

Any Act, Any Harm, To Anyone: The Transformative Potential of “Human Rights Impacts” Under the UN Guiding Principles on Business and Human Rights

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Abstract

The concept of ‘adverse human rights impacts’ introduced by the UN Guiding Principles on Business and Human Rights is frequently used in institutional, activist and scholarly discourse. However, the term is under-explored and usually equated with ‘human rights violation’, occluding its transformative potential. This article demonstrates its expansiveness and rationale: ‘impacts’ cover any business act which removes or reduces an individual’s enjoyment of human rights. The formula is designed to capture business acts that are not paradigmatically understood as human rights violations but that nonetheless cause harmful outcomes. This can encompass, inter alia, acts which reduce market access to essential goods, harm caused by business-related tax abuse, and business contributions to climate change. The extra-legal concept provides an authoritative argumentative framework through which social understandings of business-related harm can evolve and can underlie a transformative shift in the business-society relationship.

Keywords: UN Guiding Principles on Business and Human Rights; Adverse Human Rights Impacts; International Covenant on Economic, Social and Cultural Rights; Business and Human Rights; Global Justice.

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1. Introduction

The UN Guiding Principles on Business and Human Rights (UNGPs) were endorsed by the UN Human Rights Council in 2011.¹ They implement the ‘Protect, Respect, Remedy’ Framework designed by John Ruggie in 2008, under which states have a duty to protect human rights, corporations have a responsibility to respect human rights, and both parties have differentiated responsibilities to provide access to a remedy in case of breach.² They have since been incorporated into various international and domestic instruments and are described as having ‘definitively changed the lingua franca’ of business and human rights (BHR).³ The UNGPs introduce the concept of ‘human rights impacts’ in Principle 13, which Ruggie describes as ‘*the* central Guiding Principle regarding the corporate responsibility to respect human rights’.⁴ Businesses are responsible for those adverse impacts they cause, contribute to, or are ‘directly linked to... by their business relationships’.⁵ Firms should also proactively investigate their own impacts through a process of human rights due diligence (HRDD).⁶

This article investigates the definition and scope of ‘human rights impacts’. As McCorquodale and others argue, ‘impacts’ have been understood as synonymous with violations, in practice largely limiting the scope to legal and regulatory infractions.⁷ This is a narrow and *prima facie* incorrect interpretation of the term that negates its transformative potential. The Office of the High Commissioner for Human Rights (OHCHR) guidance on the corporate responsibility to respect human rights defines the term as follows: ‘[a]n “adverse human rights impact” occurs when an action removes or reduces the ability of an individual to

¹ Office of the High Commissioner of Human Rights (OHCHR), ‘Guiding Principles on Business and Human Rights’ (2011) HR/PUB/11/04.

² Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, ‘Protect, Respect and Remedy: A Framework for Business and Human Rights’ (2008) A/HRC/8/5.

³ Surya Deva, ‘Business and Human Rights: Time to Move Beyond the Beginning’ in Cesar Rodriguez Garavito (eds), *Business and Human Rights* (CUP 2017) 62.

⁴ John Ruggie, ‘Comments on Thun Group of Banks: Discussion Paper on the Implications of UN Guiding Principles 13 & 17 in a Corporate and Investment Banking Context’ (2017) <https://www.ihrb.org/uploads/submissions/John_Ruggie_Comments_Thun_Banks_Feb_2017.pdf> accessed 21 June 2019.

⁵ ‘Guiding Principles’ (n 1) Principle 13 (a) and (b).

⁶ *ibid* Principle 17.

⁷ Robert McCorquodale and others, ‘Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises’ (2017) 2 *Business and Human Rights Journal* 195, 198.

enjoy his or her human rights.⁸ To summarize, I argue that ‘impacts’ expands well beyond the scope of legal infractions to capture a much wider range of harms. Most importantly, it captures the harmful outcomes of non-violative, or legally-permitted, acts. Any business ‘act’ that impacts any ‘individual’ is covered insofar as the act causes the outcome of a ‘removal or reduction’ in rights enjoyment. The notion of ‘reducing’ rights enjoyment is particularly important for socio-economic rights, where corporate acts may quantitatively reduce access to a right through legal and ostensibly legitimate business practices.

One such example is provided by the UN Special Rapporteur (UNSR) on the right to housing.⁹ She reported in 2017 on the extensive harm caused by corporations through ‘the financialization of housing’, wherein housing is treated as a commodity and local communities are left at the whims of speculators and corporate landlords.¹⁰ A corporation investing in housing is not, by most definitions of the term, violating the human rights of individuals in that community. But, where they are furthering extreme price inflation, as occurs in Hong Kong and London,¹¹ and targeting lower-income individuals, as the investment company Blackstone is specifically accused of doing,¹² they would appear to meet the definition of an adverse impact in that they are ‘reducing’ the ability of those individuals to enjoy the right to housing. In legal terms, they are retrogressing the ‘affordability’ criterion of the right to housing.¹³ There is an evident trend towards using the ‘impacts’ framework to capture a wider range of business harms,

⁸ OHCHR, ‘The Corporate Responsibility to Respect Human Rights - An Interpretative Guide’ (2012) HR/PUB/12/02 5.

⁹ UN Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, ‘The Financialization of Housing’ (2017) A/HRC/34/51.

¹⁰ *ibid* [27].

¹¹ *ibid* [26].

¹² Mandates of the Working Group on the issue of human rights and transnational corporations and other business enterprises and the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, ‘Letter to the Blackstone Group’ (2019) OL OTH 17/2019 <https://www.ohchr.org/Documents/Issues/Housing/Financialization/OL_OTH_17_2019.pdf> accessed 21 June 2019.

¹³ Committee on Economic, Social and Cultural Rights (CESCR), ‘General Comment No. 4: The Right to Adequate Housing’ (1991) E/C.12/1992/23 [8(e)].

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including housing¹⁴ as well as tax avoidance¹⁵ and climate change.¹⁶ These arguments have however not fully elaborated the scope of ‘impacts’, and are vulnerable therefore to the claim that they are overreaching.¹⁷ The aim of this article is therefore to elaborate the scope of ‘impacts’, and thereby to solidify these arguments.

‘Impacts’ should be read in light of Ruggie’s argument that ‘the business and human rights debate needs to expand beyond establishing individual corporate liability for wrongdoing [because] an individual liability model alone cannot fix the larger imbalances in the system of global governance.’¹⁸ The understanding of ‘impacts’ elaborated herein carries two major benefits. First, ‘impacts’ offers an expansive moral norm: corporations should not remove or reduce any individual’s rights by any means. The second benefit relates to the enforcement technique proffered in the UNGPs. Numerous corporate acts may ‘reduce’ some individuals’ rights enjoyment, including downsizing and increasing prices of essential goods. Not all such acts should be absolutely prohibited - ‘impacts’ as a hard legal standard would be unworkable. However, the UNGPs are grounded in ‘social norms’.¹⁹ As such, ‘impacts’ provides an authoritative argumentative framework through which social understandings of what constitutes harmful business impacts upon human rights can evolve.²⁰ Individuals in Hong Kong can turn the framework to their housing problems; those most suffering under climate change can use it to contest the adverse impacts suffered therein; as can those in states where human rights protection is weakened by tax abuse. As such, ‘impacts’ can help

¹⁴ UN Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, ‘The Financialization of Housing’ (n 9) [62]-[66].

¹⁵ Shane Darcy, ‘The Elephant in the Room: Corporate Tax Avoidance & Business and Human Rights’ (2016) 2(1) *Business and Human Rights Journal* 23.

¹⁶ Greenpeace Southeast Asia and Philippine Rural Reconstruction Movement, ‘Petition To the Commission on Human Rights of the Philippines Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change’ (2015) cited in Sara Seck, ‘Revisiting Transnational Corporations and Extractive Industries: Climate Justice, Feminism, and State Sovereignty’ (2016) 26 *Transnational Law & Contemporary Problems* 383.

¹⁷ David Scheffer, ‘The Ethical Imperative of Curbing Corporate Tax Avoidance’ (2013) 27(4) *Ethics & International Affairs* 361, 365.

¹⁸ John Ruggie, ‘Business and Human Rights: The Evolving International Agenda’ (2007) 101(4) *American Journal of International Law* 819, 839.

¹⁹ John Ruggie, ‘The Social Construction of the UN Guiding Principles on Business & Human Rights’ (2017) HKS Working Paper No. RWP17-030, 15 <<https://ssrn.com/abstract=2984901>>.

²⁰ John Ruggie, ‘Taking Embedded Liberalism Global: The Corporate Connection’ in John Ruggie (ed), *Embedding Global Markets: An Enduring Challenge* (Routledge 2008) 232, 232.

marshal arguments to contest business practices based on the ensuing human rights harm, while the framework can reflexively assist BHR in moving beyond what Wettstein terms ‘human rights minimalism’.²¹

The article proceeds as follows: I first describe the importance of ‘strict responsibility’ for human rights impacts, and then discuss contemporary understandings, showing the prevalence of the idea that ‘impacts’ correlate to ‘violations’. I return to Ruggie’s background to better understand his priorities, and then deconstruct ‘impacts’ to demonstrate its wide scope. I discuss the role of impacts as an argumentative framework, and finally highlight the transformative potential of the term in capturing structural harm, power, and socio-economic justice, before concluding.

2. Strict Responsibility for Human Rights Impacts

To reiterate, ‘[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.’²² Businesses have a responsibility to prevent, mitigate and remedy those impacts which they cause or to which they contribute and they have a responsibility to use their leverage over third parties where they are ‘linked to’ an impact by the business relationship.²³ A 2017 debate in *The European Journal of International Law* clarified that corporations have ‘strict responsibility’, akin to strict liability under tort law, for at least those impacts which they cause or to which they contribute.²⁴ The debate revolved around what Bonnitcha and McCorquodale argue are two different conceptions of HRDD evident in the UNGPs. The first is as a process or method by which to understand and manage business risks, the second is as a standard of conduct, with the latter potentially exculpating the firm from responsibility. Under the process approach, HRDD is a tool designed to help businesses understand their risks, but correct application of HRDD does not provide a defence. Rather, the firm is ‘strictly responsible’ for all harm caused regardless of their HRDD practices. The

²¹ Florian Wettstein, ‘CSR and the Debate on Business and Human Rights: Bridging the Great Divide’ (2012) 22(4) *Business Ethics Quarterly* 739, 741-45. It must be noted that Wettstein alleges that the UNGPs are part of this minimalism, in part because reliance on ‘respect’ ignores the ‘protect’ and ‘fulfil’ elements of human rights.

²² OHCHR, ‘Responsibility to Respect’ (n 8) 5.

²³ Guiding Principles (n 1) Principle 13(a) and (b).

²⁴ Jonathan Bonnitcha 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, 912.

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standard of conduct approach has some equivalence to negligence under tort law, where if the firm can demonstrate that it has met the required standard of conduct for HRDD, it is not responsible for the harm caused on the grounds that it took adequate safeguarding measures. HRDD in this reading becomes a proxy for a meeting a common law duty of care.²⁵

The authors argue that this latter standard applies only to human rights impacts which are ‘linked to’ the firm, i.e. to which the company in question is not directly contributing.²⁶ The conceptualization of HRDD as a risk management process applies to causal and contributory impacts. This does not function as a defence and therefore ‘[b]usinesses have a strict - or no fault - responsibility for their own adverse human rights impacts.’²⁷ This therefore ‘establishes a clear line of accountability for remediation to victims under Guiding Principle 22’.²⁸ Ruggie and Sherman, in reply, argue that this ‘falls short’ of the UNGPs.²⁹ Responsibility is contingent solely on the impact itself, suggesting that strict responsibility applies in all situations, with the distinction being that for linked harms leverage over the other actor should be used, rather than incurring direct remedial responsibility.³⁰

This means that for both Ruggie and Sherman, and Bonnitcha and McCorquodale, firms at least hold a no fault responsibility for any adverse impact which they cause or to which they contribute. Ruggie and Sherman suggest it extends to impacts which are ‘linked to’ the firm as well.³¹ Bonnitcha and McCorquodale argue that this is an ethically correct standard 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.’³² Bonnitcha and McCorquodale consider this statement only as an incentive to undertake meaningful HRDD, as per the scope of their argument.³³ But perhaps more interesting is what this means for the term ‘impacts’.

The notion of strict, no fault responsibility for adverse human rights impacts opens up the scope of impacts in ways which are particularly

²⁵ *ibid* 903.

²⁶ *ibid* 919.

²⁷ *ibid* 912.

²⁸ *ibid* 918.

²⁹ John Ruggie and John Sherman, ‘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, 922

³⁰ *ibid* 926-8; Jonathan Bonnitcha and Robert McCorquodale, ‘The Concept of “Due Diligence” in the UN Guiding Principles on Business and Human Rights: A Rejoinder to John Ruggie and John Sherman’ (2017) 28 *European Journal of International Law* 929, ft 9.

³¹ Ruggie and Sherman, ‘Reply’ (n 29) 926.

³² Bonnitcha and McCorquodale, ‘Concept’ (n 24) 916.

³³ *ibid*.

important to human rights protection in the global economy. Corporate acts frequently ‘remove or reduce’ an individuals’ human rights in ways that cannot be captured by a system predicated on legal liability, in which negligence or ‘moral culpability’ must be proven. There is no necessary moral fault in an investment that increases rent prices and thereby endangers individuals’ right to housing, but it is an act that ‘reduces human rights enjoyment’. It is therefore an impact for which the company bears strict responsibility.³⁴ This appears to be coherent with both sets of authors’ positions. It is, however, a long way from how impacts are popularly understood today. I review this understanding next.

3. The Contemporary Understanding: Impacts as Violations

In this section I make two arguments: first, that the scope of ‘impacts’ is rarely explicated, particularly at intergovernmental and state level. Second, that it is generally assumed to be coterminous with ‘violations’, defined as legal or quasi-legal infractions of relational human rights standards. The term violation is itself frequently undefined, or inadequately defined, in the literature. I use the term ‘violation’ in the sense propounded by several BHR scholars, cited below, which depicts violation to mean a specific legal infraction, generally producing specified claimant victims that is, or should be, justiciable.³⁵ This is narrower than the term violation as applied to state obligations,³⁶ and much narrower than the scope of ‘impacts’. A few comparisons may help fully explicate the distinction. Labour rights violations such as non-payment of wages meet the criteria in that there is a specific legal breach producing a definitive victim, as would the unlawful destruction of individuals’ homes or the poisoning of individuals’ farmland. Acts by investors which increase house prices are legally permitted and, as they affect market prices, do not generally establish legal claims even where they ‘reduce rights enjoyment’.

³⁴ This specific example is used in the report of the UN Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, ‘Financialization’ (n 9) [5], [25]-[27], [37].

³⁵ See Kenneth Roth, ‘Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organisation’ (2004) 26 *Human Rights Quarterly* 63, 73; Audrey Chapman, ‘A Violations Approach for Monitoring the International Covenant on Economic, Social and Cultural Rights’ (1996) 18 *Human Rights Quarterly* 23, 38.

³⁶ Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Hart 2009) 93-95.

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Deva provides the most complete textual analysis of ‘impacts’.³⁷ In essence, he describes the term as I will, drawing attention to the ‘wider scope’ as compared to ‘violation’.³⁸ Impacts, Deva argues, cover even harms that breach no legally framed human rights rules.³⁹ Deva is however critical of the wider scope, arguing that it fosters indeterminacy and a relative lack of normative force.⁴⁰ He goes on to argue that the term ‘impact’ ‘shifts the focus from the breach of obligations implicit in the notion of ‘violation’ to companies merely affecting adversely the ability of a person to enjoy human rights’,⁴¹ This ‘devalue[s]’ human rights’.⁴² Deva defines violation as the ‘causation of legal injury to [an identified set of people] in terms of a breach of human rights’,⁴³ and sees the prevention and remedy of such harm as at least the primary goal of BHR. In his analysis therefore, ‘impacts’ cover an expansive range of acts, but this is problematic because it moves away from the harder criteria of human rights violations.

These arguments may be one reason why ‘impacts’ have been taken as largely coterminous with ‘violation’ today, used here in the sense defined by Deva, and similarly by Ramasastry as the breaching of ‘legal or quasi-legal obligations’.⁴⁴ McCorquodale et al. claim that ‘[t]he UNGPs do seem to establish that the ‘human rights impacts’ of companies should be interpreted in the same way as ‘human rights violations’’.⁴⁵ However, the basis for this deduction is unclear. By way of explanation they write:

*While ‘human rights impacts’ is not defined in the GPs, it does seem to be equated there with human rights violations under international law. The Commentary on Principle 12 makes clear that ‘business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights’, with the examples given of these rights being the major global human rights treaties and instruments.*⁴⁶

³⁷ Surya Deva, ‘Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles’ in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (CUP 2013) 78, 99.

³⁸ *ibid* 98.

³⁹ *ibid*.

⁴⁰ *ibid*.

⁴¹ *ibid* 97.

⁴² *ibid*.

⁴³ *ibid* 98.

⁴⁴ Anita Ramasastry, ‘Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability’ (2015) 14 *Journal of Human Rights* 237, 240.

⁴⁵ McCorquodale and others, ‘Due Diligence’ (n 7) 199.

⁴⁶ *ibid* ft 18.

There is no positive basis to assume that the UNGPs equate impacts with violations under international law. First, while the UNGPs document does not define ‘impacts’, the OHCHR’s official guidance document, drafted ‘in full collaboration’ with John Ruggie and designed to ‘provide additional background explanation to the Guiding Principles to support a full understanding of their meaning and intent’ does offer the definition supplied above.⁴⁷ The authors do not state how they define ‘violation’, but if we accept the ‘causation of legal injury’ definition then ‘impacts’ seems significantly broader than ‘violations’. Very few experts would be comfortable with a definition of human rights violations as any act which ‘removes or reduces the ability of an individual to enjoy his or her human rights’. Moreover, Ruggie himself is staunchly critical of the legalistic approach and has explicated that human rights law provides ‘the list’ of rights to be respected, but how they should be respected is unique to the UNGPs, with ‘impacts’ forming a central feature of that uniqueness.⁴⁸

However, it is true that in practice ‘impacts’ have been equated with ‘violations’, as the authors show through an empirical survey of the business understanding of HRDD. Legal and regulatory compliance and reputational risk are the main factors driving the process.⁴⁹ Legal and regulatory compliance suggest an understanding of impacts as coterminous with violations of at least the *lex feranda* as may be normatively enforced by voluntary regulation. This approach is popular among corporations because it both restricts the scope of their human rights responsibility and makes it relatively simple to manage.⁵⁰ It also leads to what many have condemned as a ‘check-box’ approach to human rights responsibilities.⁵¹ One typical example is the use of factory auditing to check for violations of specific human and labour rights abuses in supply chains.⁵² Reputational risk is potentially broader than regulatory compliance, though the authors offer no examples of what is considered a reputational risk. This fuzzier concept requires social norms promotive of expansive understandings of

⁴⁷ OHCHR, ‘Responsibility to Respect’ (n 8) 2-4.

⁴⁸ John Ruggie, *Just Business: Multinational Corporations and Human Rights* (WW Norton & Company 2013) 96.

⁴⁹ McCorquodale and others, ‘Due Diligence’ (n 7) 201.

⁵⁰ Christian Scheper, ‘From Naming and Shaming to Knowing and Showing: Human Rights and the Power of Corporate Practice’ (2015) 19(6) *The International Journal of Human Rights* 737; Ciarán O’Kelly, ‘Human Rights and the Grammar of Corporate Social Responsibility’ (2019) *Social and Legal Studies* 1.

⁵¹ Richard Locke, Matthew Amengual, and Akshay Mangla, ‘Virtue Out of Necessity? Compliance, Commitment, and the Improvement of Labor Conditions in Global Supply Chains’ (2009) 37(3) *Politics and Society* 319, 327-29.

⁵² Justine Nolan, ‘Business and Human Rights: The Challenge of Putting Principles into Practice and Regulating Global Supply Chains’ (2017) 42(1) *Alternative Law Journal* 42, 44.

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‘impacts’, and this has been lacking in the violations-centric discourse thus far.

A paradigmatic case of assuming impacts mean legal violations is a 2016 volume, *Corporate Responsibility for Human Rights Impacts: New Expectations and Paradigms*.⁵³ Many distinguished scholars contribute chapters, but primarily from the perspective of legal or regulatory compliance. Despite the term ‘human rights impacts’ being derived from the UNGPs, ‘impacts’ are taken to be legal infractions. In the words of one reviewer, ‘[t]he book focuses on the question of legal accountability of corporations for human rights violations.’⁵⁴ There is therefore a radical problem with the book, in that many chapters assume that impacts and violations are one and same, and therefore treats the UNGPs as a weak interpretation of the law.⁵⁵ The wording of impacts goes unconsidered, as does the potentially more expansive scope.

There are numerous areas in which one could seek understandings of impacts. I will focus on National Action Plans (NAPs), documents drafted by states detailing their implementation of the UNGPs. The most obvious commonality among practical guidance documents is a lack of engagement with the meaning of the term ‘impacts’. The OHCHR guidance on NAPs provides no explanation of the term, despite defining NAPs as: ‘An evolving policy strategy developed by a State to protect against adverse human rights impacts by business enterprises.’⁵⁶ The guidance explicates where potential impacts should be investigated, such as trade agreements, extraterritorial impacts, and investment agreements,⁵⁷ but fails to define what constitutes an impact. State NAPs then follow suit, failing to define the term but implicitly viewing impacts as coterminous with violations. The updated UK NAP states that firms should ‘comply with all applicable laws and respect internationally recognized human rights [and] treat as a legal

⁵³ Lara Blecher, Nancy Kaymar Stafford, and Gretchen C. Bellamy (eds), *Corporate Responsibility for Human Rights Impacts: New Expectations and Paradigms* (ABA Book Publishing 2015).

⁵⁴ Judith Schrempf-Stirling, ‘Review of ‘Corporate Responsibility for Human Rights Impacts: New Expectations and Paradigms’ in Lara Blecher, Nancy Kaymar Stafford, and Gretchen C. Bellamy (eds), *Corporate Responsibility for Human Rights Impacts: New Expectations and Paradigms* (ABA Book Publishing 2015)’ (2016) 26 *Business Ethics Quarterly* 265, 265.

⁵⁵ Penelope Simons, ‘International Law’s Invisible Hand and the Future Corporate Accountability for Violations of Human Rights’ in Lara Blecher, Nancy Kaymar Stafford, and Gretchen C. Bellamy (eds), *Corporate Responsibility for Human Rights Impacts: New Expectations and Paradigms* (ABA Book Publishing 2015).

⁵⁶ UN Working Group on Business and Human Rights, ‘Guidance on National Action Plans on Business and Human Rights’ (2016)
<https://www.ohchr.org/Documents/Issues/Business/UNWG_NAPGuidance.pdf>
accessed 24 June 2019.

⁵⁷ *ibid* 2, 26.

compliance issue the risk of causing or contributing to gross human rights abuses wherever they operate'.⁵⁸ The terminology is that of legal compliance, 'gross abuses', or else vague. There is no discussion of UK-based business impacts on the right to food or health, of zero-hour contracts, of business links to rising use of food banks or domestic homelessness, and no discussion of the impacts of tax avoidance, despite British banks being heavily implicated in its global facilitation.⁵⁹ For the UK government, 'impacts' mean legally-defined or 'gross' human rights violations, and this has not been challenged.

This same narrow scope is being drafted into national laws. The French Duty of Vigilance Law, based on HRDD, states that all large companies must implement a vigilance plan. 'The plan shall include the reasonable vigilance measures to allow for...the prevention of severe violations of human rights and fundamental freedoms...'⁶⁰ The technique of HRDD is transposed into the law, but the expansiveness of impacts is specifically denied by the change in terminology. Differentiated scopes at binding and non-binding levels are reasonable, but a full understanding of the breadth of 'impacts' would encourage critique and evolving incremental expansions of what the French law could include.

Finally, some posit an expansive understanding in seeking to capture specific harms as human rights impacts, of which climate change and, as described here, tax abuse, are the two most common. Tax abuse, the term adopted by Shane Darcy which encompasses both tax avoidance and tax evasion, is a major contemporary issue.⁶¹ The EU loses €60 billion a year;⁶² the Democratic Republic of Congo lost double its combined annual health and education budget from a case of transfer mispricing.⁶³ Asongu discusses Glencore's transfer mispricing in Zambia, stating that in 2008: 'if Zambia had received for its copper exports the same price that Switzerland

⁵⁸ HM UK Government, 'Good Business Implementing the UN Guiding Principles on Business and Human Rights Updated May 2016' (2016) Cm 9255 14.

⁵⁹ John Christensen, 'Africa's Bane: Tax Havens, Capital Flight and the Corruption Interface' (2009) Elcano Working Paper 1, 17.

⁶⁰ Sandra Cossart, Jérôme Chaplier and Tiphaine Beau De Lomenie, 'The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All' (2017) 2 *Business and Human Rights Journal* 317, 320.

⁶¹ Darcy (n 15) 2.

⁶² Gabriel Zucman, 'The desperate inequality behind global tax dodging' *The Guardian* (London, 8 November 2017)

<https://www.theguardian.com/commentisfree/2017/nov/08/tax-havens-dodging-theft-multinationals-avoiding-tax?CMP=Share_AndroidApp_Gmail> accessed 23 July 2018.

⁶³ Isabel Mosselmans, 'Tax Evasion: The Main Cause of Global Poverty' (*LSE Blogs*, 7 March 2014) <<http://blogs.lse.ac.uk/africaatlse/2014/03/07/tax-evasion-the-main-cause-of-global-poverty/>> accessed 23 July 2018.

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declared for its copper exports... Zambia’s GDP would have nearly doubled.⁶⁴

Because tax abuse is a major business-related issue, arguments have been made that it should be considered a human rights impact. UNSR on extreme poverty and human rights, Magdalena Sepúlveda Carmona, argues that tax avoiders would be in breach of the responsibility to respect, ‘insofar as they have a negative human rights impact’.⁶⁵ For Darcy, ‘[t]here is little doubt that negative human rights impacts can be linked to the abusive tax activities of accountancy, tax and law firms, banking and other financial services providers, as well as multinational and other companies that have knowingly engaged in tax avoidance.’⁶⁶ With such arguments, the potential of the UNGPs ‘is beginning to be harnessed’.⁶⁷ Juan Pablo Bohoslavsky, the UN Independent Expert on the effects of foreign debt and other related international financial obligations of states on the full enjoyment of all human rights, particularly economic, social and cultural rights, states that:

*Business enterprises that contribute through transfer mispricing, tax evasion or corruption to significant illicit financial outflows cause adverse human rights impacts by undermining the abilities of States to progressively achieve the full realization of economic, social and cultural rights.*⁶⁸

Tax abuse uncovers the gap between the ‘violation’ and ‘impacts’ paradigm. Tax avoidance is like ‘taking food off the table for the poor’,⁶⁹ yet it is not widely-understood as a prima facie human rights violation.⁷⁰ Indeed, the act reduces state budgets and thereby potentially undermines state protection of rights, but technically it is the incapacitated state that may be at risk of violating rights through non-provision of essential services. This is the problem of the violations paradigm in contesting

⁶⁴ Simplice Asongu, ‘Rational Asymmetric Development: Transfer Mispricing and Sub-Saharan Africa’s Extreme Poverty Tragedy’ (2015) African Governance and Development Institute Working Paper 7, 17 <https://mpr.aub.uni-muenchen.de/71175/1/MPRA_paper_71175.pdf> accessed 27 June 2019.

⁶⁵ UN Special Rapporteur on extreme poverty and human rights, ‘Fiscal and Tax Policy’ (2014) A/HRC/26/28 [7].

⁶⁶ Darcy (n 15) 23.

⁶⁷ *ibid* 29.

⁶⁸ Interim report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, ‘Illicit financial flows, human rights and the post-2015 development agenda’ (2015) A/HRC/28/60 [33]-[34].

⁶⁹ As quoted in Darcy (n 15) 11.

⁷⁰ CESCR, ‘General Comment No. 24: on state obligations under ICESCR in the context of business activities’ (2017) E/C.12/GC/24 [37].

global corporate economic activity and its potentially harmful impacts on rights. ‘Impacts’ overcomes this by encompassing all acts that ‘reduce’ rights enjoyment, including by contributing to that reduction. If a state claims that tax abuse has reduced its ability to ensure certain human rights provisions, this would constitute an authoritative argument that the act of tax abuse has contributed to reduced access to that right.⁷¹ This bypasses problems of establishing legal fault and finding claimant victims, while in so doing providing powerful human rights arguments against tax abuse.

The meaning of ‘impacts’ is contested, and expansive understandings exist, but the most common understanding, particularly at the institutional level, connects impacts to legal infractions. To build the more expansive argument, I first review how Ruggie perceives corporate responsibility, his underlying framework, and his priorities for the UNGPs.

4. *Reading Ruggie*

Ruggie has two major epistemic frameworks that informed the UNGPs. He believes in a post-Westphalian, polycentric world that is organized through the ‘global public domain’ comprised of states, businesses, activists and other important actors.⁷² This angle has been extensively discussed through the lens of polycentric governance.⁷³ His second belief is more normative. This is grounded in his concept of embedded liberalism and focuses on making markets and market actors work in the social interest. While polycentricity critiques reliance on hard law and state-based regulation, embedded liberalism can be used to critique legalistic human rights concerns. Reifying this latter aspect counters the view that the UNGPs are merely soft law;⁷⁴ rather, they are soft to allow greater ambition than could legalistically-framed principles.

⁷¹ This example is similar to the contributory impact of a bank loan potentially ‘enabling’ a human rights violation by the recipient. Tax abuse ‘disables’ the potential for states to protect rights, see Ruggie, ‘Thun’ (n 4).

⁷² John Ruggie, ‘Reconstituting the Global Public Domain – Issues, Actors, and Practices’ (2004) 10 *European Journal of International Relations* 499.

⁷³ Larry Cata Backer, ‘On the Evolution of The United Nations’ “Protect-Respect-Remedy” Project: The State, the Corporation and Human Rights in a Global Governance Context’ (2011) 9 *Santa Clara Journal of International Law* 37, 126; John Ruggie, ‘Global Governance and New Governance Theory: Lessons from Business and Human Rights’ (2014) 20 *Global Governance* 5; Radu Mares, ‘Decentering Human Rights from the International Order of States: The Alignment and Interaction of Transnational Policy Channels’ (2016) 23(1) *Indiana Journal of Global Legal Studies* 171-199.

⁷⁴ Justine Nolan, ‘The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law?’ in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (CUP 2013) 138.

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Many scholars have analysed Ruggie’s interim reports to the UN during the UNGPs drafting process. However, these reports are technical and descriptive in nature and give little away regarding the philosophy underlying them. For example, in the 2008 report Ruggie ‘focused on identifying the distinctive responsibilities of companies in relation to human rights’,⁷⁵ but Ruggie did not provide a conceptual framework to explain how these choices were made. Ruggie admits as much in noting his own ‘failure to provide a robust moral theory’.⁷⁶ His ‘principled pragmatism’ forbade such an option, since UN Human Rights Council approval was necessary.⁷⁷ He therefore focused on creating a document that was ‘pushing the envelope, but not out of reach’.⁷⁸ This is part of what Mares has termed Ruggie’s ‘strategic ambiguity’,⁷⁹ in which the UNGPs state few concrete implications for business but rather offer a framework encouraging norm-evolution. Although it is not my intention to surmise Ruggie’s personal, unstated, concerns, it is worth addressing his own academic background for a hint as to his normative priorities.

Ruggie’s most telling contribution to academia is the concept of embedded liberalism.⁸⁰ This states that in the period roughly from the end of WWII until the neoliberal era emerged around the 1980s, the world trade system was characterized by a ‘grand bargain’ between trade liberalization and domestic social policy.⁸¹ Serious diversions from free trade were permitted under the General Agreement on Tariffs and Trade (GATT), which allowed domestic economies to be managed in the social interest.⁸² In Ruggie’s words ‘economic liberalization was embedded in social community.’⁸³ Elsewhere he describes this as a ‘domestic social compact. Governments asked their publics to embrace the change and dislocation that comes with liberalization in return for help in containing

⁷⁵ Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises ‘A Framework for Business and Human Right’ (n 2) [53].

⁷⁶ Ruggie, *Just Business* (n 48) 107.

⁷⁷ *ibid.*

⁷⁸ *ibid.*

⁷⁹ Radu Mares, ‘“Respect” Human Rights: Concept and Convergence’ in Robert Bird and others (eds), *Law, Business and Human Rights: Bridging the Gap* (Edward Elgar 2014) 23-4.

⁸⁰ John Ruggie, ‘International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order’ (1982) 36 *International Organization* 379.

⁸¹ John Ruggie, ‘Taking Embedded Liberalism Global: The Corporate Connection’ in David Held and Mathias Koenig-Archibugi (eds), *Taming Globalization: Frontiers of Governance* (Wiley 2008) 232.

⁸² John Ruggie, ‘At Home Abroad, Abroad at Home: International Liberalisation and Domestic Stability in the New World Economy’ (1995) 24(3) *Millennium* 507.

⁸³ *ibid.*

and socializing the adjustment costs.⁸⁴ The neoliberal era ruptured this, characterized most clearly by the redefinition of a trade barrier to include ‘behind the border’ barriers such as subsidies and environmental policies.⁸⁵ This change allowed experts comprising the free trade regime to critique almost every state policy on the grounds of it disrupting trade. The tuna/dolphin cases between the US and Mexico, each predicated on the legality under World Trade Organization rules of the US prescribing that all tuna sold in the US must be ‘dolphin-safe’, is one example of this tendency.⁸⁶ This instigated a much more radical, interventionist, and less socially-protective free trade system.⁸⁷

Ruggie’s academic work is frequently underpinned by his belief that globalization has broken down this domestic social compact, and that there is a need to globalize a grand bargain between market actors and society.⁸⁸ ‘What is needed...is a new embedded liberalism compromise, a new formula for combining the twin desires of international and domestic stability’,⁸⁹ he wrote in 1999. In 2001, he was instrumental in developing the UN Global Compact, a voluntary initiative that corporations could join pledging to obey nine, later ten, key principles of responsible business.⁹⁰ In 2008, he stated that ‘[e]mbedding the global market within shared social values and institutional practices represents a task of historic magnitude’,⁹¹ and elaborated concerns about inequality, the imbalance in global rulemaking powers, and growing ‘economic instability and social dislocation’.⁹² 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.’⁹³ A 2017 paper dealt with variants of

⁸⁴ John Ruggie, ‘Trade, Protectionism and the Future of Welfare Capitalism’ (1994) 48(1) *Journal of International Affairs* 1, 4-5.

⁸⁵ Andrew Lang, ‘Legal Regimes and Professional Knowledges: The Internal Politics of Regime Definition’ in Margaret Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (CUP 2012) 113, 117.

⁸⁶ Jeffrey Dunoff, ‘Institutional Misfits: The GATT, the ICJ and Trade-Environment Disputes’ (1994) 15 *Michigan Journal of International Law* 1043.

⁸⁷ Andrew Lang, *World Trade Law After Neoliberalism: Reimagining the Global Economic Order* (OUP 2011) 238.

⁸⁸ Rawi Abdelal and John Ruggie, ‘The Principles of Embedded Liberalism: Social Legitimacy and Global Capitalism’ (2009) *New Perspectives* 151.

⁸⁹ John Ruggie, ‘Globalization and the Embedded Liberalism Compromise: The End of an Era?’ (1998) *Internationale Wirtschaft, nationale Demokratie Herausforderungen für die Demokratietheorie* 79, 97.

⁹⁰ Georg Kell and John Ruggie, ‘Global Markets and Social Legitimacy: The Case of the Global Compact’ (1999) 8(3) *Transnational Corporations* 101.

⁹¹ Ruggie, ‘Corporate Connection’ (n 81) 234.

⁹² *ibid* 236.

⁹³ John Ruggie, ‘Keynote Speech at the 2016 UN Forum on Business and Human Rights’ (2016)

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corporate power over society and claimed that neither BHR nor Corporate Social Responsibility (CSR) discourse truly grasps the depth of this power.⁹⁴ Ruggie’s view of human rights is also more holistic than legalistic. Following Sen, he argues that human rights are not just rules, but ‘mediators of social relations’.⁹⁵ They emerge from society and understandings of their scope and content evolve through society.⁹⁶ Human rights can be expressed as laws, but should also provide a vehicle for social progress through ‘public discussion’.⁹⁷ For Sen, human rights should evolve with society and can offer far more than just legal guarantees against oppression.⁹⁸ This element is particularly important for the idea that ‘impacts’ provide an argumentative framework through which claims can be made for types of harm not often considered within the scope of business responsibility, as described in Section 6.

Given Ruggie’s long-held belief in the virtues of embedded liberalism, and his extensive writings on the need for a comprehensive social compact between markets and societies,⁹⁹ it seems plausible that such ideas would be evident in the UNGPs.¹⁰⁰ Such a compact must go beyond preventing human rights violations (as legal infractions), because such a depiction only covers a small slither of this bargain, particularly in the socio-economic sphere. One cannot argue that an adequate social compact is in place if corporations are permitted to practice tax abuse, retrogress the right to housing, distort global food markets and damage the environment.

Ruggie drew on Iris Marion Young to build such a model.¹⁰¹ Young describes her model as a supplement to the failures of theories of justice grounded in individual (legalistic) liability to address structural forms of

<<http://www.ohchr.org/Documents/Issues/Business/ForumSession5/Statements/JohnRuggie.pdf>> accessed 23 July 2018.

⁹⁴ John Ruggie, ‘Multinationals as Global Institution: Power, Authority and Relative Autonomy’ (2018) 12(3) *Regulations and Governance* 317.

⁹⁵ Ruggie, ‘Evolving International Agenda’ (n 18) 15.

⁹⁶ Amartya Sen, ‘Human Rights and the Limits of Law’ (2005) 27 *Cardozo Law Review* 2913.

⁹⁷ *ibid* 2925; Amartya Sen, ‘Elements of a Theory of Human Rights’ (2004) 32(4) *Philosophy & Public Affairs* 315.

⁹⁸ *ibid*.

⁹⁹ John Ruggie, ‘Reconstituting the Global Public Domain—Issues, Actors, and Practices’ (2004) 10(4) *European Journal of International Relations* 499.

¹⁰⁰ Glen Whelan, Jeremy Moon, and Marc Orlitzky, ‘Human Rights, Transnational Corporations and Embedded Liberalism: What Chance Consensus?’ (2009) 87(2) *Journal of Business Ethics* 367.

¹⁰¹ Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, ‘Corporate Responsibility Under International Law and Issues in Extraterritorial Regulation: Summary of Legal Workshops’ (2007) A/HRC/4/35/Add.2.

harm.¹⁰² Young builds expansive societal responsibilities for structuralized harms based on the argument that through global economic activity multiple groups contribute to, and can help prevent, injustice. She frames one argument around the responsibility felt by student consumers of sweatshop clothing.¹⁰³ Ruggie drew from Young's work that 'challenges arising from globalization are structural in character [and] cannot be resolved by an individual liability model of responsibility alone.'¹⁰⁴ The most paradigmatic definition states that: '[t]he "social connection model" of responsibility says that all agents who contribute by their actions to the structural processes that produce injustice have responsibilities to work to remedy these injustices.'¹⁰⁵ 'Impacts' is similarly comprehensive in stating that businesses have responsibility for any act that causes or contributes to a removal or reduction in an individuals' human rights enjoyment. As I show next, this allows arguments to be constructed around a far wider range of harmful business acts, and, properly understood, allows for a significant departure from the limits of individual liability, and towards Young's more expansive conception.

5. Re-Reading Impacts

'An "adverse human rights impact" occurs when an action removes or reduces the ability of an individual to enjoy his or her human rights.'¹⁰⁶ Firms have strict responsibility to prevent, mitigate and/or remediate all adverse impacts that they have caused or contributed to, at least, as well as responsibility to investigate potential impacts. Breaking this term down reveals its expansiveness.

Four areas will be highlighted: the meaning of 'an action'; of 'remove or reduce'; and of 'an individual'; as well as the role of 'potential impacts'. My reading of impacts is as follows: corporations should investigate whether *any of their acts*, whether in the boardroom or on the factory floor, *might potentially*, through *violation, retrogression or other means*, harm *any right of any individual, anywhere*.¹⁰⁷

¹⁰² Iris Marion Young, 'Responsibility and Global Justice: A Social Connection Model' (2006) 23 *Social Philosophy and Politics* 102, 103.

¹⁰³ Iris Marion Young, 'Responsibility and Global Labor Justice' (2004) 12(4) *The Journal of Political Philosophy* 365.

¹⁰⁴ Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 'Legal Workshops' (n 101) [34].

¹⁰⁵ Young, 'Social Connection' (n 102) 102-3.

¹⁰⁶ OHCHR, 'Responsibility to Respect' (n 8) 5.

¹⁰⁷ The 'any right' aspect I will address briefly as it is well understood. The UNGOs encompass the International Bill of Human Rights (the Universal Declaration of Human

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The term ‘an action’ relates to how corporations might harm rights. ‘An action’ by its plain-meaning, means that any act is covered, with the judgement criterion being the ‘removal or reduction’ of human rights enjoyment. This is far more inclusive than understandings incorporating only acts that breach ‘legal or quasi-legal rules’.¹⁰⁸ This has a prima facie link to tort law in that tort claims can in theory cover any action based on the harm caused, providing the other elements of tort law are also met. However, ‘impacts’ also goes far beyond the scope of tort law. Impacts requires neither that the act breached a legal rule nor that proximity or other tort principles be found, nor is it, like strict liability torts, restricted to a narrow scope of harms based on inherent danger and/or a high level of duty of care, as per product liability. ‘Impacts’ explicitly encompass *any act* that leads to *the outcome* of any ‘removal or reduction’ of rights’ enjoyment.

This wide, extra-legal scope is clear from some examples in the official guidance. The OHCHR lists one contributory impact as ‘[t]argeting high-sugar foods and drinks at children, with an impact on childhood obesity’.¹⁰⁹ This is neither a criminal nor tortious legal breach in any jurisdiction in the world, albeit regulations on advertising and product standards may exist. It is a human rights impact regardless of any regulations based solely on the outcome of increased child obesity. John Ruggie has more recently argued that bank lending can constitute a contributory human rights impact where that loan has ‘enabled’ the impact by the recipient.¹¹⁰ These examples teach a great deal about the scope of impacts, particularly when read alongside the notion of ‘strict responsibility’. The fundamental rule underlying ‘impacts’ is outcome-based.¹¹¹ Any act which causes or contributes to the outcome of a removal or reduction in an individual’s rights constitutes an adverse impact. This means that all acts by business enterprises are within the scope of impacts if they remove or reduce rights’ enjoyment. There is therefore no prima facie exclusion of investment

Rights; the International Covenant on Civil and Political Rights; and the International Covenant on Economic, Social and Cultural Rights), and the principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work. All other human rights treaties ‘may be relevant as additional standards’. The OHCHR guidance describes specific situations, such as armed conflict, when these additional standards become relevant, strongly implying that they form part of the responsibility to respect insofar as they are relevant to the specific business actor; OHCHR, ‘Responsibility to Respect’ (n 8) 11-2. As per Principle 12, the UN Guiding Principles cover all ‘internationally recognized human rights’.

¹⁰⁸ Ramasastry, ‘Gap’ (n 44) 240.

¹⁰⁹ OHCHR, ‘Responsibility to Respect’ (n 8) 17.

¹¹⁰ Ruggie, ‘Thun’ (n 4) 2.

¹¹¹ This element is further discussed in David Birchall, “The Consequentialism of the UN Guiding Principles on Business and Human Rights: Towards the Fulfilment of “Do No Harm” (2019) 24(1) Electronic Journal of Business Ethics and Organization Studies 28.

firms, housing developers, or the facilitators of tax abuse; a boardroom choice with repercussive impacts on a human right is just as relevant to the framework as a direct violation such as a boss not paying a worker. The impact is the only relevant factor.

This then makes the term ‘removes or reduces’ rights enjoyment the crucial element. While the ‘removal’ of an individual’s rights enjoyment suggests its complete violation (i.e. the destruction of a home or instigation of torture), the term ‘reduce’ expands the scope beyond the compliance/violation legal paradigm. The term ‘reduce’, which is uncommon in legal or other rights discourse, is likely designed to encompass a wider range of harm to rights, most obviously, in the language of human rights law, ‘retrogressions’ of rights, without using legal language that may have perturbed states. The term ‘reduce’ is similar to ‘retrogress’ in that both are quantitative terms. ‘Reduce’ means to ‘make less in amount’,¹¹² while ‘retrogression’ is defined as a ‘de facto, empirical backsliding in the effective enjoyment of rights’,¹¹³ for example, a reduction in the availability of food. Under the International Covenant on Economic, Social and Cultural Rights (ICESCR) state parties undertaking ‘deliberately retrogressive measures’ are in violation of the Covenant unless the measure is necessary to protect the totality of rights.¹¹⁴ This includes any law, policy or act that has the effect of quantitatively reducing access to the right.¹¹⁵ In the Committee on Economic, Social and Cultural Rights’ (CESCR) Concluding Observations on Egypt, budget cuts to health, education and housing, as well as ‘increasing recourse to regressive indirect taxation’ were considered to constitute retrogressive measures based on the harmful outcomes for the rights in question.¹¹⁶ This may be defined as a violation of Egypt’s obligations, but such retrogressive acts are rarely seen as violations by business actors.

The ‘impacts’ framework thereby shifts corporate responsibility closer to the more comprehensive state obligations. The purpose of the term retrogression is to capture that the macro-level backsliding of the availability of material rights is as harmful to rights as traditional legal breaches. ‘Impacts’, by covering acts which ‘reduce the ability of an

¹¹² Oxford Dictionaries, ‘Reduce’ <<https://en.oxforddictionaries.com/definition/reduce>> accessed 24 June 2019.

¹¹³ Christian Curtis, Nicholas Lusiani and Aoife Nolan, ‘Two Steps Forward, No Steps Back? Evolving Criteria on the Prohibition of Retrogression in Economic and Social Rights’ in Aoife Nolan (ed) *Economic and Social Rights After the Global Financial Crisis* (CUP 2014) 121, 123.

¹¹⁴ CESCR, ‘General Comment No. 3: The Nature of States Parties’ Obligations’ (1990) E/C.12/1991/23 [9].

¹¹⁵ Curtis, Lusiani and Nolan, ‘Retrogression’ (n 113 **Error! Bookmark not defined.**) 123-4.

¹¹⁶ CESCR, ‘Concluding Observations: Egypt’ (2013) E/C.12/EGY/CO/2-4 [6].

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individual to enjoy his or her human rights’, must include any business practices that retrogress access to human rights. Encompassing retrogressive acts renders the ‘impacts’ framework particularly expansive and far beyond legal practice as applied to corporations. The example above of increasing house and rental prices caused by investment companies constitutes a retrogression in the affordability of housing. It is not a legal breach under any domestic law and it is not a tortious wrong.¹¹⁷ It is, however, a human rights impact insofar as it is reducing individuals’ access to affordable housing, one of the seven core criteria of the right.

One possible counterargument is that under the UNGPs firms do not have positive responsibilities to realize human rights. An impact can only be negative. Therefore, it may be claimed that housing investments are positive actions engendering no responsibilities. A company that was providing housing, food or healthcare and is now providing less or a less affordable version, has merely reduced its contribution to the fulfillment of rights. However, this is not the way impacts is framed. A business act that causes any kind of reduction constitutes an impact. Such adverse impacts should best be seen as ‘active negative’ responsibilities. An active negative responsibility is one in which the prevention of harm requires taking a positive action, and as such it remains part of the ‘respect’ pillar.¹¹⁸ Ruggie has mentioned active negative responsibilities such as implementing a workplace anti-discrimination policy to ensure non-discrimination,¹¹⁹ and health and safety policies have similar active components. The essence of ‘impact’ is the harm the act caused. At least where corporations have significant power over provision of a right, active negative responsibilities will be necessary to prevent adverse impacts. As the retrogression of affordable housing constitutes an adverse impact it requires that companies involved in housing take steps to prevent, mitigate and remedy the impact. It is reasonable that debates take place around the precise limits of this responsibility, as the grounding in ‘social norms’ encourages, but the wording of ‘impacts’ creates a paradigm capable of capturing such harmful acts.

The third aspect related to the precise terminology is that it applies to ‘an individual to enjoy his or her human rights’. We have already captured any act, and any form of harm. This completes the triad by reinforcing that

¹¹⁷ For example, no constitutional or civil cases have ever been brought successfully over this matter.

¹¹⁸ Florian Wettstein, ‘Making Noise About Silent Complicity: The Moral Inconsistency of the ‘Protect, Respect, Remedy’ Framework’ in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (CUP 2013) 243, 253.

¹¹⁹ Special Representative of the Secretary-General on the issue of human rights and transnational corporation and other business enterprises, ‘A Framework for Business and Human Rights’ (n 2) [55].

it applies to anyone, anywhere, thus clarifying the global scope of impacts. An adverse impact occurs if any individual, anywhere, is harmed. It does not matter what kind of relationship the ‘victim’ has with the corporation, nor how distant the harm may be. As Ruggie has argued in a critique of the ‘sphere of influence’ depiction of responsibility, corporate impacts ripple around the world, affecting individuals far removed from the source of the issue.¹²⁰ It means that managers must consider globally repercussive impacts. This is bolstered by one criterion of ‘severe’ impacts being the ‘scope’, that is, the number of people harmed.¹²¹ Such a concept is alluded to in Ruggie’s critique of the Thun Group’s paper, which stated plainly that banks should lend with the repercussions of those lending choices in mind.¹²² Even though the banks may never know the specific individuals that might be harmed by a specific project, they should consider how their lending may contribute to an impact.¹²³

This allows an expanded look at how rights are being impacted in the global economy, and provides an argumentative basis for those who have identified a particular practice as harmful to their rights. It is not, in my view, an example of ‘rights inflation’, such that this dilutes the strength of human rights claims.¹²⁴ Rather, it centres the rights-holder and takes seriously the fact that human rights are being impacted through actions within the global economy in a litany of ways. Since businesses can cause harm in near infinite and evolving ways, the framework does not create a closed list of obligations (as is Ruggie’s fear around a binding treaty),¹²⁵ but rather adopts an inclusive definition of what constitutes relevant harm. This is important because many forms of harm to human rights by private actors are not legal breaches and are economic in nature. The financialization of housing is a good example because it comprises a long list of corporate acts, all of which are legally-permitted, which vary by jurisdiction, and for which the same act taking place in different contexts may cause varying levels of harm, or even none at all. ‘Impacts’ centres the harmful outcome on rights-holders. If certain practices under the umbrella of financialization are causing harm in a particular location, this harm can be challenged. As such it centres the right to housing, rather than a set of

¹²⁰ *ibid* [15].

¹²¹ OHCHR, ‘Responsibility to Respect’ (n 8) 19.

¹²² Ruggie, ‘Thun’ (n 4).

¹²³ *ibid* 2.

¹²⁴ Paul O’Connell, ‘Human rights: Contesting the Displacement Thesis’ (2018) 69(1) Northern Ireland Legal Quarterly 19.

¹²⁵ John Ruggie, ‘A Business and Human Rights Treaty? International Legalisation as Precision Tools’ (*Institute for Human Rights and Business*, 13 June 2014) <<https://www.ihrb.org/other/treaty-on-business-human-rights/a-business-and-human-rights-treaty-international-legalisation-as-precision/>> accessed 24 June 2019.

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preconceived rules within which gaps will inevitably appear. This is crucial if human rights are to be protected from harm by global economic actors.

Finally, ‘potential impacts’ reverse the demand for proof. Under the impacts framework, the victim does not have to show that a specific firm committed a specific violation, but rather corporations must identify their own potential impacts, including by drawing on outside expertise.¹²⁶ This reverses the logic of legalism, from setting stringent demands on the victim: ‘can you show legal liability of a specific firm?’ to the company: ‘will this act adversely impact anyone’s human rights anywhere?’ Combined with the above, corporations should proactively identify whether any of their acts will reduce the rights of anyone, anywhere. By placing the onus on the outcome of corporate acts, rather than individual legal liability, ‘impacts’ greatly expand the scope of responsibility.

There is one crucially important final aspect to be discussed. The ‘impacts’ framework is not legally binding. Firms should prevent and remedy all adverse impacts, but they are not bound to do so. This ostensible weakness is in reality a product of the transformative scope of ‘impacts’. As a binding legal standard it would be too onerous. As a social standard, as I show next, it provides a way of understanding BHR impacts and an argumentative framework in which affected groups can voice concerns, ultimately offering a contestatory logic for those who suffer not from human rights violations, but under the heaving body of adverse impacts stemming from the global economy.

6. Impacts as an Argumentative Framework

The ‘impacts’ framework sets prohibitive limits to business activity. Losing one’s job may reduce one’s ability to enjoy human rights, as may a ban from a social media platform. Some impacts are very minor, some may never be known, and some are necessary to balance interests, yet all are included as impacts. However, there are some defined and some de facto limits. In the former category are severity and salience, both of which are prioritization strategies, rather than limits on the scope, though they will play a role in limiting what firms will address in practice. Severity is judged on ‘scale’ (seriousness), ‘scope’ (extent), and ‘irremediability’ (how difficult the harm would be to remedy).¹²⁷ ‘Salient human rights issues’, refer to those most likely to occur within a specific corporate operation.¹²⁸ The most salient issues ‘will likely need to be the subject of the most

¹²⁶ ‘Guiding Principles’ (n 1) Principle 18(a).

¹²⁷ OHCHR, ‘Responsibility to Respect’ (n 8) 9.

¹²⁸ *ibid* 8.

systematized and regular attention.’¹²⁹ In the latter category, are the ‘socially-binding’ status of the UNGPs and the idea that firms should ‘know and show’ their own impacts. Firms are not legally required to undertake HRDD or consider their impacts beyond that enforced by applicable law, rather, the ‘responsibility is based in a social norm’,¹³⁰ defined as ‘shared expectations of how particular actors are to conduct themselves in given circumstances.’¹³¹ The real quality of impacts is in providing an authoritative argumentative framework within which social norms against corporate behaviours can develop. There is little need to worry that empowered calls of ‘human rights impact’ will meet every redundancy. What the framework provides is a way to both understand and contest corporate impacts.

The social grounding has been heavily criticized. Wettstein states the UNGPs ‘appeal to interests rather than to morality’.¹³² Cragg agrees that the ‘justificatory foundation of the report is enlightened self-interest’, and is based on the unpredictable social reaction to a human rights issue.¹³³ A basing in social costs favours ‘those stakeholders with the largest impact on the company’s bottom line’.¹³⁴ This is ‘the ethic of instrumentalism’, that ‘reasserts, rather than relativizes, the primacy of profits and shareholder value’.¹³⁵ ‘While instrumental reasoning is geared to cater to the powerful, the very purpose of human rights is to protect the powerless.’¹³⁶

The authors take the social as synonymous with the business case for human rights, which states that respecting rights improves the firm’s reputation and mitigates serious risks, thereby making business sense.¹³⁷ This does encourage an instrumental approach favouring the concerns of powerful stakeholders. However, this is a limited view of Ruggie’s constructivist conceptualization of social norms. Social constructivism claims that the social reality we inhabit is largely socially constructed ‘by the means of commonly shared, intersubjective knowledge.’¹³⁸ Therefore,

¹²⁹ *ibid* 21.

¹³⁰ Kell and Ruggie, ‘Social Legitimacy’ (n 90) 12.

¹³¹ *ibid* 13.

¹³² Florian Wettstein, ‘Normativity, Ethics, and the UN Guiding Principles on Business and Human Rights: A Critical Assessment’ (2015) 14 *Journal of Human Rights* 162, 175.

¹³³ Wesley Cragg, ‘Ethics, Enlightened Self-Interest, and the Corporate Responsibility to Respect Human Rights: A Critical Look at the Justificatory Foundations of the UN Framework’ (2012) 22 *Business Ethics Quarterly* 9, 13-4.

¹³⁴ Wettstein, ‘Ethics’ (n 132) 176.

¹³⁵ *ibid* 171.

¹³⁶ *ibid* 176.

¹³⁷ Björn Fasterling, ‘Human Rights Due Diligence as Risk Management: Social Risk Versus Human Rights Risk’ (2016) 2 *Business and Human Rights Journal* 225.

¹³⁸ Tilmann Altwickler and Oliver Diggelmann, ‘How is Progress Constructed in International Legal Scholarship?’ (2014) 25 *European Journal of International Law* 425, 427.

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when Ruggie discusses ‘social norms’ he is not referring to business case instrumentalism, but rather to the norms of society at large. In each society there are harmful acts that businesses are prohibited (legally or socially) from undertaking, and harmful acts that generate minimal pushback. One key norm in need of elaboration is therefore which business acts that cause harm to human rights count as BHR issues. For the constructivist, this is an important and relatively indeterminate question.¹³⁹ Such norms are always evolving, with what constitutes discrimination being one case-in-point.¹⁴⁰ Issues like tax avoidance can become relevant with enough social pressure, but this will only occur through gradual acculturation.¹⁴¹

Building intersubjective knowledge around the human rights harm resulting from such acts encourages a shift in the social understanding of BHR, and can therefore lead to powerful evolutions in rights discourse, capable, in time, of informing law. In this constructivist vein, ‘impacts’ should therefore be seen primarily as an argumentative framework through which social actors – from small community groups to global activists or politicians – can translate the harms of global business into human rights concerns. Sen argues that ‘survival in open public discussion’ is crucial for any rights-claim.¹⁴² This is a limiting factor, but also a liberating factor from the specific technical boundaries of the legal approach. Not every claim will succeed, but as intersubjective knowledge evolves through this framework, the legitimacy of such claims should increase. As such, the socially-grounded ‘impacts’ framework provides a vital supplement to binding but inevitably more minimal legal frameworks.¹⁴³

HRDD and firms ‘knowing and showing’ their own impacts assists in the creation of this knowledge.¹⁴⁴ While the basic rule is that all impacts should be prevented and/or remediated, there will be debates around what constitutes an impact, and companies will deny some alleged impacts. But it is more difficult for managers to argue that they should not at least investigate possible impacts. If claims are made that the actions of firm X are adversely impacting right Y, any firm concerned with its reputation, at

¹³⁹ Alexander Wendt, ‘Anarchy is What States Make of It: The Social Construction of Power Politics’ (1992) 46(2) *International Organization* 391.

¹⁴⁰ Michael O’Flaherty and John Fisher, ‘Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles’ (2008) 8(2) *Human Rights Law Review* 207.

¹⁴¹ John Ruggie, ‘What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge’ (1998) 54(4) *International Organization* 855.

¹⁴² Sen, ‘Limits of the Law’ (n 96) 2925.

¹⁴³ One recent study found that ‘corporations and states consistently resist standards that are both strong and broad’; Tori Loven Kirkebø and Malcolm Langford, ‘The Commitment Curve: Global Regulation of Business and Human Rights’ (2018) 3(2) *Business and Human Rights Journal* 157, 160.

¹⁴⁴ Guiding Principles (n 1) Principle 15 (commentary).

least, should be motivated to investigate. If human rights impacts are then discovered, much stronger arguments can be made that they should be addressed. Although HRDD and ‘know and show’ applies to companies, it also creates incentives for others to investigate business impacts. This increases the knowledge of potential impacts that is a prerequisite for ethical business.

Finally, impacts reify a truth marginalized by legalism: that social problems are human rights problems. It is difficult to imagine a socially unpopular business act that definitively has no human rights impacts, yet many such issues are rarely discussed in human rights terms. In so doing, some groups feel under-represented in rights discourses, as Alston discusses around rising populism.¹⁴⁵ Drawing these links can ensure rights are respected in our increasingly corporatized and interconnected world, and ‘impacts’ provides the means to do so.

7. ‘Impacts’ as a Lens on Structural Harm, Corporate Power, and Socio-Economic Justice

In this section I want to briefly clarify the transformative potential of ‘impacts’. I propose three areas occluded by a violations approach but captured by impacts: structural harm, corporate power, and socio-economic justice.

A focus on violations occludes structural harm. Linklater defines structural harm as harm rooted in ‘systemic forces’,¹⁴⁶ and is critical of those ‘who would claim so little [as constituting harm that they sought only to prevent] harming each other in the course of their interactions.’¹⁴⁷ This interactional view of harm equates to the violations approach rooted in legal accountability, where acts must provably harm specific individuals. Even structural harm, however, is still ultimately traced to human agency.¹⁴⁸ Housing crises, climate change, the 2008 global food crisis and many other possible examples, are structural in nature (the latter defined by sudden failure of the global food system to provide adequate food), yet the causes

¹⁴⁵ Philip Alston, ‘The Populist Challenge to Human Rights’ (2017) 9 *Journal of Human Rights Practice* 1.

¹⁴⁶ Andrew Linklater, *The Problem of Harm in World Politics: Theoretical Investigations* (CUP 2011) 60.

¹⁴⁷ *ibid* 79.

¹⁴⁸ *ibid* 60.

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can be traced to specific acts by states and corporations.¹⁴⁹ Calls for structural change are in reality calls for individual duty bearers to take responsibility, and ‘impacts’ captures the business side of this. It captures, therefore, those problems too often dismissed, as in the UN Working Group (UNWG) report on access to remedy, as requiring ‘fundamental changes in social, political or economic structures’ and therefore beyond the scope of accountability.¹⁵⁰

Structural harm matters because of corporate power over rights, states and societies.¹⁵¹ McKinsey puts total global corporate profits at \$7.2 trillion, just under 10% of total global GDP.¹⁵² Complex, corporate-managed, systems dictate the availability of many material rights, while corporate wealth exerts major pressures on other actors, not least states. This power leads to the wide gamut of potential harm beyond violations. Corporations can instrumentalize power resources in harmful ways (e.g. by lobbying states), can exercise power over structures in harmful ways (e.g. housing), and can impact individuals directly such as through employment practices.¹⁵³ Such power can cause harmful outcomes for individuals’ human rights. This invokes difficult questions of responsibility at the margins that require further research, but when the instrumentalization of power resources causes discernible harm to a human right,¹⁵⁴ they constitute prima facie adverse impacts. Research into impacts should look at specific lobbying practices, for example, to identify whether and how they adversely impact rights.

By covering acts that ‘reduce’ rights enjoyment, harms to socio-economic justice are captured, including retrogressions even from relatively high starting points. This is a major advance in a world where socio-economic rights are often theoretically realisable, but are vulnerable to systemic issues, including corporate policies. The risks inherent in

¹⁴⁹ Olivier De Schutter, ‘Transnational Corporations as Instruments of Human Development’ in Philip Alston and Mary Robinson (eds), *Human Rights and Development* (OUP 2005) 443; UN Special Rapporteur on the right to food, ‘Crisis Into Opportunity: Reinforcing Multilateralism’ (2009) A/HRC/12/31 [21].

¹⁵⁰ Working Group on the issue of human rights and transnational corporations and other business enterprises, ‘Access to Effective Remedies’ (2017) A/72/162 [16].

¹⁵¹ Florian Wettstein, *Multinational Corporations and Global Justice: Human Rights Obligations of a Quasi-Governmental Institution* (Stanford University Press 2009); Susan Strange, *States and Markets* (Bloomsbury 2015).

¹⁵² McKinsey Global Institute, ‘*Playing to Win: The New Global Competition For Corporate Profits*’ (2015) <https://www.mckinsey.com/~media/mckinsey/business%20functions/strategy%20and%20corporate%20finance/our%20insights/the%20new%20global%20competition%20for%20corporate%20profits/mgi%20global%20competition_full%20report_sep%202015.ashx> accessed 24 June 2019.

¹⁵³ Ruggie, ‘Trade, Protectionism and the Future of Welfare Capitalism’ (n 89) 5-10.

¹⁵⁴ Wettstein, *Quasi-Governmental* (n 151) 214-21.

financialized housing, commodified food, and through tax abuse have been cited in this area. In these sectors, business acts are reducing human rights enjoyment, but human rights law has been tentative in addressing the issues, with some arguing that it may go beyond the legitimate scope of human rights.¹⁵⁵ While herein I have advocated for the broad approach, the latter does have advantages in terms of enforceability. Nonetheless, the quality of the social norm approach is in providing a framework through which the more ambitious cases can be made linking the business act and the resultant adverse impact. This provides a fresh lens on the major socio-economic problems of our time, and a powerful weapon for those suffering from such acts.

The next stage in understanding impacts must be research into specific impacts. Corporations are potentially adversely impacting rights in a plethora of ways in every society. Empirical work is needed around each specific right and around multiple corporate practices. Concurrently, affected citizens need to understand that the social problems associated with corporate activity can be contested based on their human rights impacts. At the theoretical level, full engagement with the text of the impacts framework from human rights scholars would assist in understanding the scope and limits of the social responsibilities of business toward human rights.

8. Conclusion

Corporations hold a strict responsibility to prevent and/or remedy all adverse human rights impacts which they cause or to which they contribute. ‘Impacts’ go far beyond ‘violations’ to cover any act that removes or reduces an individual’s enjoyment of human rights. As such, the framework is rightly understood as having an expansive scope that is of particular use where corporations have power within rights-relevant global markets and to address the corporate role in structural issues such as the global food crisis. This scope is however only socially-binding and therefore requires social norms and expertise promotive of this broader understanding, particularly in popular discourse. It is submitted that this is Ruggie’s under-explored contribution to the BHR debate: the creation of an argumentative framework for social actors to use that can capture all business-related harm to rights, and that in so doing offers a platform that can transform the business-society relationship.

¹⁵⁵ See John Tasioulas, ‘Minimum Core Obligations: Human Rights in the Here and Now’ (2017) Research Paper Commissioned by the Nordic Trust Fund for The World Bank, 4-8; Tom Campbell, *Rights: A Critical Introduction* (Routledge 2011) 11-19, 91-95, and ff.

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