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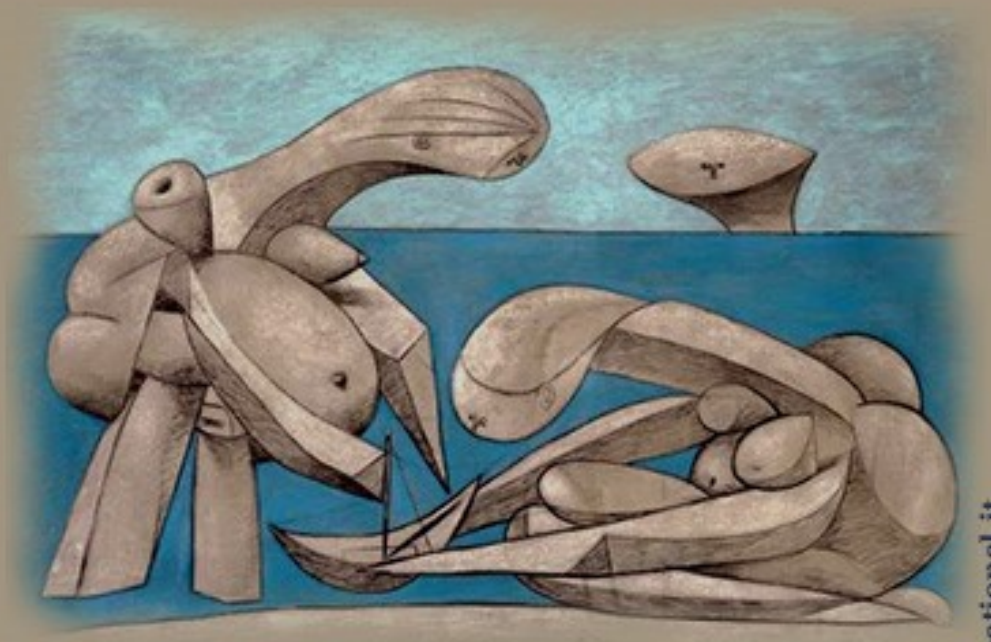

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Corporate Responsibility and Transnational Law: a Short Stocktaking

Peter Muchlinski♣

1. Introduction

The role of corporations in society has been the subject of debate for as long as corporate entities have existed. One persistent theme has been the capacity of the corporation to be a bad actor bent on accumulation of wealth and power for its owners whether they be colonial despoilers operating through the European chartered trading companies of the sixteenth to eighteenth centuries, rapacious railway magnates in Britain or the corporate "robber barons" of nineteenth century America.[1] Some have come to see the corporation as a pathological entity displaying psychopathic tendencies caused by its relentless pursuit of profit at all costs leading it to become asocial and devoid of empathy towards, or responsibility for, others.[2] Yet throughout its existence the value of the corporation as a vehicle for economic development has remained as has the question of how to direct its power, capacity and knowledge towards socially beneficial goals. It is in the attempt to strike a balance between economic action and responsible business conduct that the issue of corporate responsibility exists.

This contribution seeks to offer a brief stocktaking of corporate responsibility as an issue of transnational law. It does so, first, by outlining the meaning of corporate responsibility in its transnational context through the development of the concept of international corporate social responsibility (ICSR) as a response to the growth of corporate power following economic globalisation; secondly by examining why transnational legal analysis is important to the study of ICSR; and thirdly, by considering the limitations of transnational legal analysis focusing on how corporate power coupled with the retreat of "official' legal regulation and the consequential stress on informal corporate self-regulation has led to weak ICSR norms including through the process of corporate responsibility for human rights as developed in the UN Guiding Principles on Business and Human Rights (UNGPs). The contribution ends with the conclusion that formal legal regulation has to strengthen ICSR norms as this is the most legitimate way to ensure effective observance of those norms by business actors.

2. Globalisation and International Corporate Responsibility

According to the Chartered Institute of Personnel and Development, the principal professional body for human resources specialists, "Corporate responsibility (CR) is about the impact an organisation makes on society, the environment and the economy. Having an effective CR programme contributes positively to all stakeholders as well as adding value for the

♣ Emeritus Professor of International Commercial Law, The School of Law, SOAS, University of London.

[1] See for example John Micklethwait and Adrian Wooldridge *The Company: A Short History of a Revolutionary Idea* (London, Phoenix Books, 2003) who discuss critiques of the corporation and calls for corporate responsibility throughout their historical account of the company.

[2] See Joel Bakan *The Corporation* (London, Constable, 2005) 56-7.

organisation itself, and ensures it operates in a sustainable way."[3] Corporate responsibility is also referred to as corporate social responsibility (CSR) or business sustainability and is "about the ethics which drive an organisation's activities and how it operates so that it's viable over the long term."[4] These goals have been widely promoted by corporations themselves and, as will be seen, corporate influence has played a significant part in how the notion of corporate responsibility has been translated into the sphere of transnational law.

The question of corporate responsibility has become an issue of international importance. The rise of multinational enterprises (MNEs) since the nineteenth century has created two waves of economic globalisation, the first ending with the outbreak of World War I while the second emerged from the ruins of World War II and continued unchecked up to the financials crisis of 2007-9.[5] Since then the global economy has experienced new pressures as a result of supply chain weaknesses uncovered through the Covid pandemic and also as a response to growing uncertainty over the geopolitical role of China and its capacity to remain an integral part of the global production system, resulting in moves towards "reshoring" production and greater controls over inward investment based on national security grounds.[6]

Economic globalisation has shifted the nation state towards facilitating corporate freedom of trade and investment through policies of economic liberalisation including the removal of barriers to trade and guarantees of investor rights through international treaties limiting state regulatory discretion. This has been motivated by the desire to attract trade and foreign direct investment (FDI) on the part of MNEs which have acquired significant market power as a result.[7] That power has raised concerns about their accountability and capacity to act in a socially responsible way. The need for trade and inward investment by MNEs has also questioned the will of the contemporary "market-state" to enact corporate regulation focused on the elimination of external social and environmental costs associated with MNE operations.

As a result calls have emerged in recent decades for an international solution to corporate responsibility.[8] The notion of "international corporate social responsibility" (ICSR) rests on the obligations that corporations owe to the societies in which they operate. [9] This may be

[3] Susannah Haan "Corporate Responsibility: An Introduction" Chartered Institute of Personnel and Development Factsheet (29 June 2023) at https://www.cipd.org/uk/knowledge/factsheets/corporate-responsibility-factsheet/#what-is-corporate-responsibility

[4] ibid.

[5] See further Peter T Muchlinski *Multinational Enterprises and the Law* (Oxford, Oxford University Press, 3rd ed, 2021), 8-18.

[6] ibid, 18-20 and 761-5 and ch 5. See too European Parliament "Post Covid-19 value chains: options for reshoring production back to Europe in a globalised economy" (Policy Department for External Relations Directorate General for External Policies of the Union PE 653.626 – March 2021) at https://www.europarl.europa.eu/RegData/etudes/STUD/2021/653626/EXPO_STU(2021)653626_EN.pdf and see Peter Muchlinski "Inward FDI Regulation in the UK: Closing the "Open Door"?" in *Springer Studies in Law & Geoeconomics Vol 1."Weaponizing Investments"* (Springer, 2023) 169 at https://link.springer.com/chapter/10.1007/17280_2023_6

[7] See further Stephen Wilks *The Political Power of the Business Corporation* (Cheltenham, Edward Elgar, 2013); Doris Fuchs *Business Power in Global Governance* (Boulder and London, Lynne Reinner Publishers, 2007).

[8] This paragraph draws on Muchlinski n 5, 103-4 and 562-3.

[9] See further Jennifer Zerk *Multinationals and Corporate Social Responsibility Limitations and Opportunities in International Law* (Cambridge, Cambridge University Press, 2006); Ramon Mullerat *International Corporate Social Responsibility* (Alphen aan den Rijn, Kluwer Law International, 2010).

justified philosophically by appeals to a "social contract" and to the need of all actors, including non-state actors, to observe the preservation of human dignity through adherence to fundamental human rights.[10] Equally ICSR can be justified by reference to a "social licence to operate" (SLO) in the communities where they do business.[11] According to John Morrison, the Chief Executive Officer of the Institute for Human Rights and Business, the SLO emerged as a business term in the mining industry especially in Australia and Canada in the 1990s.[12] The SLO has no precise definition but it encompasses an understanding that a business operates in a community on the basis of its social acceptance or approval earned through "consistent and trustworthy behaviour and interactions with stakeholders".[13] In this sense the SLO represents a "social contract" between the corporation and community.[14]

There remains a great deal of disagreement over ICSR.[15] Some see ICSR as misguided, risking policies that harm the beneficial effects of international business activity.[16] Other critical voices regard ICSR as a smokescreen, which serves to cover up the true extent of unethical corporate practices, and which needs a major shift away from the enhancement of shareholder value as the core function of management towards concern for wider stakeholder interests backed up by effective legal regulation.[17] In this sense ICSR obligations may be seen as a response by the international community, organised through intergovernmental organisations, to the relative lack of national regulation of the abovementioned social and environmental costs of MNE operations.[18] ICSR obligations may also be seen as the *quid pro quo* for the protection of investors and investments under international investment protection agreements and international economic rules such as those of the WTO.[19]

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[10] See further Thomas Donaldson *The Ethics of International Business* (Oxford, Oxford University Press, UK Paperback Ed, 1992); Peter Muchlinski "International Business Regulation: An Ethical Discourse in the Making?" in Tom Campbell and Seumas Miller (eds) *Human Rights and Moral Responsibilities of Corporate and Public Sector Organisations* (The Hague, Kluwer Law International, 2004) 81.

[11] See John Morrison *The Social License: How to Keep Your Organisation Legitimate* (Basingstoke, Palgrave MacMillan, 2014); Leeora Black *The Social License to Operate: Your Management Framework for Complex Times* (Oxford, Do Sustainability, 2013).

[12] Morrison ibid at 14.

[13] Black n 11 at 18.

[14] See Morrison n 11 at 23-6.

[15] This paragraph is taken from Muchlinski n 5, 103.

[16] See David Henderson *Misguided Virtue: False Notions of Corporate Social Responsibility* (Wellington, New Zealand Business Roundtable, 2001).

[17] See further Wilks n 7, ch 9; The Corporate Reform Collective *Fighting Corporate Abuse: Beyond Predatory Capitalism* (London, Pluto Press, 2014) ch 6; Peter Fleming and Marc T. Jones *The End of Corporate Social Responsibility: Crisis and Critique* (London, Sage Publications, 2013); Renginée Pillay *The Changing Nature of Corporate Social Responsibility: CSR and Development – The Case of Mauritius* (Abingdon, Routledge, paperback ed, 2016). For a development focused critique see: Michael Blowfield and Jedrzej George Frynas (eds) "Critical perspectives on Corporate Social Responsibility" 81(3) *International Affairs* (May 2005).

[18] See further Phillip Paiement, "Transnational Sustainability Governance and the Law" in Peer Zumbansen (ed.), *The Oxford Handbook of Transnational Law* (2021; online edn, Oxford Academic, 14 Apr. 2021), https://doi.org/10.1093/oxfordhb/9780197547410.013.37, accessed 1 Nov. 2023.

[19] For a discussion of the concept of social responsibility and its implications for international standard setting and investment protection see UNCTAD *The Social Responsibility of Transnational Corporations* (New York and Geneva, United Nations, 1999) at https://unctad.org/en/Docs/poiteiitm21_en.pdf; UNCTAD above n 25 ch XII; UNCTAD above n 10 ch VI. See too UNCTAD *Social Responsibility* UNCTAD Series on issues in international investment agreements (New York and Geneva, United Nations, 2001) at https://unctad.org/en/pages/PublicationArchive.aspx?publicationid=342.

3. Corporate Responsibility and Transnational Law

How is ICSR an issue for transnational law? This can be answered by looking at transnational law as an analytical process focused on understanding law in a global context.[20] Transnational legal analysis can be seen historically as a response to the process of globalisation, and the resulting extension of corporate activities across borders, which have created the need for an ordering of MNE operations so that they can do business effectively. Accordingly much of the field of transnational law has been about how private business can control the legal dimension of transnational commercial operations especially in relation to the enforcement of transnational contracts and the resulting need for dispute settlement methods that can take account of this context. Thus the origins of transnational legal thought are deeply entwined with the process of international arbitration and the mix of legal sources that arbitrators should use when confronted with transnational contractual disputes spanning multiple legal jurisdictions, the divide between national and international law and evolving new business practices that are as yet unregulated by conventional laws but which have been privately ordered through contractual and other transnational business practices.[21]

The primarily commercial focus of transnational legal analysis poses the question whether ICSR standards can also be subjected to this methodology. As already noted one effect of transnational corporate activity is that states may not have the political will or the regulatory reach to control bad business practices resulting in social and/or environmental damage to individuals and communities living in the locations where MNEs operate. This opens a regulatory space much like that which opens in relation to commercial regulation. It would appear straightforward, therefore, to extend the logic of transnational legal analysis to ICSR issues as well.

This argument may be enhanced by the emerging consensus that corporate actors have a responsibility to respect human rights in the course of their operations. Fundamental human rights lie at the heart of ethical business practice and ICSR.[22] As a consequence thinking on CSR, originally a voluntary process centred on corporate philanthropy, is becoming more normative with corporations having moral, social and, increasingly, legal responsibilities to observe human rights.[23] The UN Guiding Principles on Business and Human Rights (UNGPs) have asserted the existence of a new "transnational norm" of business respect for human rights,

[20] See Peer Zumbansen, "Transnational Law: Theories and Applications", in Peer Zumbansen (ed.), *The Oxford Handbook of Transnational Law* (2021; online edn, Oxford Academic, 14 Apr. 2021), https://doi.org/10.1093/oxfordhb/9780197547410.013.1, 5 "Transnational Law, then, can best be understood as a methodological architecture for both a doctrinal, conceptual and a socio-legal engagement with law in this, irreversibly and irreducibly global, context."

[21] See Ilias Bantekas "A General Theory Of Transnational Private Law", in this issue; Zumbansen, ibid, 11.

[22] See John M. Kline *Ethics for International Business: Decision Making in a Global Political Economy* (London, Routledge, 2005) 25; Nadia Bernaz *Business and Human Rights: History, law and policy – Bridging the accountability gap* (Abingdon, Routledge, 2017) 3-8.

[23] See Karin Buhmann *Changing Sustainability Norms Through Communication Processes: The Emergence of the Business and Human Rights Regime as Transnational Law* (Cheltenham, Edward Elgar, 2017) ch 2; Anita Ramasastry "Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability" 14 *Journal of Human Rights* 237 (2015); Florian Wettstein "The history of business and human rights and its relationship with corporate social responsibility" in Surya Deva and David Birchall *Research Handbook on Human Rights and Business* (Cheltenham, Edward Elgar Publishers, 2020) ch 2, https://doi.org/10.4337/9781786436405.00007

the first ever international instrument to do so. The UNGPs have been followed in numerous other international instruments and national laws as well as informing the content of national court decisions.[24] Business itself has now accepted a general responsibility to respect human rights in the light of the UNGPs.[25] Accordingly we may think that we are on the right lines. But this may miss some of the real limitations of transnational law analysis when applied to important issues of social, environmental and human rights protection.

4. Limitations of Transnational Legal Analysis and Corporate Responsibility

The starting point is to acknowledge the differences between international commercial law and the regulation of ICSR, especially when it comes to demands for corporate observance of fundamental human rights. Unlike transnational commercial law norms, the norms of human rights do not exist to facilitate commercial activity or efficiency. They exist to identify and safeguard core standards of behaviour required to protect human dignity. This raises the question whether transnational legal analysis, which emerged to facilitate corporate operations across borders, can offer by itself a suitable method for dealing with the fundamental rights of victims of corporate human rights violations.

Secondly, human rights norms are aimed primarily at state activity not the activity of private non-state actors such as corporations. As such these norms are found in international human rights instruments that are binding on states, most notably in the UN International Bill of Human Rights consisting of the Universal Declaration of Human Rights and the UN Covenants on Civil and Political Rights and Economic, Social and Cultural Rights.[26] Equally human rights are found as positive legal obligations in national constitutions which increasingly echo international human rights norms and language.[27] Accordingly, the shift towards human rights obligations for corporate actors has so far occured outside the usual state-centric, international and national legal normative environment for human rights. This generates considerable uncertainty over the content of corporate human rights norms and their legal quality, permitting open contestation over their content between corporate actors and groups advocating greater corporate accountability.[28]

Such normative uncertainty is reflected through the analytical compromise that exists within the UNGPs.[29] In order to fit in with pre-existing notions of where the legal regulation of non-state actors should occur the UNGPs posit three pillars: a state duty to protect against

[24] UNGPs at https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf . See further Peter T Muchlinski *Advanced Introduction to Business and Human Rights* (Cheltenham, Edward Elgar Publishers, 2022) chs 4-6.

[25] See Peter Muchlinski, "The Impact of the UN Guiding Principles on Business Attitudes to Observing Human Rights." 6(2) *Business and Human Rights Journal* 212 (2021).

[26] See UN "International Bill of Human Rights" at https://www.ohchr.org/en/what-are-human-rights/international-bill-human-rights

[27] See Colin J Beck., John W. Meyer, Ralph I. Hosoki, and Gili S. Drori. "Constitutions in World Society: A New Measure of Human Rights." in Gregory Shaffer, Tom Ginsburg, and Terence C. Halliday (eds) *Constitution-Making and Transnational Legal Order* (Cambridge: Cambridge University Press, 2019) 85; Colin J Beck, Gili S Drori and John W Meyer "World influences on human rights language in constitutions: A cross-national study" 27(4) *International Sociology* 483 (2012).

[28] See further Paiement, n 18, 822-4.

[29] See further Muchlinski n 24, 60-67.

infringements of human rights by business actors thereby reaffirming national law as the primary site for regulating private business actors; a non-binding corporate responsibility to respect human rights which accords with the principle that private non-state actors cannot hold direct international legal obligations but which requires corporations vountarily to adopt a human rights risk assessment strategy through human rights due diligence (HRDD) analysis as a means of discharging their responsibility to respect human rights; and access to remedy which emphasises the need for states to offer judicial and non-judicial remedies and for businesses to provide informal grievance mechanisms accessible to stakeholders at risk of business generated human rights infringements. The result leaves the development of binding corporate legal obligations to respect human rights to states while corporate and other business actors are left to evolve, at their own discretion, systems for the identification and avoidance of human rights risks in their operations.

The corporate discretion inherent in the responsibility to respect human rights creates the kind of space in which new transnational normative expectations of business can develop. Here, a major problem emerges. Can we say with certainty that the normative practices that emerge from the exercise of the corporate responsibility to respect human rights will enjoy legitimacy or effectiveness? Given that corporate actors have significant power in the globalised economy and given the discretion available to them in structuring their human rights compliance systems under the UNGPs it is possible that the exercise of HRDD under the second pillar and the provision of grievance mechanisms under the third pillar will be less than ideal. They may generate a weak set of norms which fail to address the concerns of victims and which will ensure that corporate interests prevail. In addition the rise of multistakeholder initiatives (MSIs) as fora for the development of new normative standards through business conduct guidelines can give rise to similar concerns of corporate control over this process. These risks will now be illustrated in the next section of the contribution.

5. ICSR Norms and Corporate Interests

As already noted, while there is no doubt that significant progress has been made in corporate circles regarding the acceptance of a responsibility to observe human rights, much remains open to contest and to corporate control. In this section three illustrative examples will be given of how such control emerges and how this risks weak normative development. First, the emergence of MSIs will be examined as a method for corporate actors to control the development of new transnational corporate responsibility norms; secondly the weaknesses inherent in the process of HRDD will be analysed as a means of developing a corporate ethic of human rights compliance in the absence of binding standards; thirdly the limitations of corporate level grievance mechanisms as alternatives to judicial dispute settlement will be examined.

(a) Multistakeholder Initiatives

A prominent feature of transnational law is its eclectic approach to sources.[30] As pointed out by Craig Scott, not only does transnational legal method borrow from concepts and rules of

[30] See “Presentation du Journal”, in this issue; Craig Scott "Transnational Law" as Proto-Concept: Three Conceptions” 10(6-7) *German Law Journal* 859 (2009).

national and international law it also benefits from the accumulation of decisions by courts and other dispute settlement bodies dealing with transnational legal questions and from a pluralistic approach to sources allowing for the referencing of informal regulatory rules and structures that are, "constructed and continue to exist independently of 'official' (in the sense of the modern state) law."[31] Scott offers a number of examples including " 'internal' corporate norms, commercial custom in all its varieties, the complex normative nature of Internet regulation, the certification process of the Forest Stewardship Council, the guidelines produced by the International Union for Conservation of Nature" all of which are relevant to corporate ordering including the furtherance of responsible business practices.

The rise of such informal sources of corporate ordering is bound up with the increased acceptance of corporate-self regulation as an aspect of "global governance".[32] This highlights the complex web of institutions and actors that seek to manage the global economic system in the absence of global government. It involves the internal management systems of MNEs and inter-firm supply chains, the various normative standards developed by inter-governmental organisations, states and sub-state entities with legislative and regulatory powers, transnational networks of experts and the activities of NGOs and other civil society bodies. This approach is also termed "civil regulation" or "polycentric governance" the latter being the preferred term used by John Ruggie, the progenitor of the UNGPs, to explain the regulatory model behind this instrument.[33] The "experimental/global governance" or "civil regulation/polycentric governance" approach offers a "liberal" strategy that may lead to joint standard setting through NGO/civil society-business partnerships devoted to the pursuit of particular policy goals and/or the realisation of particular projects.[34] That said, the risk remains that corporations will take advantage of the structural weaknesses inherent in co-operative approaches to governance and exploit their power to further only corporate interests.[35] This risk is present in the increased use of MSIs in the field of ICSR including business and human rights.[36]

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[31] ibid, 874.

[32] This paragraph is taken from Muchlinski n 5 at 101-3. See further Jonathan Zeitlin "Pragmatic Transnationalism: Governance Across Borders in the Global Economy" 9 *Socio-Economic Review* 187 (2011); Peer Hull Kristensen and Jonathan Zeitlin *Local Players in Global Games: The Strategic Constitution of the Multinational Corporation* (Oxford, Oxford University Press, 2005) especially chs 11 and 12; see too Fuchs n 7 ch 2 "Globalization and Global Governance".

[33] See further Jem Bendell and David F. Murphy "Towards Civil Regulation: NGOs and the Politics of Corporate Environmentalism" in Peter Utting (ed) Peter Utting (ed) *The Greening of Business in Developing Countries: Rhetoric, Reality and Prospects* (London, Zed Books, 2002), 24; Simon Zadek *The Civil Corporation* (Abingdon, Earthscan, 2nd ed, 2007) ch 5; Keith Carlisle and Rebecca L. Gruby "Polycentric Systems of Governance: A Theoretical Model for the Commons" 47(4) *Policy Studies Journal* 927 (2019) at https://doi.org/10.1111/psj.12212; John Gerald Ruggie "The social construction of the UN Guiding Principles on Business and Human Rights" in Surya Deva and David Birchall (eds) *Research Handbook on Human Rights and Business* (Cheltenham, Edward Elgar Publishing, 2020) 63

[34] On "critical" and "liberal" civil society strategies see Peter Newell "Environmental NGOs, TNCs and the Question of Governance" in Dimitris Stevis and Valerie J. Assetto (eds) *The International Political Economy of the Environment: Critical Perspectives* (Boulder, Lynne Reiner Publishers, 2001) 85.

[35] See further Fuchs, n 7 ch 5 discussing corporate structural power through public-private partnerships, giving direct rule-making power to corporations, and the development of corporate codes of conduct as a form of regulatory agenda setting.

[36] For a detailed examination see Peter Muchlinski "The Changing Nature of Corporate Influence in the Making of International Economic Law: Towards 'Multistakeholderism' " in M. Bungenberg, M. Krajewski, C.J. Tams, J.P. Terhechte, A.R. Ziegler (eds) 11 *European Yearbook of International Economic Law* 3 (Springer, Cham, 2020) https://doi.org/10.1007/8165_2020_52. See too Scott Jerbi "Assessing the roles of multi-stakeholder

The core characteristic of MSIs is the involvement of "stakeholders", global actors who have a "stake" in an issue, who come together to work out a collaborative solution to issues of mutual concern.[37] In relation to responsible business conduct issues, these arrangements range in function from: policy-oriented multi-stakeholder groups such as the Kimberley Process Certification Scheme (KPCS) established in 2003 as a multilateral trade regime to prevent the flow of "conflict diamonds"; standard-setting organisations such as the International Standards Organisation (ISO) which entered the field of ICSR when it adopted the ISO 14000 Environmental Management Standard and the ISO 26000 Social Responsibility Standard; and project-oriented groups of which the Accord on Fire and Building Safety in Bangladesh of 15 May 2013, renewed in 2018 and 2021, offers an example.[38] This is "a legally-binding agreement between global brands & retailers and IndustriALL Global Union and UNI Global Union and eight of their Bangladeshi affiliated unions to work towards a safe and healthy garment and textile industry in Bangladesh." [39] Now known since 2021 as the International Accord for Health and Safety in the International Textile and Garment Industry it has also adopted a second agreement covering the garment and textile industry in Pakistan.[40]

MSIs need to take heed of a number of design and procedure questions to ensure their effective and legitimate operation. These revolve around how the "stakeholders" are identified and admitted to the arrangement, how power imbalances between various stakeholders are dealt with and how transparency and accountability is to be achieved. [41]
Some progress has been made by MSIs themselves. For example, the International Social and Environmental Accreditation and Labelling (ISEAL) Alliance was formed to ensure credible and legitimate standard setting by environmental sustainability MSIs.[42] A further example of procedural standard setting comes from the Institute for Multi-Stakeholder Initiative Integrity (MSI Integrity). This is a non-profit organisation, "dedicated to understanding the human rights impact and value of voluntary MSIs that address business and human rights."[43] This body has developed an MSI Evaluation Tool to help MSIs assess whether their membership and

initiatives in advancing the business and human rights agenda" 94(887) *International Review of the Red Cross* 1027 (2012).

[37] See Muchlinski ibid at 4-5. See further Harris Gleckman *Multistakeholder Governance and Democracy: A Global Challenge* (Abingdon, Routledge, 2018) Preface, xiii. See too M.Raymond M and L. Denardis "Multistakeholderism: anatomy of an inchoate global institution" 7(3) *International Theory*, 572 at 574 (2015), who assert, "multistakeholderism entails two or more classes of actors engaged in a common governance enterprise concerning issues they regard as public in nature and characterized by polyarchic authority relations constituted by procedural rules." Polyarchy, "entails situations where authority is distributed among a number of actors" ibid, 580.

[38] See generally Gleckman ibid 16-25 and for detailed analysis of the examples in the text see Muchlinski n 36, 17-26.

[39] Bangladesh Accord Foundation "About the Accord" at http://bangladeshaccord.org/about/. http://bangladeshaccord.org/signatories/

[40] See International Accord "Governance" at https://internationalaccord.org/about-us/governance/ . For the full list of brand and trade union signatories of both agreements see: https://internationalaccord.org/signatories/

[41] See Muchlinski n 36, 23-6 for a detailed analysis.

[42] ISEAL Credibility Principles (June 2021) at https://www.isealalliance.org/credible-sustainability-standards/iseal-credibility-principles.

[43] See MSI Integrity "Our Mission and Vision" at http://www.msi-integrity.org/test-home/mission-principles/

procedures adhere to good governance practices.[44] As with the ISEAL Credibility Principles the MSI Evaluation Tool stresses the need to

> "(a) address any power imbalances or adversarial relationships that may disadvantage stakeholders with fewer resources, such as global south or local representatives, or civil society or affected community participants; (b) ensure it has sufficient resources to operate effectively; and, (c) establish decision-making processes that are efficient, inclusive, and capable of overcoming internal disputes. Finally, to the extent that transnational standard-setting MSIs operate as governance tools, they must also be transparent and accountable."[45]

The Evaluation Tool fleshes these principles out into a detailed check-list of the minimum requirements to meet these goals.

However, in July 2020, MSI Integrity changed course and abandoned its original mission to improve MSIs. It concluded,

> "After reflecting on a decade of research and analysis, our assessment is that this grand experiment has failed. MSIs are not effective tools for holding corporations accountable for abuses, protecting rights holders against human rights violations, or providing survivors and victims with access to remedy. While MSIs can be important and necessary venues for learning, dialogue, and trust-building between corporations and other stakeholders—which can sometimes lead to positive rights outcomes— they should not be relied upon for the protection of human rights. They are simply not fit for this purpose."[46]

Instead, MSI Integrity is now focusing on reimagining the relationship between stakeholders and corporations towards new forms of doing business that are more socially responsive and responsible, to move in their words "beyond corporations". What is striking is that MSI Integrity sees formal legal accountability as a core aspect of their new programme:

> "To us, moving beyond corporations means developing and promoting economic models and policy transformations whereby:
> **(1) Workers and/or affected communities are at the center of decision-making.** What if businesses were legally and operationally accountable not to shareholders, but to the workers and/or the communities affected by their decisions? What if workplace democracy was a universally recognized human right? What if affected communities and workers determined who governed an organization or how that organization was run?

[44] MSI Integrity "MSI Evaluation Tool" at http://www.msi-integrity.org/evaluations/msi-evaluation-tool-2/. See too MSI Integrity, *The Essential Elements of MSI Design* (2017) at http://www.msi-integrity.org/wp-content/uploads/2017/11/Essential_Elements_2017.pdf

[45] *The Essential Elements of MSI Design*, 6.

[46] MSI Integrity "Not Fit For Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance" (July 2020) at https://www.msi-integrity.org/not-fit-for-purpose/ .

> **(2) Benefits and ownership accrue to the workers who generate value for a business and/or to the communities and rights holders who are impacted by its behavior.** What if the primary economic beneficiaries of enterprises were the workers or wider communities impacted by those businesses? What if businesses who contribute a net harm to society lose their legal license to operate?"[47]

This shift from voluntary standard setting by MSIs to calls for "official" legal regulation of business actors by MSI Integrity is based on the view that the self-regulatory model of "global governance" cannot deliver effective human rights protection or ensure responsible business conduct. In terms of transnational legal analysis while globalisation has prompted a carve out from both national and international law towards informal legal pluralism, the failure of MSIs adequately to protect the rights of non-commercial stakeholders is signalling a "carve-in" back to official legal regulation.[48] This is also the case in relation to HRDD and informal grievance procedures

(b) HRDD and its Limitations

As already noted, HRDD is the cornerstone of the corporate responsibility to respect human rights under the UNGPs. It gives business actors a significant discretion in how to put HRDD into practice. HRDD has four components: initial identification of human rights risks and impacts; assessment of their seriousness and of those most at risk; avoidance and mitigation of risks and accounting for and remediation of human rights risks.[49] The exercise by business actors of HRDD in the course of their decision-making permits a learning process to develop which, it is hoped, will lead them towards integrating human rights compliant behaviour into their operations. But is it effective in achieving this aim?

For now the answer appears to be no.[50] First, as businesses control their own HRDD, many key human rights questions may be overlooked.[51] In the absence of mandatory due diligence laws business incentives to undertake HRDD remain largely reputational and sector or firm specific. If a sector or company is not very visible to the public, shareholders are silent and there is little or no campaigning by NGOs on human rights issues pertaining to that sector or company, the incentive to undertake HRDD remains minimal.[52]
This lack of incentives is enhanced by the dilemmas businesses face when identifying human rights risks.[53] As Fasterling asserts, effective HRDD processes entail a significant alteration of

[47] MSI Integrity "Beyond Corporations" at https://www.msi-integrity.org/beyond-corporations/
[48] On the carve-out of business regulation from national and international law to privatised regulation by transnational law see further Bantekas n 21.
[49] See generally OECD *Due Diligence Guidance for Responsible Business Conduct* (OECD, Paris, 2018) ch II "The Due Diligence Process" at http://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm. For a detailed analysis see Muchlinski n 24, 100-112.
[50] The following account is based upon and develops Muchlinski ibid 115-118.
[51] See further Daniela Chimisso dos Santos and Sara L. Seck "Human rights due diligence and extractive industries" in Surya Deva and David Birchall (eds) *Research Handbook on Human Rights and Business* (Cheltenham, Edward Elgar Publishing, 2020) ch 8 especially at 166-73.
[52] Muchlinski n 24, 116. See further Lutz Preuss and Donna Brown "Business policies on human rights: An analysis of their content and prevalence among FTSE 100 firms" 109(3) *Journal of Business Ethics,* 289, 294-5 (2012).
[53] See Mark B. Taylor "Human rights due diligence in theory and practice" in Surya Deva and David Birchall (eds) n 51, ch 5.

corporate purpose which prioritises respect for human rights over value maximisation.[54] In such circumstances the corporation may opt to avoid meaningful HRDD processes in favour of a "tick-box" exercise that aims to limit costs, avoid producing a record that could be used against the corporation or require decisions that conflict with financial corporate objectives.[55]

This problem may be exacerbated by the use of social auditing as the principal tool for implementing HRDD.[56] A social audit verifies supplier compliance with human rights standards, usually set out in a code of conduct, involving, typically, a site inspection, review of documents, if available, and interviews with managers and employees.[57] This is not always effective at avoiding breaches of human rights by business partners or subsidiaries. In particular, the audit is often no more than a one-off, rather than continuous, short check-list exercise; it may be carried out by auditors who face conflicts of interest as they are paid for by the business carrying out the audit; it will not identify all relevant human rights risks and it is often carried out only on first tier suppliers.[58] Furthermore, social auditing is as effective as the degree of leverage the auditing business has over the audited business which may not always be high enough to effect change.[59] As McCorquodale and Nolan note, HRDD is quite different from social auditing as its main aim is the collection of information not the active avoidance of human rights infringements, and that "the ongoing reliance on social auditing by businesses reflects a very limited vision of HRDD and may result in cosmetic or self-legitimating compliance-oriented responses by business to address and reduce the potential for harms."[60]

The risk of a "tick-box" effect increases with the widening of due diligence reporting requirements.[61] The increased adoption of mandatory corporate mandatory HRDD laws will increase demand for expertise in HRDD which is currently unevenly dispersed and of variable quality. Thus if the legal requirements of HRDD remain much as they are the risk of superficial "tick-box" exercises will increase. To be truly effective new laws would need to ensure that the requirements of HRDD are clearly laid down, a properly resourced and staffed regulatory body would need to be established to review corporate HRDD processes and submissions and effective complaints procedures need to be in place as would strong sanctions for non-compliance.[62] In this respect, HRDD connotes the development of a legal duty of care and this can develop, either through statute or case-law, into a binding legal obligation at the level of

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at 93-4.

[54] Björn Fasterling "Human Rights Due Diligence as Risk Management: Social Risk Versus Human Rights Risk" 2(2) *Business and Human Rights Journal* 225 at 246 (2017).

[55] ibid at 247.

[56] See Justine Nolan and Nana Frishling "Human rights due diligence and the (over) reliance on social auditing in supply chains" in Deva and Birchall (eds) n 51, 108.

[57] ibid at 118

[58] ibid at 121-3. On the issue of human rights auditor independence see James Harrison "Human Rights Due Diligence: Challenges of Method, Power and Competition" (Centre for Human Rights in Practice, University of Warwick, March 2023) at https://wrap.warwick.ac.uk/174876/1/WRAP-harrison-hrdd-2023.pdf.

[59] See further Nolan and Frishling, n 56, 125-9.

[60] Robert McCorquodale and Justine Nolan "The Effectiveness of Human Rights Due Diligence for Preventing Business Human Rights Abuses" 68 *Netherlands International Law Review* 455 at 468 (2021). https://doi.org/10.1007/s40802-021-00201-x

[61] See Harrison n 58 on which this paragraph draws.

[62] For a critical assessment of existing mandatory HRDD laws see Surya Deva "Mandatory human rights due diligence laws in Europe: A mirage for rightsholders?" 36 *Leiden Journal of International Law* 389 (2023). https://doi.org/10.1017/S0922156522000802.

national law for business actors to be liable for damage and loss caused by their failure to observe human rights.[63] Indeed in 2017, the UK Parliamentary Joint Committee on Human Rights proposed that new legislation be adopted, "to impose a duty on all companies to prevent human rights abuses, as well as an offence of failure to prevent human rights abuses for all companies, including parent companies, along the lines of the relevant provisions of the Bribery Act 2010."[64] Equally the draft legally binding business and human rights instrument (LBI), currently being discussed in the UN, also seeks to determine the legal scope of binding HRDD requirements.[65] In terms of transnational legal analysis once again the movement is towards "carving-in" national and international law to regulate HRDD.

(c) Corporate Operational-Level Grievance Mechanisms

The UNGPs recommend that where enterprises have identified, through due diligence, any adverse human rights human rights impact that they have caused, or contributed to, they must provide processes to enable remediation.[66] In some situations, recourse to judicial or state-based non-judicial mechanisms is preferable, but in many cases an operational-level grievance mechanism (OGM) established by the business enterprise may be effective.[67]
The main question raised is whether OGMs will offer functional, fair and effective remediation. This is the subject of a continuing scholarly debate.[68]

There is evidence that such mechanisms do not always offer effective remedies. For example, in a recent study, the Roundtable on Sustainable Palm Oil (RSPO) mechanism was found to perform well when judged according to the UNGPs' effectiveness criteria, which stress the need for due process and accessibility for stakeholders, but performed poorly when individual cases were assessed to ascertain the outcomes that were achieved for rightsholders.[69] The most

[63] See Peter Muchlinski "Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation" 22(1) *Business Ethics Quarterly* 145 (2012); Doug Cassel "Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence" 1(2) *Business and Human Rights Journal* 179 (2016) https://doi.org/10.1017/bhj.2016.15

[64] UK Joint Parliamentary Committee on Human Rights *Human Rights and Business 2017: Promoting responsibility and ensuring accountability (*HL PAPER 153 HC 443, 5 April 2017) para 193 at https://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/inquiries/parliament-2015/inquiry/.

[65] See Muchlinski n 24, 158-171. The latest draft of the LBI adopted in July 2023 is available at: https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc

[66] UNGPs n 24, Principle 22. See further Office of the United Nations High Commissioner for Human Rights *The Corporate Responsibility to Respect Human Rights: An Interpretative Guide* (New York and Geneva, United Nations, 2012) at 63-7 available at http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf (*Interpretative Guide*); Shift, *Remediation, Grievance Mechanisms, and the Corporate Responsibility to Respect Human Rights* (New York, 2014) at https://shiftproject.org/wp-content/uploads/2014/05/Shift_remediationUNGPs_2014.pdf . This section draws upon Muchlinski n 24, 142-147.

[67] *Interpretative Guide* ibid at 68. See further Shift ibid at 5-6.

[68] See further Fiona Haines and Kate Macdonald "Nonjudicial business regulation and community access to remedy" 14 Regulation & Governance 840 (2020).

[69] See UNGPs, n 24, Principle 31; Mark Wielga and James Harrison "Assessing the Effectiveness of Non-State-Based Grievance Mechanisms in Providing Access to Remedy for Rightsholders: A Case Study of the Roundtable on Sustainable Palm Oil" 6(1) *Business and Human Rights Journal* 67 (2021). See further James Harrison and Mark Wielga "Grievance Mechanisms in Multi-Stakeholder Initiatives: Providing Effective Remedy for Human Rights Violations?" 8(1) *Business and Human Rights Journal* 43 (2023).

common criticism of the procedure was that it took an inordinate amount of time.[70] The study concludes that non-judicial grievance mechanisms will remain severely limited due to their voluntary nature and the duration of procedures suggests little immediate advantage over judicial proceedings.[71]

In relation to corporate level OGMs, a study by the International Commission of Jurists (ICJ) echoes these findings.[72] This points out the difficulties experienced by stakeholders in accessing OGMs and the dangers of the corporation acting as both defendant and judge in a complaint. In addition, problems arise regarding the transparency and publicity of claims, the imbalance of resources between the corporation and outside stakeholders and the relationship between the procedure and judicial proceedings especially where the complainant is required to waive their right to go to court.[73]

OGMs may beneficial in weak governance zones where legal remedies are non-existent, but in states with effective legal systems OGMs may in fact replace more effective judicial remedies and give the corporation control over remediation to the possible detriment of local communities.[74] To avoid this, OGMs should be administered in collaboration with local stakeholders and must focus on their needs and not those of the corporation. Otherwise the OGM may become a process of self-interested local dissent management.[75] Equally, states should not rely on OGMs to avoid their regulatory responsibilities for upholding human rights and environmental justice. Again, in terms of transnational legal analysis these privatized methods of dispute settlement need regulating both in relation to procedural propriety as demanded by the UNGPs but also in relation to substantive effectiveness. Above all it should not be acceptable for the terms of the OGM to exclude judicial remedies for alleged victims.

6. Concluding Remarks: Bringing Official Law Back In

In his study of transnational private law theory Ilias Banteks offers this important conclusion

> "Transnational regulation is predicated on state approval, yet the form of regulation it gives rise to is tantamount to a sui generis private law. Although this author finds the creation, maintenance and reinforcement of this sphere an important element in cross-border finance and commerce, it should not under any circumstances become a platform or guise for the erosion of civil liberties and socio-economic rights."[76]

The message from this short stocktaking of ICSR and, in particular, the rise of business and human rights is that the space opened up for corporate self-regulation through MSIs and the

[70] Wielga and Harrison ibid, 82-8
[71] ibid, 88-91.
[72] International Commission of Jurists *Effective Operational Grievance Mechanisms* (Geneva, November 2019) at https://www.icj.org/wp-content/uploads/2019/11/Universal-Grievance-Mechanisms-Publications-Reports-Thematic-reports-2019-ENG.pdf
[73] On which see further Rae Lindsay "Multinational Human Rights Litigation from the Perspective of Business" in Richard Meeran (ed) *Human Rights Litigation Against Multinationals in Practice* (Oxford, Oxford University Press, 2021) ch 11 at 310-11.
[74] Muchlinski, n 24, 143. For an instructive study see Rajiv Maher, David Monciardini and Steffen Böhm "Torn between Legal Claiming and Privatized Remedy: Rights Mobilization against Gold Mining in Chile" 31(1) *Business Ethics Quarterly* 37 (2021).
[75] Muchlinski ibid.
[76] Bantekas n 21.

voluntarism of the UNGPs operationalized through HRDD and OGMs contains within it the very risks Bantekas identifies.

In response, an increased response from "official" law is taking place amid calls for greater corporate accountability for responsible conduct and observance of human rights. This is manifested in the rise of new mandatory HRDD laws and in the proposed UN binding treaty. However, as has been argued, formal law cannot by itself guarantee the effective reduction of human rights violations by businesses in the course of their operations. So much depends on the content and regulatory apparatus established by HRDD laws. At a minimum they must display the characteristics described earlier: clear HRDD requirements, an effective monitoring mechanism and complaints procedure and strong legal remedies for corporate non-compliance with HRDD procedures and for violating their duty of care not to infringe human rights. In addition, while space prevents a detailed discussion of the UN draft treaty, it too raises similar questions concerning the suitability of its eventual substantive content and institutional apparatus as a means of furthering business compliance with human rights.[77]

Equally, the process of privatized self-regulation has opened up new regulatory gaps in terms of the accountability of MSIs and in the proper conduct of OGMs. Self-regulation without formal legal oversight is unlikely to work and, if the utility of such multistakeholder and informal grievance mechanisms is to be upheld, formal legal intervention will be necessary to ensure proper organisation, accountability and procedures as well as to ensure compatibility with existing judicial and non-judicial structures of compliance with responsible business conduct norms.

Accordingly, the landscape of ICSR as a transnational legal phenomenon will display elements of both formal and informal regulation but the latter has to occur within a framework of law that ensures informality does not descend into a corporate free-for-all that effectively disregards the fundamental rights and freedoms which corporate actors have the power to undermine. "Consequently", as Bantekas notes, "the transnational sphere should be accessible to civil society organizations, as well as parliamentary entities that seek conformity with national constitutions. The benchmark for the success of transnational law will depend on how much its end users entrench it in the rule of law and provide it with a high degree of legitimacy. Legal systems often crumble without such attributes."[78] This word of warning cannot but be most strongly echoed in relation to the subject matter of this contribution.

[77] On which see further Jernej Letnar Černič and Nicolas Carillo-Santarelli (eds) *The Future of Business and Human Rights: Theoretical and practical Considerations for a UN Treaty* (Cambridge, Intersentia, 2018).
[78] Bantekas n 21.