Toward a Strategic Engagement with the Question of the Corporation

Critical Remarks on Business and Human Rights

Michael Bader

Abstract Corporations, in their quest for the highest profit margin, have violated human rights, labour rights and environmental standards for decades, with little to no accountability. In recent years, the fight for corporate accountability under the banner of “Business and Human Rights” has come to dominate civil society’s engagement with the “question of the corporation.” This chapter aims to critically examine the political objectives underpinning the broad-church project of Business and Human Rights in its world-making aspirations, taking the Legally Binding Instrument currently under discussion at the UN Human Rights Council as a case study. Using a historical narrative approach, this article first situates the evolution of Business and Human Rights within neoliberal globalisation and, against this backdrop, attempts to think through the “dark side” of this particular strand of human rights activism. By bringing critical legal scholarship on the corporation and human rights into closer conversation with Business and Human Rights, the article aims to excavate the latter’s structural flaws, namely that it leaves the asymmetries in the global economy and the imperial corporate form unchallenged. By problematising Business and Human Rights’ presupposition of business as fact and its uncritical embrace of rights as positive change-makers, the article presents an invitation to rethink strategic political objectives vis-à-vis corporate rights abuses.

Keywords Business and Human Rights · Corporations · Corporate power · Neoliberalism · Globalisation · Critical legal theory · Global governance · United Nations · OEIGWG

I would like to thank ECCHR’s Business and Human Rights team, particularly Cannelle Lavite, Miriam Saage-Maaß, Christian Schliemann and Ben Vanpeperstraete, for valuable insights and fruitful discussions. Further I am grateful to Nicolas Bueno, Andreas Fischer-Lescano, Christopher Patz and Julia Sachseder for their valuable critique of and opinion on earlier drafts as well as Allison West and Arite Keller for their indispensable work on the text. All errors are mine.

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1 Introduction

For decades, survivors, activists and an array of civil society organisations (CSOs) have worked to hold corporations to account for their abusive practices around the globe and to make them legally liable for the harm they cause. The grotesque structural set-up of corporate legality, pointedly termed “a structure of irresponsibility” by legal scholar Harry Glasbeek,¹ has, however, made achieving corporate accountability a difficult task, requiring much creativity from lawyers as they attempt to forge cases against the decision-making bodies of complex corporate networks, often headquartered in the Global North.² The legal struggle against the German retail company KiK, part of the broader accountability campaign related to the 2012 Ali Enterprises factory fire in Pakistan, is certainly one such case.³ Due to the hardship faced by those affected by and survivors of corporate human rights violations, it seems almost a natural course of action for the bulk of CSOs, lawyers and policy-makers concerned with these violations to focus on establishing a legal pathway for remedy and (imagined) justice. From this viewpoint, one concerned with ensuring legal opportunity and access to remedy, the existing accountability vacuum with regard to corporations’ transnational operations must be closed and related governance gaps filled.⁴

The project of “Business and Human Rights” in general, and the negotiation of the Legally Binding Instrument⁵ in particular, have contributed to directing much public attention to “the question of the corporation” in the international realm, and brought together an array of activists, scholars and practitioners committed to fighting corporate abuse of people and the planet. While I share a central desire with Business and Human Rights and the proponents of the Legally Binding Instrument—namely to end corporate harm in the name of profit—I am highly sceptical of the draft treaty’s prospects in attaining this goal. Although I have doubts about the legal design of the current Legally Binding Instrument, this is not the main focus of the present inquiry.⁶ Rather, I am interested here in engaging with the

¹Glasbeek (2010).

²A well-known example of such creative lawyering practice is Peter Weiss’ excavation of a US Federal law, the Alien Tort Claims Act of 1789, for the purpose of making an extraterritorial legal claim in *Filártiga v. Peña-Irala*, which eventually, and for a few decades, led to significant corporate accountability practice in the United States.

³See chapter by Miriam Saage-Maaß in this volume; Bader et al. (2019).

⁴Bernaz (2016); Ramasastry (2015), p. 237; De Jonge (2011), p. 69.

⁵Legally Binding Instrument to regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, currently in its Revised Draft version, see: OEIGWG Chairmanship Revised Draft 16 July 2019; www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf (last accessed 1 August 2020).

⁶The major realist doubt is the idea that the Legally Binding Instrument will streamline, on a global scale, the efforts of Business and Human Rights. The human rights system, as it stands, is highly fragmented (see for example Payandeh 2015, p. 302). Therefore, the question arises as to how the dynamic linkage to “all human rights” in Article 3(3) of the Legally Binding Instrument will be

political objectives formulated by civil society and scholarly activists in the name of Business and Human Rights, in order to excavate the structural flaws underpinning this approach. By bringing Grietje Baars' monograph *The Corporation, Law and Capitalism* and other critical interrogations of rights and corporate power under neoliberalism into conversation with Business and Human Rights, I aim to provide a different perspective on the occurrence of corporate rights abuses in order to spur a reorientation of strategic engagement with the "question of the corporation."⁷

Taking the scholarly work of Robert Knox as a starting point for my train of thought, I understand strategic interventions as "revolutionary, inasmuch as they address critiquing or abolishing the basic logic of the system."⁸ Importantly in Knox's account, strategic interventions are not less pragmatic than tactical ones, as both aim at finding the best possible engagement. Rather, the difference lies in the goal of the former to overcome or radically transform a structure or system, while the latter is concerned with "conjunctural moments" or "transitory conflicts."⁹ Crucially, strategic objectives determine the overall frame for our actions, while tactics in service of a strategy must take care to evade capitulation to the logics of the very system the strategy seeks to overturn.

My main argument is that the political objectives of Business and Human Rights are not strategic and aimed at transformation or emancipation, but—at first glance, somewhat counter-intuitively as pointed out by Baars—run a high risk of legitimising and stabilising the status quo by not centring the composition of the global economy as well as the corporation's profit mandate in their quest for change. Importantly, however, this article does not in any way aim to denounce all scholarship produced under the auspices of Business and Human Rights, nor does it lament that more rights-based NGOs have started to attend to the topic of corporate exploitation and abuse. Crucially, too, it is not the usage of corporate accountability litigation as a tactical means of resistance that is problematised here, but rather the

dealt with, as it stipulates no new substantive provisions. It takes quite the imagination to envision states protecting against corporate abuse when they themselves are not bound by the human rights provisions they are supposed to oversee. This is especially so as, contrary to hopes of some civil society stakeholders and the unsuccessful aspirations of the UN Norms of 2003 (UN Doc.E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003); Weissbrodt and Kruger 2003; Miretski and Bachmann 2012), there is no set of rules binding corporations directly. The Revised Draft is more a repetition of already established duties of states, primarily, as De Schutter (2015), p. 67, argues, because it would not be politically feasible for corporations to be made direct subjects of international law. Equally unfeasible politically, but a provision that could have had a profound impact on the international legal sphere, was Article 13(6) of the Zero Draft, which proclaimed the primacy of human rights over trade and investment agreements. Much debated at the fourth session, as it is not a principle of international law *de lege lata*, such a primacy-of-human-rights clause, certainly possible *de lege ferenda*, would have represented a useful tool to mitigate state-corporate complicity and corporate coercion of states by ensuring that human rights provisions trump investment treaty clauses (Krajewski 2017; Amnesty International 2014, p. 173).

⁷Baars (2019) and Knox (2010).

⁸Knox (2010), p. 199.

⁹Knox (2010), p. 199.

turn from case-based struggles to world-making within a legal frame that takes the lack of remedy and redress as its starting point. My aim here is to question Business and Human Rights' presupposition of "business" as a natural phenomenon, its mobilisation of (human) rights as an unquestionable force for good, and its employment of (human) rights to save the world from bad corporate decision-making and corporate greed. Both the posture of leaving business structures unquestioned and the uncritical embrace of rights have, in my reading, implications for the prospect of ending corporate abuse.¹⁰

To elaborate on this, I first trace a historical narrative that situates the evolution of Business and Human Rights within the context of neoliberal globalisation. Against this backdrop, I aim to think through the "dark side" of this particular strand of human rights activism with a focus on its costs rather than benefits.¹¹ Finally, I offer an invitation to those equally concerned with Business and Human Rights' prospects for bringing about the change so direly needed, to consider more profound solutions to the question of the corporation that are attentive to both the corporate form and the global economic order in the quest for transformative change.

2 The Corporation, Neoliberal Globalisation and the Emergence of Business and Human Rights

As Baars has outlined, the evolution of Business and Human Rights and its focus on corporate accountability—from the voluntary UN Global Compact to the "soft law" UN Guiding Principles on Business and Human Rights (UNGPs) and now the Legally Binding Instrument—represents more an inevitable and logical continuation than a strategic roadmap for structural change. While over the last decades the corporation and the atrocities committed in the name of profit have both accelerated and become increasingly exposed, Business and Human Rights and the drafting of the Legally Binding Instrument neither radically question the system that produces corporate abuse, nor do they formulate strategic objectives. Rather, as Baars explains, Business and Human Rights and its focus on corporate accountability "shows how capitalist law generates seemingly emancipatory discourses and practices that, on closer inspection, turn out to follow the logic of capitalism itself."¹² Importantly, this capitulation to the logics of the system makes it so that corporate accountability becomes not a restraint on corporate value extraction activities, but rather a facilitator and stabiliser of corporate profit-making and corporate capitalism on the whole.¹³

¹⁰See also Baars (2019), p. 3.

¹¹Kennedy (2004), p. 3.

¹²Baars (2016), p. 132.

¹³Baars (2016), p. 132.

By way of briefly touching upon the main regulatory attempts to tame the corporation after the Second World War, this section aims to situate the post-war evolution of the corporation and its rise to unprecedented influence and power under neoliberalism. Importantly, this narrative must start in the 1970s with the aspirations for a New International Economic Order (NIEO).¹⁴ Rarely mentioned in Business and Human Rights scholarship, this third-way counter-proposal by the Group of 77 of the Non-Aligned Movement had the regulation of the corporation on its agenda, but was not narrowly focused on corporate (mis)conduct alone.¹⁵ Instead, it comprised a broader struggle “for structural changes in the world economy that the new nations desired, in the interests of justice, world peace, and development.”¹⁶ While the newly independent states’ proposal was met with strong resistance by the (mostly) former colonial empires,¹⁷ neoliberal capitalism rose to dominance and spread across the globe by way of a universalised development paradigm.¹⁸ It is here that the corporation (re)emerged as the dominant transnational economic actor. The following decades saw the behavioural patterns of corporate activity evolve to its current *modus operandi* through complex global value chains.¹⁹ Although the corporation is not a new phenomenon, the current power and influence of transnationally operating businesses within today’s globalised economy is unprecedented,²⁰ with

¹⁴See further Bockman (2015) and Volume 6 of *Humanity* (2015), wholly dedicated to an exploration of the NIEO.

¹⁵The NIEO’s vision is mirrored in the two most notable international legal documents produced under its auspices, the Declaration of the Establishment of a NIEO of 1 May 1974 and the Charter of Economic Rights and Duties of States. See UNGA Res. 29/3281 (XXIX); UN Doc A/RES/S-6/3201 (1 May 1974); UNGA 3201 (S-VI); and UN Doc A/RES/29/3281 (12 December 1974). Article 2 No. 2(a) of the Charter provoked controversy as it holds that every state has the right to “regulate and exercise authority over foreign investment within its national jurisdiction [. . .],” while Article 2 No. 2(b) awards the host state the power to “regulate and supervise the activities of [the corporation]” (UNGA Res. 29/3281 (XXIX), (12 December 1974), Article 1). Further, it was in the wake of the NIEO that the UN Commission on Transnational Corporations and UN Centre for Transnational Corporations (UNCTC) were established. See ECOSOC Res. 1908 (LVII) (2 August 1974) and ECOSOC Res. 1913 (LVII) (5 December 1974). For further reading, see Hippolyte (2019), Sauvart (2015), Bair (2015) and Weber and Winanti (2016).

¹⁶Rajagopal (2003), p. 73.

¹⁷At first glance, it already becomes clear that the divide was among the “underdeveloped” Third World and its “developed” counterpart which, with the exception of Australia, opposed the charter (Belgium, Denmark, Germany, Luxembourg, the United Kingdom and the United States) or abstained (Austria, Canada, France, Ireland, Israel, Italy, Japan, the Netherlands, Norway and Spain). See Chatterjee (1991), p. 672.

¹⁸Pahuja (2011) and Slobodian (2018).

¹⁹Muchlinski (2007), p. 21; IGLP Harvard Law and Production Working Group (2016).

²⁰De Jonge (2011), p. 66. For the historical roots of the corporation and its relationship with the state, see further: Baars (2015), Stern (2011) and Taylor (2006).

over 80 percent of global trade being attributed to corporations' global value chain networks.²¹

With the ascent of neoliberal globalisation came the rise of rights as the main language to bring human suffering into the realm of global governance,²² notwithstanding, of course, that the current form of globalisation is somewhat "inimical to human rights protection."²³ As Mary Nolan contends, at the same time that the neoliberal project was first minted into concrete policy "the dominant understanding of human rights in the long 1970s encouraged governments, NGOs, and international institutions to focus on the individual, the legal and the political, and to ignore how neoliberal structural adjustment violated the economic and social human rights of so many."²⁴

While the turn to neoliberalism was conventionally described as one of state retraction in order for the market to be "freed" from state interference through liberalisation, privatisation and deregulation measures,²⁵ historian Quinn Slobodian describes the role of the state in neoliberalism not as an outside force to the market, but a rather important component of the neoliberal project itself. According to its Geneva School architects, this neoliberal economic world order "depends on the protection of dominium (the rule of property) against the overreach of imperium (the rule of states)."²⁶ Slobodian therefore proposes the metaphor of "encasement" as best capturing the role of the state in the neoliberal project.²⁷ Rather than states with insulated economies that relate at the international level, he suggests it is the neoliberal international economic order that encases the state, its democratic rule and its national economies.²⁸ "What neoliberals seek," he contends, "is not a partial but a complete protection of private capital rights, and the ability of supranational judiciary bodies [...] to override national legislation that might disrupt the global rights of capital."²⁹

As stories of corporate abuse increased and earlier attempts to regulate corporations' transnational activity failed,³⁰ the 2000 UN Global Compact, a global, principles-based but voluntary "corporate social responsibility" (CSR) initiative,

²¹United Nations Conference on Trade and Development (2013) World Investment Report, Global Value Chains: Investment and Trade for Development, p. iii., www.unctad.org/en/PublicationsLibrary/wir2013_en.pdf (last accessed 20 July 2020).

²²Whyte (2019) and Moyn (2015, 2018).

²³O'Connell (2007).

²⁴Nolan (2013), p. 172.

²⁵Muchlinski (2001) and Lang (2011).

²⁶Slobodian (2018), p. 279.

²⁷Slobodian (2018), p. 13.

²⁸See further: Harvey (2005), pp. 64ff. An understanding of neoliberalism as not only an economic and political project, but a distinctly legal one, is also the point of departure for the detailed empirical case studies in the contributions to Brabazon (2018).

²⁹Slobodian (2018), p. 12.

³⁰Post-NIEO, and echoing the same, namely the UN Code of Conduct on Transnational Corporations of 1983.

was launched. Resting on a 10-principle approach across four pillars—human rights, labour, environment and anti-corruption—the UN Global Compact is the largest voluntary CSR group in the world, with a vast geographical reach.³¹ Early on, however, many civil society groups raised concerns over corporations' exploitation of UN legitimacy by signing on to the compact, while continuing their problematic business practices.³² This criticism and the non-adoption of the 2003 treaty-like set of Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN Norms),³³ led to the appointment of John Ruggie as the UN Special Representative of the Secretary-General, his drafting of the UN Guiding Principles (UNGPs) on Business and Human Rights, and the subsequent unanimous adoption thereof by the UN Human Rights Council in 2011.³⁴ Although the UNGPs' detailed three-pillar approach sets out a comprehensive international framework reiterating the state duty to *protect* against corporate human rights abuses, the corporate responsibility to *respect* human rights, as well as the need to achieve effective *remedy* for corporate violations, it does not provide a clear solution for closing the accountability gap.³⁵ The UNGPs were designed as a governance tool aimed at slow self-transformation through polycentric governance rather than as an international framework for legal accountability.³⁶

As the UNGPs had not been satisfactory in providing legal tools to hold corporations to account, in June 2014, the UN Human Rights Council established the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (OEIGWG).³⁷ The OEIGWG's first and second sessions focused on "the content, scope, nature and form of the future international instrument [...],"³⁸ while the third dealt with preparing "elements for the draft legally binding instrument."³⁹ In October 2018, the OEIGWG's fourth session involved heavy debate of the "Zero Draft" of a Legally Binding Instrument to Regulate in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises,⁴⁰ which included 15 articles and an optional protocol. With subsequent revision, the

³¹Rasche et al. (2012), p. 7; UN Global Compact, The Ten Principles of the UN Global Compact, www.unglobalcompact.org/what-is-gc/mission/principles (last accessed 1 August 2020).

³²Rasche et al. (2012), p. 7.

³³Weissbrodt and Kruger (2003) and Miretski and Bachmann (2012).

³⁴UNHRC Res. 17/4, UN Doc A/HRC/RES/17/4 (6 July 2011).

³⁵United Nations, Guiding Principles on Business and Human Rights – Implementing the United Nations "Protect, Respect and Remedy" Framework, 2011, www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf (last accessed 1 August 2020); Omoteso and Yusuf (2017).

³⁶Ruggie (2018), p. 317; Taylor (2011), p. 9; see further: Ramasastry (2015).

³⁷UN Doc A/HRC/RES/26/9, p. 2.

³⁸UN Doc A/HRC/RES/26/9, p. 2.

³⁹UN Doc A/HRC/RES/26/9.

⁴⁰Zero Draft Treaty, Legally Binding Instrument to Regulate in international human rights law, the activities of transnational corporations and other business enterprises, Article 10, 16 July 2018,

OEIGWG's fifth session in 2019 again discussed the Legally Binding Instrument, which then contained 22 articles outlining the OEIGWG's vision for the future governance of the corporation with regards to its vast social and environmental impact.

The story typically advanced by the growing number of Business and Human Rights activists and scholars suggests that the UNGPs were a first step in the right direction, but are not enough. Instead, the UNGPs' "soft law" norms and obligations must now be "hardened" into a binding legal document.⁴¹ Notably, however, both the UNGPs, underpinned by Ruggie's vision of embedded liberalism,⁴² as well as an eventual "hard law" international treaty in the form of the Legally Binding Instrument, rely on the state to tame the corporation's social impact. Considering that the state under neoliberalism is encased by an international order that protects the rights of capital over the rights of the vast majority of people, we must ask how this very same state will ensure that the rights of those within its jurisdiction are not violated.⁴³

3 The Dark Side of Business and Human Rights

I now turn to the political objectives of activists, CSOs, policy-makers, scholars and other experts who imagine achieving the end of corporate abuse via the international Legally Binding Instrument and the mandatory national-level human rights due diligence framework it envisions. For most proponents of Business and Human Rights and the Legally Binding Instrument, "it is high time that [corporations] were recognized as having responsibilities as global actors under international law," because "rules imposing responsibilities and standards of behaviour on [corporations] have not kept up with the expanding reach of their actions."⁴⁴ The aim is to "[prevent] and [address] human rights violations by the business sector"⁴⁵ by "design[ing] legal solutions" to the problem of corporate misconduct.⁴⁶ The overarching objective is to "humanize business by effectively regulating the human rights violative activities of corporations."⁴⁷

www.ohchr.org/documents/hrbodies/hrcouncil/wgtranscorp/session3/draftlbi.pdf (last accessed 1 August 2020).

⁴¹Macchi and Bright (2020).

⁴²Ruggie (1982). For a critical interrogation of this Polanyian regulation of the economic, see Baars (2011).

⁴³See further: Bueno (2019), p. 437.

⁴⁴De Jonge (2011), p. 66.

⁴⁵Bernaz (2016), p. 296.

⁴⁶Bilchitz (2017), p. 4.

⁴⁷Deva (2012).

While the vast array of cases brought against corporations (most of which have been and are still lost)⁴⁸ points to the continuous urgency for change, it seems that the lack of legal redress and the rise of rights under neoliberalism has shaped the engagement and apparent unity among the proponents of the Legally Binding Instrument regarding how to challenge corporations' systemic misconduct. At first glance, one could indeed be inclined to conclude that the drafting of the Legally Binding Instrument is a "step in the right direction." In a critical reading, however, it is somewhat revelatory that the names of both the emerging academic sub-discipline found in law and business schools alike, as well as the evolving subsections of rights-NGOs is Business and Human Rights.⁴⁹ This terminology semantically encapsulates what the activism in its name presupposes when political objectives are formulated: it suggests that business in its current form is an unchangeable, almost natural, occurrence and, borrowing from Nicholas Connolly and Manette Kaisershot, "that human rights represent the only meaningful attempt at a universally applicable a-religious 'moral' code – a blueprint to define reasonable regulation of human life [. . .]."⁵⁰ This leads to structural flaws and shortcomings in the approach of the Legally Binding Instrument, by attempting to mobilise rights as an external frame to ensure corporate accountability. Neither does doing so properly tackle corporate logic and decision-making, nor does it take into account the structural set-up of the global economy and its encasement of states, or the inevitable shortcomings of rights as "powerless companions" within this very structure.⁵¹

3.1 Corporate Logic and Decision-Making in the Global Economy

After tracing the evolution of the corporate form or "personality" and evaluating its organisational psycho-social structure, Joel Bakan concludes that corporations are "institutional psychopaths" necessarily "wont to remove obstacles that get into their way"⁵² and "programmed to exploit others for profit."⁵³ Oriented toward profit maximisation for their shareholders, it is unremarkable that in the current global market economy corporations often strategically choose locations with cheap labour, lax regulation and implementation, and weak judicial infrastructure. These locations

⁴⁸The most comprehensive database of human, environmental and labour rights violations by transnational business is found at the Business and Human Rights Resource Centre, www.business-humanrights.org/ (last accessed 1 August 2020).

⁴⁹See for example Amnesty International, www.amnesty.org/en/what-we-do/corporate-accountability/ (last accessed 1 August 2020).

⁵⁰Connolly and Kaisershot (2015), p. 665.

⁵¹Moyn (2015).

⁵²Bakan (2004), p. 85.

⁵³Bakan (2004), p. 85.

are frequently found in the Global South or Eastern Europe, where corporations can “seek greater profit margins and greater shareholder returns by participating in a ‘race-to-the-bottom’ which undermines human rights protection and provision to varying degrees in all states.”⁵⁴ South Asia’s garment industry, where major European and North American fashion brands flock to have their textiles and garments produced, is an emblematic example of such a race-to-the-bottom. In this context, the Ali Enterprises factory fire in Pakistan as well as the Tazreen factory fire and Rana Plaza collapse in Bangladesh, represent only the tips of icebergs of inequality.

Significant local and transnational activism occurred following these prominent garment industry disasters in Pakistan and Bangladesh, including efforts to secure corporate accountability on behalf of families and survivors, and to reform occupational health and safety (OHS) standards in factories.⁵⁵ Almost a decade later, however, most of the legal struggles have been unsuccessful in strictly legal terms, while the conditions in South Asia’s garment factories remain largely unchanged.⁵⁶ Notably, the Business and Human Rights approach animating many of these efforts failed to address the underlying fact that global inequality neither starts with the lack of OHS standards in factories—which these events so brutally shined a light upon—nor with the lack of corporate accountability in the wake of their evident non-implementation.

Rather, global inequality is rooted in and produced through the global economy by a “power asymmetry” that Mark Anner suggests we can understand for the garment industry as working “through two mechanisms: a price squeeze and a sourcing squeeze.”⁵⁷ Where the incentive of corporate entities is profit, lead firms or “brands” under “conditions of supply chain oligopsony (lead firm power concentration),” will “squeeze supplier firms on how, where and when they source their fabric and at what cost,” and “this ‘price squeeze’ impacts workers.”⁵⁸ A further layer of problems in the garment and textile industry is certainly added by the fact that global value chains can be diverted relatively easily to expedient jurisdictions—locations where profit is higher and corporate risks are lower. Because many “underdeveloped” states are starved for investment, large corporations can often pick and choose the best location to conduct their business and can also exert tremendous influence over how they operate in these jurisdictions. As both the lead firms of corporate networks as well as their local suppliers aim to maximise their profit for the sake of (shareholder) returns, both externalise their costs and risks onto workers in order to attain the highest profit margin possible. This frequently results in (*inter alia*) minimum wages too low to live, unpaid over-time work,

⁵⁴Connolly (2012); Choi and Park (2014), p. 61. See further the chapter by Palvasha Shabab in this volume for an elaborate discription of the location of Pakistan in the global political economy.

⁵⁵See chapter by Ben Vanpeperstraete in this volume.

⁵⁶See chapter by Palvasha Shahab in this volume.

⁵⁷Anner (2019), p. 22.

⁵⁸Anner (2019), p. 2.

outsourced production to booming informal economies in order to avoid existing regulatory mechanisms, and the absence of social protections, strong labour unions,⁵⁹ and diligently implemented OHS standards, the latter of which represent just another cost factor for corporations to minimise. The problem of corporate violations should not, therefore, be understood as one of bad individual decision-making and greedy “bad-apple” corporate managers, but as one of a double-structure: the corporate form with its imperial profit mandate and the global economy structured along the “developed” and the “developing.”⁶⁰

3.2 *The Rights Lens: Masking Root Causes?*

Business and Human Rights aims to remedy the excesses of corporate risk externalisation by institutionalising a legal framework for corrective justice but leaves unchallenged the overall structure in which this externalisation occurs. This sparks the question of whether and how a human rights framework for business can change or, indeed, even mitigate, corporations’ behavioural patterns structured along the lines of capital accumulation and their mantra of maximising profit and minimising risk for a small group of shareholders. In this context, relying on individual remedy, to which human rights language is confined, seems akin to putting a plaster on a gaping wound.

Susan Marks explains that the human rights movement and its earlier activism has tended to neglect root causes, “understood as the basis on which a given circumstance rests.”⁶¹ The “basis” on which the “circumstance” of corporate rights violations rests is not the absence of an international legal regime of human rights protections, as proponents of the Legally Binding Instrument seem to suggest. As far as international human rights law is concerned, states already have the duty to protect against rights violations by third parties in their territory and, thus, the duty to prevent corporate abuse.⁶² Rather, the basis—or root cause—of corporate violations

⁵⁹As Hansen-Miller (2017), p. 480, argues, this is because “[g]lobal production networks are primarily an instrument designed to avoid the power of organized labour.”

⁶⁰Harvey (2018); Pahuja (2011); Bueno (2019), p. 437.

⁶¹Marks (2011), p. 60.

⁶²For instance, the Committee on Economic, Social and Cultural Rights highlights the state’s duty to protect in regards to the right to water: “The obligation to protect requires State parties to prevent third parties from interfering in any way with the enjoyment of the right to water. Third parties include [...] corporations and other entities [...]” (UN Doc E/C.12/2002/11 (20 January 2003), para 23). The Committee on the Rights of the Child asserts that “States should require businesses to undertake child-rights due diligence. This will ensure that business enterprises identify, prevent and mitigate their impact on children’s rights including across their business relationships and within global operations” (General Comment No. 16, UN Doc CRC/C/GC/16 (17 April 2013)). Similarly, the Inter-American Court of Human Rights asserts: “The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction [...]. This duty to prevent includes all

is global capitalism and the prevailing neoliberal free market ideology and policy that treats workers and the environment as mere commodities, and prioritises privatisation and deregulation measures at the expense of the welfare state.⁶³ As the “main engine of capitalism”⁶⁴ in this context, the corporation comes to life through and is facilitated by the internal and external double-structure mentioned above. Internally, the structure of the corporate form itself, with its shareholder model and the director’s mandate to maximise returns for a small group, transforms all obstacles to this objective into risks to be managed and impediments to be removed. Externally, the corporation finds fruitful ground for its transnational operations at the bottom of a global economic structure that facilitates transboundary exploitation and extraction.

While Marks contends that the human rights movement’s neglect of root causes has significantly changed since the 1970s, she attests to three persistent shortcomings in the rights approach’s framing and addressing of root causes: “In the first place, the investigation of causes is halted too soon. Secondly, effects are treated as though they were causes. And thirdly, causes are identified, only to be set aside.”⁶⁵ Thus, while some root causes may indeed be detected by a human rights approach to address and remedy individual human suffering, others are concealed.⁶⁶ If one applies Marks’ analysis or, indeed, warning, to the Legally Binding Instrument, which aims to institutionalise a human rights framework for business activity in order to ensure remedy and accountability for corporate harm, must we not ask if such an approach eventually conceals the underlying factors that make corporate cross-border operations exploitative and often deadly? Does the anatomising remedy of human rights—even if the Legally Binding Instrument was implemented in the way imagined by Business and Human Rights activists and scholars—not narrow our sight to the individual and thus hinder rather than further collective struggle to overturn the system that produces corporate violations?⁶⁷

those means of a legal, political, administrative and cultural nature that promote the protection of human rights” (*Velásquez Rodríguez v. Honduras* (29 July 1988, para. 174–175)). Contrary to the hopes of some civil society stakeholders and the aspirations of the UN Norms of 2003, there is no set of rules that directly binds corporations (see Weissbrodt and Kruger 2003; Miretski and Bachmann 2012). The Revised Draft is a mediatory instrument at best (see Peters et al. 2020, p. 5).

⁶³Harvey (2005).

⁶⁴Baars (2019).

⁶⁵Marks (2011), p. 70.

⁶⁶Marks (2011), p. 77.

⁶⁷Baxi (2006).

3.3 *Mandatory Human Rights Due Diligence: For the Rights-Holder or the Corporation?*

Rather than remaining in an abstract mode of criticism, I believe it is beneficial to zoom in briefly on the regulatory mechanism proposed by the Legally Binding Instrument for reducing and eventually eradicating corporate misconduct. Article 5 (2) of the Legally Binding Instrument foresees that: “State Parties shall adopt measures necessary to ensure that all persons conducting business activities, including those of transnational character, to undertake human rights due diligence [. . .].” Predating the implementation of the Legally Binding Instrument itself, national-level mandatory human rights due diligence (mHRDD) frameworks of the type envisioned by the instrument already exist and continue to evolve in many European jurisdictions as well as at the EU level.

Without aiming to change internal corporate or external economic structures, states parties to the Legally Binding Instrument will be obliged to advance compliance-model legislation that translates UNGP 15,⁶⁸ in one form or another, into concrete policy in order to “harden” this “soft law” principle.⁶⁹ Despite mHRDD taking centre-stage in campaigns and policy-drafting on how to eventually eradicate corporate abuse, it remains rather unclear what legal obligations such mHRDD would entail.⁷⁰ Much will depend on the way national policy frameworks are formulated and how they are interpreted by courts.⁷¹

Importantly, as Jonathan Bonnitcha and Robert McCorquodale explain, due diligence originates as a genuine business term and denotes “any set of processes undertaken by a business to identify and manage risks to the business.”⁷² They contend that “the basic understanding of due diligence in a business context is ‘a procedural practice to assess risk in a company’s own interest.’”⁷³ They, like most engaged with Business and Human Rights, seem to suggest, however, that the

⁶⁸UNGP 15 reads: “In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including (a) a policy commitment to meet their responsibility to respect human rights; (b) a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights; (c) processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.” See www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf (last accessed 1 August 2020).

⁶⁹Bonnitcha and McCorquodale (2017a), p. 908, point out an example of what could well be the result of such policy, by taking the example of the UK Modern Slavery Act, where “the concept of due diligence, understood as a standard of conduct, plays no role [. . .].”

⁷⁰See debate in the European Journal of International Law: Bonnitcha and McCorquodale (2017a); Ruggie and Sherman III (2017); Bonnitcha and McCorquodale (2017b).

⁷¹On the different forms of newly evolving due diligence policies, see Bueno (2019), p. 430ff. For a detailed evaluation of the relationship of mHRDD and corporate liability, see Bueno and Bright (forthcoming).

⁷²Bonnitcha and McCorquodale (2017a), p. 902.

⁷³Bonnitcha and McCorquodale (2017a), p. 902.

human rights risk in the mHRDD framework is not like other corporate risks because it is located “outside” of or external to the corporation in that it pertains to negative or adverse corporate impacts on third-party stakeholders, such as workers, communities, and the environment. Yet, because mHRDD frameworks leave the corporate form unchanged, a human rights risk as envisaged in such a framework will, from the perspective of a corporation, form just another corporate risk among many: a risk for the corporation to manage and minimise, if not remove entirely, in its quest to maximise profit.⁷⁴ Hence, we can understand why corporations that have been sued for their violative practices, such as the German discounter KiK in relation to the Ali Enterprises factory fire in Pakistan, have themselves become proponents of mHRDD legislation. As KiK put it: “Companies need legal certainty. For this reason, we have argued for a legal regulation of corporate due diligence.”⁷⁵ KiK’s reconsideration here is not despite corporate accountability but because of it:⁷⁶ like all corporations, KiK accounts for risks in its (transnational) operations. From a corporate perspective, the risk posed by a thoroughly formulated and fully implemented national mHRDD policy⁷⁷ amounts to the legal risk of being sued for non-compliance, which poses both financial and reputational risks.

But while a mHRDD frame will likely turn the current reputational risk posed by “soft-law” yardstick mechanisms like the UNGPs into a more straightforward financial risk for corporations when assessing their transnational business activity, it cannot be presumed “that the widespread institutionalisation of the [mHRDD] will necessarily translate into significant improvements in corporate respect for human

⁷⁴For instance, Fasterling (2017) contends that human rights due diligence is conceptually incompatible with the management of social risk (defined as the actual and potential leverage that people or groups of people with a negative perception of corporate activity have on the business enterprise’s value), because social risk management and human rights due diligence vary at each step of the risk management process (risk identification, risk measurement and assessment, and risk reduction measures). To resolve this incompatibility, he argues, respect for human rights would have to be elevated to a corporate goal that determines corporate strategy.

⁷⁵Translation by the author of the original German: “Unternehmen benötigen Rechtssicherheit. Aus diesem Grund haben wir uns für eine gesetzliche Regelung unternehmerischer Sorgfaltspflichten ausgesprochen.” See: Reiner Burger “Saeeda Kathoon gegen KiK – Ich will Gerechtigkeit” *Frankfurter Allgemeine Zeitung*, 29 November 2018, www.faz.net/aktuell/gesellschaft/ungluecke/der-kampf-der-saeeda-khatoon-15916387.html, (last accessed 1 August 2020).

⁷⁶Baars (2015).

⁷⁷Such desired full realisation seems unlikely given the politico-economic dynamics of and the corporate leverage in such legislative processes surrounding the corporation. While the German Initiative Lieferkettengesetz (a civil society group campaigning for a supply chain law) has published a detailed account of what a German mHRDD law must entail in order to function, the German government’s “*Eckpunkte*” (Basic Points) for a such a law already gravely diminish hope for the possibility of making a legal claim, let alone the aim of “humanizing business.” For instance, there is no reversal of the burden of proof and they introduce the concept of a “safe harbour” which would enable corporations to sign up to an industry standard in order to exclude their liability for ordinary negligence. See www.ecchr.eu/nc/pressemitteilung/eckpunkte-zum-lieferkettengesetz-ein-guter-beginn-aber-noch-lange-nicht-ausreichend/ (last accessed 1 August 2020).

rights.”⁷⁸ Ingrid Landau, drawing on regulatory studies and Kimberly Krawiec’s concept of cosmetic compliance,⁷⁹ asserts that there is “a significant risk that these regulatory interventions will result in companies adopting policies and implementing internal compliance structures that exhibit some or all of the formal elements of HRDD – and have the purpose of conveying the appearance of taking action – but ultimately fail to achieve the public goal they are designed to achieve: that is, the reduction or elimination of adverse human rights impacts.”⁸⁰ By using empirical data on existing due diligence policies, she argues that there is mounting evidence that mHRDD will turn into a box-ticking exercise for corporations.⁸¹ This, she contends, is not so much due to the business sector’s misunderstanding or unfamiliarity with mHRDD, but inherent to the concept itself.⁸² While its ambiguity, the proliferation of guidance, and the lack of transparency all increase the risk of cosmetic compliance, she posits a primary danger exists in mHRDD’s very design, which is focused on procedures rather than outcomes.⁸³

Problematically, mHRDD and its compliance framework will likely not entail a clear-cut corporate obligation to guarantee the non-violation of rights or the positive realisation thereof. While the Legally Binding Instrument in its Revised Draft version is ambitious in formulating measures states must take to ensure effective regulation and prevention, such as identifying and assessing risks, taking appropriate action to prevent them, monitoring them during the business activity, and communicating their efforts to stakeholders (Article 5), it remains a procedural compliance obligation. Crucially, the corporate obligation here is not to refrain from violating rights, but to have *a process in place* that aims to ensure rights are not violated. From a legal standpoint, if the corporation can show it has fulfilled its procedural compliance obligations, it will not matter if rights end up being violated and suffering is inflicted on other “stakeholders” or “rights-holders.” Rather, gaining it further legitimacy, the corporation can legally exculpate itself in the legal process by showing it complied with its legal obligations, despite any harm that may have

⁷⁸Landau (2019), p. 222.

⁷⁹Krawiec (2003).

⁸⁰Landau (2019), p. 222.

⁸¹Landau (2019), p. 235, draws on empirical findings from the UK Modern Slavery Act, the California Transparency in Supply Chains Act and the US Dodd-Frank Act. See also Baars (2020) The limits of law: Why “corporate accountability” will not change the corporation, www.tni.org/en/publication/the-limits-of-law (last accessed 1 August 2020): They argue that the set-up of compliance frameworks serves the corporation as yet another shield against (criminal) legal liability “by adopting programmes that provide compliance in technical terms while not actually reducing the incidence of ‘violation.’ If a company is charged with failure to exercise due diligence, a so-called ‘due diligence defence’ can be invoked, which allows the company to argue that managers had followed protocol.”

⁸²Landau (2019), p. 235.

⁸³Landau (2019), pp. 235–239. See also Baars (2020) and Bueno (2019).

actually occurred in the course of its (transnational) operations.⁸⁴ Thus, while the instalment of a process to assess and prevent human rights risks might indeed generate impulses to secure non-violation, mHRDD nonetheless runs the risk of serving the corporation rather than the rights-holder. With its focus on process (due diligence compliance) instead of outcomes (human rights violation or non-realisation), mHRDD policy “runs the risk of becoming a substanceless sham, to the delight of corporate power-mongers who can bend it to their interests.”⁸⁵ While the creation of legal certainty through mHRDD frameworks allows a corporation like KiK to more accurately refine its risk calculus, it does not necessarily deter its risky operations, should the corporation deem the potential human rights harm to be worth the profit.

This suggests the likelihood that the mHRDD mechanism envisioned by the Legally Binding Instrument will further legitimise the status quo without eradicating corporate abuse. The risk here is that on its current course, Business and Human Rights activism is drafting yet another smokescreen and a deterrence away from challenging the root causes of corporate harm by seeking refuge in an already established human rights doctrine.

4 Conclusion: Toward Strategic Objectives

What is the cost or “dark side” of pursuing and advocating for reforms in the name of Business and Human Rights in general and the Legally Binding Instrument in particular? I have tried to give a cursory answer to this question for civil society organisations and activists, for whom consideration of this cost is not least a question of resource allocation. Further, I have sought to bring critical legal scholarship on the corporation and human rights into closer conversation with Business and Human Rights in order to excavate the project’s structural flaws, namely that too often it leaves the asymmetries in the global economy and the imperial corporate form

⁸⁴ At first glance, an exceptional formulation in the Revised Draft version of the Legally Binding Instrument gives hope in this regard. As Bueno and Bright (forthcoming) point out, Article 6(6) of the first Revised Draft ambitiously foresees liability for a corporation’s “failure to prevent” a third party with whom it has a business relationship from violating rights. This would indeed disable a corporation’s easy exculpation through cosmetic compliance. Of course, it remains to be seen whether this article of the Legally Binding Instrument’s current version will remain, as the negotiation process is far from over. But even if it does remain, Bueno and Bright note that such a strong formulation for third-party wrongdoing may, in turn, create the problematic incentive for transnational business to withdraw from collaborating with or investing in partners deemed to be too risky. If anything, this exemplifies the problem of not tackling the prevailing structure of the global economy or the corporate form in Business and Human Rights’ answer to the question of the corporation. It shows the impossibility of tackling corporate capitalism through rights-based compliance policy, pointing all the more to the need for more radical solutions to eventually eradicate corporate-inflicted suffering.

⁸⁵ Parker (2007), p. 209.

unchallenged. I have argued that this presupposition of business (encapsulating both the corporate form and the global economy) as a natural occurrence legitimises the status quo more than it presents a challenge to its logic, making Business and Human Rights interventions stabilising rather than challenging to systemic logics, if the strategic objective is radical (“root cause”), transformative change.⁸⁶ The uncritical embrace of rights as positive change-makers is problematic because their institutionalisation and formalisation runs the risk of masking the underlying factors that produce corporate violations. What is more, the approach of employing rights while leaving corporate logic and prevailing global economic structures unchallenged will continue to lead corporations to translate human suffering articulated through rights into corporate risk factors to be managed, accounted for and minimised in their pursuit of profit. By defining and clarifying what legal risks Business and Human Rights policy poses to the corporate entity, mHRDD, the main regulatory mechanism envisioned by the Legally Binding Instrument, will likely facilitate corporations’ risk management process rather than rights-holders’ quest for justice, bestowing increased morality and legitimacy upon corporations in the process. This is not only because mHRDD compliance mechanisms are likely to turn into a mere box-ticking exercise for companies, but also, and crucially, because mHRDD frameworks will rarely entail an opportunity for survivors or advocates to bring claims against corporations for the suffering they have inflicted, only for the compliance obligations they have failed to meet.

The political objectives as formulated by Business and Human Rights have been shaped and formed not only by the neoliberal proliferation of rights as the main remedy for human suffering over the last decades, but also by a well-intentioned and somewhat pragmatic translation of case-based struggles—lawsuits lost against corporate abuse—into world-making. But it is not the lack of remedy, formalisation and institutionalisation of rights that leads corporations to inflict and produce harm. Rather, it is the structural set-up of the corporate form and the global economy, neither of which often feature in Business and Human Rights scholarship or activism. The Legally Binding Instrument’s compliance-model legislative framework and focus on corporate accountability are unlikely to change the asymmetries emanating from this structural set-up. Rather, as Baars argues, Business and Human Rights codifies the corporation, the “apparatus that facilitates the surplus value-extracting function of global capitalism,”⁸⁷ legitimising its existence and, with it, the existence of neoliberal corporate capitalism—the very root causes of corporate abuse and exploitation.⁸⁸

While I acknowledge that from a legal or, better, a lawyer’s perspective, the main problem seems to be that corporations abuse rights and avoid legal responsibilities, this does not necessarily warrant a call for more (dysfunctional) law. Rather, to put a difficult task simply, it calls for dismantling or fundamentally altering the corporate

⁸⁶Knox (2009, 2010).

⁸⁷Baars (2016), p. 131.

⁸⁸Baars (2016), p. 132.

form and a radically different organisation of the global economic system. Thus, I agree with Amelia Evans that instead of “endlessly responding to abuses,” we must aim to “[address] the incentives and decision-making structures that cause them.”⁸⁹ Likewise, I concur with human rights defender and activist Alejandra Ancheita’s recent assessment that: “Addressing the vulnerabilities faced by [*inter alia*] women, workers, and indigenous peoples will require a radical change in the economic model that will require a political movement unequivocally committed to human rights which, in the best-case scenario, will take decades to build.”⁹⁰ In sum, rather than asking how we can broaden opportunities for corrective justice when abuse has already occurred by establishing yet another regulatory framework likely to boost corporate legitimacy while masking ongoing misbehaviour, I argue that we need more scholarship on and activism geared towards strategically reorganising the corporate form and global economy in a way that works for all equally and equitably.

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⁸⁹ Evans (2020) How to eradicate human rights abuses? Change the corporate model. Rethinking Corporate Governance, Business and Human Rights Resource Centre, www.business-humanrights.org/en/how-to-eradicate-human-rights-abuses-change-the-corporate-model (last accessed 1 August 2020).

⁹⁰ Ancheita A (2020) Inequality is the real pandemic, www.gi-escr.org/blog/inequality-is-the-real-pandemic (last accessed 1 August 2020).

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