequate HRDD taking into account all adverse human rights impacts. Arla Foods agreed and promised to 'engage in a more systematic identification, prevention and mitigation of actual and potential unintended consequences on local farmers' business prospects and rights that may be impacted by Arlas [sic] sales and operations' (ibid.).

This case perfectly demonstrates the ambitious scope of the UNGPs framework in going beyond deontological breaches. The EU has been criticized for subsidizing farm products that are then sold at below cost price to the developing world, harming local industry and development (Action Aid, 2011). However, with the EU unwilling to clamp down on the practice, it is necessary to turn to business responsibility. The practices of Arla Foods violated no deontological rules but did cause adverse human rights impacts on the basis of 'negative consequences' upon local livelihoods (OECDWatch, 2014). As per the rationale herein, if one's livelihood is adversely impacted, it may well reduce one's access to work, just work, food or health-

care, thereby having defined human rights impacts. This is the only case to have reached 'agreement' under the OECD Guidelines that adopts this understanding of 'human rights impacts' – every other case alleges specific violations – suggesting that the consequentialist scope of 'impacts' needs greater normative reification to bring its potential to fruition (OECDWatch, 2018).

Making corporations responsible for all negative consequences of their actions is a different form of ambition to drafting 'fulfil' responsibilities, but may not be less ambitious. Indeed, as I examine below, by asking businesses, activists and researchers to trace the links between corporate acts and harmful outcomes, it may be a more forceful form of responsibility, dedicated to excavating and understanding the various ways in which businesses harm rights beyond the deontological violation. Negative consequentialism challenges us to understand the full range of business harm to human rights, and this should be considered an essential element of human rights protection in an increasingly globalized, corporatized, and connected world.

Progressive Consequentialism: Incremental Shifting of Social Norms

Ruggie often adopts a discursivity of incrementalism, captured best by his description of the finalization of the UNGPs as 'the end of the beginning' (Ruggie, 2011, para. 13), designed to foster a gradual shifting of the social norms around what constitutes a human rights respectful business. He seeks 'cumulative change over time [that no] top down command-and-control regulation could possibly create (Ruggie, 2017a, 14). This ties in a practical sense with progressive consequentialist ethics. Progressive consequentialism 'is the view that a right action is one whose consequences improve the world... what [progressive consequentialism] requires of agents is that they act in such a way as to increase value in the world' (Jameson and Elliot, 2009, 244). It means, simply, that at every opportunity to act, the agent in question attempts to improve the world. Following one improving act, the next act will build on this, and so on. No single act need be overly demanding, but the sum total should lead to transformative progress. Within this theory, actors are also not permitted to cause harm. If any act is liable to cause harm, inaction becomes the most progressive (least retrogressive) option (ibid.).

One problem with progressive consequentialism 'is that it risks making morality extremely demanding for the highly moral and extremely undemanding for the morally indifferent' (ibid., 247). Demandingness appears to increase exponentially, a supererogatory deed today leads to demands for even greater supererogation tomorrow. The authors agree that this is true, and use an example of Gandhi and Bernie Madoff, positing that Gandhi's greater moral virtues make supererogation more personally justifiable. He may even demand supererogation from himself, and therefore progressive consequentialism captures our own innate virtuousness and pushes it as far as it can reasonably go. In my own opinion, the authors do not adequately justify the precision they claim for their theory, nor the demandingness criterion. Just like satisficing consequentialism, we left asking the question of how can we know that our actions are improving the world? However, these critiques are not relevant for progressive consequentialism as it applies in the UNGPs.

The UNGPs avoid these problems by addressing progressivism at the level of social norms (Ruggie, 2017a). '[W]here new hard law is not immediately in the offing, creating, consolidating, disseminating and embedding social norms is an indispensable tool for inducing changes in conduct' (Ruggie, 2017a, 14). This has two inter-related elements, the business norm and the

social norm. The former element aims to gradually expand the scope of what business feels it must address. Therefore, more responsive businesses will, like Gandhi, have greater demands placed upon them. This may not be perfectly fair, but it is a practical reality that has been used previously, for example, to foster extensive regulation of fashion-brand value chains. As important is the shifting of the social norms around what constitutes legitimate human rights-based critique of business, that is, what acts society contests in human rights terms. This is a question resting on value judgements that will shift over time, and Ruggie's open-ended framework allows significantly more ambitious arguments to be made around it, as will be shown in the next section.

What Ruggie has done is very clever. He has left an unlimited negative framework into which any and all harms can be fitted. However, he has not stated that all harm must be fitted into it (the word 'should' appears frequently), and he has not made this a binding standard. Had he done this, the UNGPs would presumably not have been approved by the Human Rights Council (Ruggie, 2013, 103). Rather, through debate in the 'global public domain' (Ruggie, 2005) the understanding of 'impacts' can evolve. This is based on his constructivist background, although many ethicists also value the importance of, for Sen, 'public discussion' (Sen, 2004, 329), and for Habermas 'deliberative democracy' (Habermas, 1994). The point, for Ruggie, is that only through public discussion will harms caused through less direct means become legitimate targets. Thus, rather than entering the contentious grounds of which ethical approach to adopt, Ruggie has created space for the most ambitious form, without demanding the most ambitious reading be immediately taken. The concept of 'severity' is useful in providing a prioritization strategy within this unlimited framework (OHCHR, 2012, 82). All impacts should be addressed, but the most severe impacts should take priority. This is rather unsatisfactory if we take a deontological approach, but logical under consequentialism. The most severe, including the most obvious, impacts, should take priority, while some impacts will require extensive investigation and argumentation to bring into the fold of corporate responsibility. For example, there is a historical norm that tax avoidance is not a BHR issue. Darcy (2017) seeks to challenge this norm through the UNGPs. Constructivists see these norms as innately malleable, and, in a normative sense, seek to open space under which norms can progressively evolve. 'Impacts' seeks to widen the BHR agenda, but through public discussion, rather than appeal to authority, and primarily by providing a rationale by which to build arguments, rather than rules that must be followed.

Rule Consequentialism: Diligently Investigating Harm

'Impacts' is very useful in widening the scope of BHR responsibilities, but also has disadvantages, particularly where social problems do not capture the wider public imagination. It has the advantage of breadth and the disadvantage of a lack of clarity. To address this problem, Ruggie offers the rule consequentialist technique of HRDD. This is designed to assist in mapping impacts, and increase both business and civil society knowledge of these impacts. Simply, following the 'rules' of HRDD will increase the chances of avoiding harmful consequences.

The process of HRDD is not perfectly aligned with the philosophy of rule consequentialism, but it does share some elements. Portmore defines rule consequentialism as holding 'that the rightness of an act depends not on the goodness of its consequences, but on whether or not it is in accordance with a certain code of rules, which has been selected for its good consequences

(Portmore, 2008, 1). Thus, philosophically, rule consequentialism is a rival, not a partner, to act consequentialism. There is however a major similarity between the techniques of HRDD and rule consequentialism, in that 'the rightness of an act' by a business is evaluated, in part, according to whether the rules of HRDD have been followed. This is the understanding of HRDD as potentially exculpatory practice that Bonnitcha and McCorquodale contested, above. Thus, on some interpretations of the UNGPs, even an adverse impact can be deemed 'right', or at least acceptable, if HRDD has been correctly practiced (e.g. Michalowski, 2013). On a strict responsibility understanding, the adverse impact remains unacceptable, but a firm that follows HRDD is less likely to cause such an impact. Thus, HRDD remains as a set of rules designed to prevent negative consequences, although the philosophical understanding of the rightness of act depending on the rules being followed is denied. This again fits the pragmatic tone of the UNGPs as it borrows from rule consequentialism, without being overly restricted by the philosophy.

Principle 17 states that:

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.

HRDD should cover adverse impacts that the business causes, contributes to, or is directly linked to its operations. It should be specific to the context of the firm's operations, and should be ongoing (UNGP, Principle 17). Businesses should consult with relevant stakeholders to help identify potential impacts (18), integrate their findings into decision-making processes and provide sufficient budgetary allocations to address risks and extant impacts (19), and track the effectiveness of their responses using 'appropriate qualitative and quantitative indicators', as well as stakeholder consultation (20). Firms should report publicly on how they are addressing potential and extant impacts (21) and provide remedy for any impacts they have caused (22). Where necessary, firms should prioritize the most severe and/or irremediable impacts (24).

The essence of rule consequentialism is that one follows a prescriptive rule set designed to ensure good consequences. Under the UNGPs, HRDD provides a prescriptive rule set designed to identify, prevent and remedy all adverse consequences. Through the method of HRDD, all impacts can be tracked and understood. By conjoining act and rule consequentialism, Ruggie is able to harness the best of both worlds. Act consequentialism is the basic standard, but, given the indeterminacies inherent therein, the much simpler norms of rule consequentialism provide a toolkit through which to think about impacts. Although HRDD is meant as a business practice, the practice also informs civil society understandings and techniques. The tools of HRDD can be used by civil society, and failure to correctly practice HRDD can be a critical weapon.

One benefit of HRDD is that it asks, only, in the first instance, that firms 'know and show' their impacts. This is a lower bar than preventing and remedying all such harm, and one that fits with embedded transparency norms. Once impacts are known and shown, a more powerful argument that they should be addressed is available. This is particularly true of potentially retrogressive acts and particularly of acts with complex impacts, such as may occur with mass automation of factories, for ex-

ample (Freeman, 2015). It remains true that the full impact of business decisions will be difficult to map, but some harms stemming from non-violative acts will be apparent. Again, it is a practical form of ambition. Just because even well-designed HRDD might miss some issues, does not mean that the consequences of non-violative acts should not be investigated at all.

One problem with HRDD as a form of rule consequentialism is vagueness. There is an aspirational quality to the rules, wherein it is not at all clear what constitutes real compliance. For example, at what point is stakeholder consultation complete? If we see HRDD as rule consequentialism, there is reason to believe that it should provide reasonably determinate standards. As the OHCHR Guidance (2012, 33) makes clear at many points, 'there is no single answer' to how businesses should conduct HRDD. It should vary greatly with different contexts. There is also the ever-present issue of business acceptance and 'pushing the envelope' (Ruggie, 2013, 107). Ruggie clearly believed that too many concrete demands would result in push back. However, adopting the rationale of rule consequentialism, I would argue that there is scope in the future for a more strictly delineated set of HRDD standards. For example, Principle 21(a) regarding public communication of the identification and prevention and remediation of adverse impacts states that communications should '[b]e of a form and frequency that reflect an enterprise's human rights impacts and that are accessible to its intended audiences'. This could be improved by making specific requirements as to the frequency and form (such as translation into relevant languages). It would be ideal if over time incremental improvements to the definitiveness of HRDD were made, making it easier to see if the practice had been followed.

Why is Consequentialism a Good Lens for BHR?

In this section I will argue that it is ethically valid that corporations have consequentialist responsibility for their harm to human rights. Firstly, corporate harm to rights, whether deontological violation or consequence, is still the product of moral agency. Second, corporations have power over rights and can therefore adversely impact rights in ways beyond deontological obligations. Third, human rights law as addressed to states deals with this similar state power over rights through consequentialist means. Fourth, the absence of consequentialism is an important gap in contemporary BHR praxis that allows harm to proliferate.

Moral Agency

Why should corporations have responsibility for the harmful consequences of their actions? I begin with a basic prefigurative step in the more basic argument that corporations are legitimate bearers of human rights responsibilities, that of moral agency (Arnold, 2016). Moral agency is the prerequisite of responsibility. Sepinwall (2015, 518) defines as moral agents 'those who are fit to be held morally responsible (i.e., praiseworthy or blameworthy) for their acts.' Without moral agency there is no possibility of bearing moral responsibility. A moral agent is therefore one that may hold obligations. This is distinct from a moral person, who holds both rights and obligations. Both Donaldson (1980) and French (1979) have argued that corporations are moral agents, capable of bearing obligations, but are not moral persons capable of claiming rights. There are many potential grounds for denying corporations moral personhood, including their unique form: they cannot die, eat, marry, be tortured, thus they at least would require radically

different or more limited version of rights. Bishop (2012) and Werhane (2016) both worry that granting corporations moral personhood would elevate them above individuals because of their greater (aggregated) power. Others argue that the individual should be supreme, and no group or aggregated power should prevail over the individual (List and Pettit, 2011, 179-181). Generally, these arguments lead to a position in which corporations rightly require some rights (such as to property and contract) but not the full body of human rights, and moreover the rights they do hold may have specific limits. The Citizens United decision controversially denied such a limit over free speech (Néron, 2016). This is problematic because it elevates corporations above the status of individuals, at least de facto based on their greater power.

Corporations are often described as moral agents due to their internal decision-making process (Arnold, 2016, 262). The decisions that eventually lead to human rights harm are part of complex process involving all manner of departments. No single individual can (usually) be held responsible for harms resulting from this process. Novelist John Steinbeck (1939, 43) described the logic thus: 'It happens that every man in a bank hates what the bank does, and yet the bank does it. The bank is something more than men, I tell you. It's the monster. Men made it, but they can't control it.' Because this decision-making process denies extensive moral agency to individuals within it, it follows that it is the corporation itself that must hold this agency.

The next important point is intentionality. Arnold defines intentionality 'as the ability to plan future actions in a coordinated manner' (Arnold, 2016, 257). This includes 'the capacity for reflective assessment of corporate plans and practices' (ibid., 262) Corporations have a large degree of scope when planning. Where and when to invest, whether to adopt an ethics or human rights policy, and how to address problems with suppliers, subsidiaries or state partners are issues in need of consideration, and over which firms can choose their own ethical approach, or lack thereof. This is key to intentionality: because corporations can make active decisions that cause harm to human rights, but simultaneously are capable of making different decisions that do not harm human rights, they are legitimately obliged to respect human rights (ibid., 262).

Grounding human rights responsibility in moral agency appears to collapse the distinction between deontology and consequentialism. If firm A is violating labour rights, and firm B finds that its practices are reducing access to food, both, as moral agents, are capable of preventing and remedying this harm to human rights. That is, if we accept that corporations have responsibility for their human rights violations on the basis of their moral agency and concomitant ability to plan, assess and reverse their acts, by that logic they hold equal moral responsibility for consequentialist harms resultant from non-violative acts. This leads to a position in which the morally agential corporation is responsible for the harm caused by its own acts. As long as the harm is foreseeable and/or discernible, the corporation with responsibility to respect human rights should have moral responsibilities to prevent, mitigate and/or remedy this harm. This is captured by the unlimited act consequentialist framing of the UNGPs. In some consequentialist cases the links and quantitative proof may be more difficult to draw, but this is also true of many deontological issues, such as those in value chains. A focus on intentionality opens space for a consequentialist lens because it starts from the act and then seeks the outcome. Switching to biofuels is just as morally agential as using child labour, and therefore subjecting the policy to human

rights critique is *prima facie* valid.

Corporate Power

This ethical rationale provides a basis for legitimate consequentialist responsibilities. The issue of corporate power makes these responsibilities necessary. Corporations have significant power resources which can be instrumentalized in search of profits in ways which cause adverse impacts on rights. Some such impacts require consequentialist responsibilities, or else firms will be left unaccountable. A crucial element of consequentialist responsibility is that it allows the contestation of a much wider range of power instrumentalities.

Firms may 'intentionally' plan acts which lead them into human rights violations or complicity in such violations. They would be, by most conceptions of BHR, responsible for these violations. But firms can also intentionally plan acts which cause consequentialist harm, such as reduced access to food or healthcare. Failure to address such harms goes against the primary tenet of human rights, that they are inalienable to all persons, and that rights should provide 'trumps' against other arguments. The lack of consequentialist responsibilities mean that, in practice, only some rights provide trumps in some situations. In particular socio-economic rights only rarely, in practice, provide even an argumentative basis to claim as trumps against business actions, because they are most likely to be impacted through non-violative means.

This is most apparent where firms have a position akin to that of the primary agent of justice (O'Neill, 2001; Wettstein, 2009, 161-164). Here, due most likely to *de facto* control over a right within a community, or in some cases a shared control with an industry-based oligopoly, the decisions that a firm takes will directly impact a right. In these situations, the assumption that corporations are rule-takers subservient to state power breaks down. This also occurs where corporations can bypass state regulation, or have structural power over states, such as when making investment choices (De Schutter, 2006). States cannot mediate corporate behaviour, and so corporations require more direct, and expansive, human rights responsibilities. According to the wording of impacts, any instrumentalization of power that causes an adverse impact is captured.

O'Neill (2001, 181) argues that the distinction between primary and secondary agents is that the former is the rule-maker and institutional organizer, the latter the rule-taker. Primary agents have 'capacities to determine how principles of justice are to be institutionalised within a certain domain.' This leads to a relevant consequentialist distinction. The primary agent of justice must be a legitimate bearer of consequentialist responsibility, while secondary agents must merely follow the rules. Primary agents of justice are required to take into account outcomes when deciding policy, and this is exactly what 'impacts' proposes. This is a vital distinction: under 'impacts' the corporation is reconceived as partially coterminous to the primary agent of justice. Unlike most BHR instruments, the corporation must not merely follow prescribed rules, but must actively investigate the effects of all its policies and practices to ensure they are conducive to rights' respect. This is not a demand that would typically be made of a secondary agent, because it is too demanding. The empowered corporation, however, with both the capacity to cause structuralized harm through legitimate business decisions, and the capacity to understand and remake these decisions, is not a typical secondary agent. To fully understand how this can work in practice it is worth returning to the legal concept of 'retrogressive measures', because human rights lawyers have long dealt with this exact problem.

Human Rights Law

The CESCR has a specific problem to address, in that socio-economic rights are harmed by a range of forces, and are not so likely to be directly violated, as, for example, the right to freedom from torture may be violated. Of course, all rights require a range of protections, and all rights have material, legal and normative bases that can be undermined by a range of factors. Nonetheless, these structural factors are magnified around socio-economic rights.

For states, acts may be disbarred under the ICESCR if they have the consequence of retrogressing the right in either a quantitative or juridical protection sense (Courtis et al, 2014, 124-6). General Comment 3 (1990 para. 9) lists 'deliberately retrogressive measures' as *prima facie* violations of the Covenant. 'A retrogressive measure is one that, directly or indirectly, leads to backward movement in the enjoyment of the rights recognized in the Covenant (OHCHR, 2012, para. 41). The use of the term 'deliberately' is not defined in the General Comment or subsequently. The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights also demurred from a definition. It is clear from the document, and General Comment's dealing with specific rights, that it does not mean to limit coverage to moral fault of the deontological violation variety. Rather, 'deliberate' should be seen similarly to morally agential intentionality, covering any state act which has the effect of retrogression.

The General Comment on the Right to Food (1999, para. 15) lists that 'measures preventing access' are violations of the duty to respect the right to food, and this includes changes to law or policy, based on the consequence of retrogression. Elsewhere, introducing tertiary education fees in the UK was deemed deliberately retrogressive, as were Egyptian government cuts to health, education and housing budgets, and 'increased recourse to regressive indirect taxes' (Ssenyonjo, 2016, 93-94). It is important to highlight the consequentialism of these rules. This is clearly shown in the Concluding Observations on Egypt, which stated:

The Committee is concerned that the reduction in the proportion of budgetary resources allocated for health, education and housing has resulted in retrogression in the effective enjoyment of the rights enshrined in the Covenant, disproportionately impacting disadvantaged and marginalized individuals and groups.

Note here that reducing the proportion of budgetary resources allocated to socio-economic rights is not the problem. The problem is the resultant retrogression, which has been traced back to budget cuts. Just like 'impacts', the outcome of retrogression is the only relevant factor. Any act may be retrogressive, no act necessarily is.

There are clearly many discrepancies between state and corporate responsibilities. Nonetheless, the basic idea that states have deeply embedded consequentialist responsibilities within human rights law should give us reason to consider such a rationale for corporations. Retaining the right to food example, we could compare a state tariff to a company production change. Neither are *prima facie* human rights violations. But, if state A implemented a tariff that resulted in 10% of its population suffering a quantifiable retrogression in the right to food; that tariff would be considered deliberately retrogressive. If company B implemented a change in production that resulted in a similarly quantifiable retrogression, and, at least, if the affected state was unable to prevent the retrogression, it should be challenged as an adverse impact on these individuals' right to food. This is bolstered by the Maastricht Principles on Extra-

territorial Obligations of States in the Area of Economic, Social and Cultural Rights (MPs), which clarify that state duties in this regard extend extraterritorially. If a state tariff, for example, caused a retrogression in the right to food of a neighbouring state, the first state would be in violation of its duties under the ICESCR (e.g. under MPs, Principles 13 or 20). They do so on the basis of the need for universal protection³. If corporations do not have such consequentialist responsibilities, a gap is evident in global human rights protection: some individuals' right to food will be unprotected. The UNGPs, by stating that firms have responsibilities to not commit any act that 'removes or reduces' rights enjoyment, provide a basis for such necessary consequentialist responsibilities.

Systemic Harm

A fourth rationale is the systemic element of corporate consequentialist harm. Using the rubric above, a morally agential instrumentalization of a power resource that causes foreseeable or discernible harm to individuals' human rights is legitimately within the scope of human rights impacts, as it is within the scope of 'deliberately retrogressive measures'. For those concerned with business impacts on socio-economic justice, particularly, consequentialism is a necessary lens. Neither law nor politics, nor, to a significant extent, the BHR movement is doing enough to challenge corporate power and the harm it causes. Placing business decisions beyond the remit of BHR is most damaging single problem of the movement. When Samuel Moyn writes that human rights have been 'powerless' to contest neoliberalism (2015), and are 'not enough' in an 'unequal world' (2018), this is the mentality to which he refers, a mentality that separates violations and economic decisions, and therefore occludes a wide range of harms. Society understands the harm that these problems cause, and therefore empowering society to contest this harm in the powerful languages of human rights may be the best option currently available.

More ambitious scholars often turn to positive responsibilities to create more meaningful business involvement in socio-economic justice. Wettstein (2015, 757) makes this argument based on two interrelated factors. Some harms are 'the result of complex systemic interactions between a wide variety of different agents. This... makes it difficult, if not impossible, to assign [causal] responsibility'. Wettstein therefore turns to positive responsibilities based on capabilities, arguing that business entities are legitimate bearers of moral responsibilities to fulfil rights (ibid.).

While Wettstein is right that many global issues are complex and caused by a range of actors, this is no reason to deny responsibility for the specific role in harming rights that certain firms may have. Consequentialism encourages a focus on tracing the range of harms that corporations may cause to rights. Pogge (2008, 13) justifies a relational form of global justice on the grounds that we are all connected through the global economy, that those actors with power over and within the global economy have used this power to harm the powerless over a

long time period, and that they therefore have moral responsibilities towards those harmed. 'Impacts' captures the business side of this harm. This is, at least, a requirement alongside positive responsibilities.

Some examples of 'complex systemic interactions' may include climate change, socio-economic rights, and global labour fragility. These are complex, yet they are also problems that some individual corporations exacerbate in demonstrable ways in the course of making immense profits. Just 100 corporations are responsible for 71% of global carbon dioxide emissions, for example (CDP, 2017, 8). These firms could argue, quite fairly, that their customers and states also bear responsibility, but this argument does not deny that they bear significant responsibility themselves. 'Impacts' allow for such arguments on the basis of climate change causing harm, and these firms causing climate change. These links are (almost) undeniable and therefore responsibility under the UNGPs is similarly undeniable.

Finally, it is important to highlight that it is not virtuous corporate benevolence that is being sought, but rather an end to harm. There is a tendency to posit greater responsibilities for causal harms than for harms one has the capability to remedy. This may be a facet of engrained liberalism, predicated on some variant of JS Mill's maxim 'The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others' (Mill, 1859, 22). Linklater uses the example of being approached by two beggars, one of whom you have previously harmed, and what appears to be an innate predilection to feel extra responsibility for the causal role you have played in this person's misery (Linklater, 2011, 78). Within current ethical norms, contesting harm is more normatively valid, and, if understood holistically, a deeply ambitious project of its own. Understanding the links between corporate actions and harm to human rights and encouraging affected communities to put a wider range of harms into the 'impacts' framework represents a fruitful project in engendering greater business responsibility for human rights.

Conclusion

I have made two arguments in this paper. The first is descriptive: 'human right impacts' under the UNGPs adopts a consequentialist framing. The second is normative: consequentialism is a necessary lens on business responsibility toward human rights. That businesses should avoid actions which remove or reduce the ability of individuals to enjoy their human rights offers an expansive framework in which we can consider the consequences of corporate activity from a human rights standpoint. This is a useful formulation to tackle the harmful repercussions of global business activity, especially as corporate scale, scope and power continues to develop. The global protection of human rights requires a form of business responsibility that encompasses the macro-impacts of business decisions. The UNGPs open space to begin this project, and this aspect should be reified and centralized.

³ E.g. 'Without ETOs [extraterritorial obligations], human rights cannot assume their proper role as the legal bases for regulating globalization and ensuring universal protection of all people and groups' (MPs, 2013, 3)

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