

# Legal Innovations for Corporate Accountability under International Law: A Critique

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The pursuit of morally driven concepts of justice may find a constant struggle to navigate through the maze of institutional arrangements, procedures, political objectives, and techniques of international law. In order to exert an effective influence over social problems, the role of international legal innovators has sometimes relied upon an eclectic approach that reconciles multiple competing interests by encompassing them completely.<sup>1</sup> Thus, the background process of legal innovation necessarily requires some degree of principle bargaining. This particular characteristic is probably the reason why a paradoxical nature underlies several of international law's sectoral divisions.

For example, a close analysis of international criminal law unveils how the pursuit of historical truth and justice can sometimes lead to the contradictory effect of creating a *show trial* or turning criminals into martyrs.<sup>2</sup> Similarly, critiques of human rights law demonstrate how the state's function as the main guarantor of rights consistently collides with the state's unavoidable role as main violator of human rights.<sup>3</sup> In both examples, the cognitive narrative that is created to set in motion a legalized process or techno-strategic language,<sup>4</sup> turns out to be counter-productive or ineffective to the original intended

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<sup>1</sup> See, e.g., an interesting assessment of this eclecticism during the creation of modern international institutions. Nathaniel Berman, *Modernism, Nationalism and the Rhetoric of Reconstruction*, 4 YALE J. OF L. AND HUM. 351 (1992).

<sup>2</sup> See Marti Koskenniemi, *Between Impunity and Show Trials*, 6 Max Planck Yearbook for United Nations Law, 1–35 (2002).

<sup>3</sup> See Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L. J. 201 (2001).

<sup>4</sup> A techno-strategic language refers to a specialized argot used by professionals within a specific field of knowledge. This concept attempts to describe the way in which technical words used to frame discussions within a professional field, are also influencing the strategic thinking of the professionals actively engaged in the practice. For example, the military jargon will be influencing the way that military officers perceive and engage within a specific circumstance, in a way that deviates from the way a person not using that language would engage. See, e.g., C. Cohn, *Sex and Death in the Rational World of Defense Intellectuals*, 12 SIGNS 4, 687–718 (1987).

outcome. Assessing the necessity—or in this case, desirability—of proposing legal innovations to bring justice for corporate actors requires us to consider this possibility.

Through this Article, I will explore the adequacy of creating new law or institutions to hold corporations accountable for human rights violations. I must clarify though, that I do not advocate for impunity or take a critical position against justice. On the contrary, I intend only to assert that any authentic concern for justice demands careful assessment to ensure that the design of any new process or institution takes into account the possible externalities and unintended outcomes it may provoke.

On this matter, I will start by addressing Maya Steinitz's proposal to create an International Court on Civil Justice. This idea would appeal to international lawyers' desire for centralizing decision-making and ensuring the completeness and coherence of the legal system. Abstractly proposed, it is also attractive to individuals seeking redress and perhaps even to corporations looking for more legal certainty regarding the consequences of their activities. As Steinitz affirms, it is not far-fetched that corporations may "gain from the vastly more efficient system of dispute"<sup>5</sup> by avoiding indirect costs related to fragmented litigation. Indeed, creating such a court could tilt the balance of power relations between transnational corporations, states, and individuals. However, it might do so in a way that, instead of having a deterrent effect against inappropriate behavior, would merely grant corporations a clear sense of the price they must pay for any particular conduct. In that sense, the uncertainty of the decentralized transnational legal processes may actually allow individuals on the receiving end of power relations to design innovative strategies that would become unavailable if the accountability mechanisms were narrowed to a sole international court conducting its procedures according to a unified set of rules.

Furthermore, the eventual establishment of such a court would forcefully follow—or at the most, it would form part of—a codification initiative. Such a process is, in fact, currently taking place within the Human Rights Council. It is thus timely that we discuss the potential drawbacks of that type of initiative and consider the critiques against the proponents of legalization and their doctrinal positions in particular. In this regard, it is important to note John Ruggie's warning about the risk of attempting to codify an inherently complex and dynamic subject through an inevitably generalizing and static framework.<sup>6</sup> It is unclear how a body of hard law could respond to the evolving nature of the corporate world and how it could remain compatible with the shifting nature of the global economy while simultaneously offering effective protection to changing humanitarian interests. Proponents of a rigid set of rules may overestimate the reach of legalization and underestimate the unavoidable fragmentation of international law and the costs derived from the future uncertainty of the problems.

This naiveté, as Ruggie suggests, may result from a belief that creating more law translates into bringing more justice, while experience demonstrates that resources could be better allocated in other types of initiatives. According to this perspective, it could be that,

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<sup>5</sup> Maya Steinitz, *The Case for an International Court of Civil Justice*, 67 STAN. L. REV. ONLINE 75 (2014).

<sup>6</sup> See John G. Ruggie, *The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty*, Institute for Human Rights and Business (July 08, 2014), <http://www.ihrb.org/commentary/board/past-as-prologue.html>.

while diplomats and NGOs were expending great effort in negotiating such a treaty, they lost sight of how to pursue the desired outcomes through other means, such as on a national or case-by-case basis. The idealization of law as an inherently effective tool for social change may be blinding humanitarians once more. Similarly, extending this critique could also lead us to consider the unfortunate possibility that, even if such a treaty were to be adopted in the future, it would risk becoming outdated in a relatively short period. This has happened before with human rights treaties and institutions that currently struggle to adapt to a globalization process in which nation-states are no longer the only or the main threat to humanitarian interests.

The question remains as to how—and if—international law may increase the accountability of corporations. To address this matter, it is important to look back and draw lessons from previous experiences. On this matter, one analogical analysis can be made about the international codification processes regarding mercenaries (who, like corporations, are private actors capable of committing severe human rights abuses).

The international law on mercenaries presents us with an archetypal case of how the strengthening of norms can sometimes be effective through weak law and how institutionalization can actually damage the content of a norm.<sup>7</sup> The first international anti-mercenary law was adopted as part of the negotiations of the Protocol Additional to the Geneva Convention of 1949.<sup>8</sup> Since then, it became evident that the results of this legalization process, instead of boosting the effectiveness of a widely accepted anti-mercenary social norm, created a law so flawed that “any mercenary who cannot exclude himself from [its] definition deserves to be shot—and his lawyer with him!”<sup>9</sup>

When the legalization of a somewhat solid norm—such as the norm claiming to hold corporations accountable for human rights violations—provokes the collision of harshly opposing interests, the legal precision sought by institutionalization processes requires bargaining. This bargaining process may solidify a compromise that undermines the effectiveness of a social norm that would otherwise have empowered strategic projects and deterred misconduct. As Sarah Percy states, while codification may spread the precise content of a sufficiently developed norm, it also risks curtailing the effectiveness of contested normative propositions by narrowing the scope of their influence, by delegitimizing them if the adopted law goes unenforced, or by creating loopholes that can be exploited.

Defining the type and extent of corporate liability under hard international law, as well as the remedies and processes for their enforcement would require a negotiation process, possibly leading to an overtly ambiguous or overgeneralizing norm that may end up curtailing the possibility of attaining justice.

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<sup>7</sup> See Sarah V. Percy, *Mercenaries: Strong Norm, Weak Law*, 61 INTERNATIONAL ORGANIZATION 2 (2007).

<sup>8</sup> Through Article 47 of *Protocol I Additional to the Geneva Conventions & the International Convention against the Recruitment, Use, Financing, and Training of Mercenaries*.

<sup>9</sup> Geoffrey Best, HUMANITY IN WARFARE: THE MODERN HISTORY OF THE INTERNATIONAL LAW OF ARMED CONFLICTS (1980), cited in Sarah V. Percy, *Mercenaries: Strong Norm, Weak Law*, 61 INTERNATIONAL ORGANIZATION 2 (2007)

In spite of these concerns, one final remark is possible in favor of the current projects seeking to increase corporate accountability. By invigorating the discussion, the ongoing deliberative process may spread the normative content of a claim for justice against corporate abuses. This effect should serve to proliferate the internalization of such a norm, thus creating a favorable environment for pursuing projects aimed at holding corporations accountable. As the norm develops, legalization may provoke a normative cascade leading to compliance. However, before proposing such a measure, we should recall Cicero's advice and remember that sometimes more laws means less justice.