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Committing the Crime of Poverty: The Next Phase of the Business and Human Rights Debate

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1 INTRODUCTION

The UN Guiding Principles on Business and Human Rights (GPs)[1] and the adoption of the UN Human Rights Council Resolution on the elaboration of a binding instrument,[2] represents the latest stage in the evolution of attempts to regulate multinational corporations (MNCs). The advocates of the GPs propose a rigorous drive towards National Action Plans (NAPs) to implement the GPs; those in favor of a binding treaty veer away from the emphasis on NAPs, emphasizing the nonbinding nature of the GPs. Irrespective of one's view as to the best way to regulate cross border corporate conduct, we are all facing the "what next" question. This chapter posits that the "what next" question requires an analysis of the context of global economic hegemony and its accompanying harm – arguably the greatest violation of our age – structural poverty.

The chapter begins with an analysis of two specific structural flaws in the architecture of the GPs, namely: the context of poverty and the role of global politics in shaping the GPs. These principles must be considered in the development of a treaty if it is to be effective and genuinely fill the identified gap in the GPs. This analysis segues into a discussion of the various categories of players within the business and human rights debate who have been elided or inappropriately conflated. I challenge the current groupings by the UN into the state, business, and affected communities. I propose a revised categorization of relevant actors that

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[1] UN Human Rights Council, "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises," John Ruggie, 21 March 2011, A/HRC/17/31.

[2] Human Rights Council, "Elaboration of an internationally legally binding instrument on transnational corporations and other business enterprises with respect to human rights" A/HRC/26/L.22/Rev.1 (25 June 2014) ("resolution for a binding treaty" or "binding treaty resolution").

requires a profoundly uncomfortable review of the harm that the business and human rights regulatory system should be addressing, specifically structural poverty and economic inequality between the Global North and the Global South. Finally, the piece proposes two global adjustments that are necessary in order for any regulatory framework to be successful. These two criteria are (i) regional trade cooperation and (ii) the recalibration of the value of human labor.

2 THE DEFICIENCIES OF THE GPS AND CHALLENGES FOR A TREATY

2.1 *Design Flaw in the Architecture of the Protect, Respect, and Remedy Pillars*

Is there a design flaw in the architecture of the GPs' three-pillar framework? In theory, no; in practice, yes. The GPs are a framework that rests on three pillars, the well-known Protect, Respect, and Remedy triumvirate ("the pillars"). The effectiveness of the framework is dependent on the mutually reinforcing pillars, each operating at maximum strength. The success of the GP framework relies on a coexistence of three factors: a robust state that has the interests of its citizens at heart; a strengthening of corporate compliance with human rights standards; and effective remedial systems. If all three work together, the GPs would indeed produce a remarkable structure for attenuating corporate malfeasance. But, if one of the three pillars fails, does the overall structure stand?

Pillar one, for example, suffers from the reality that host states, in which multinational corporations operate, may not comply with their international human rights obligations to protect their citizens from violations perpetrated by non-state actors. Because of the need for foreign capital, host states in the developing world tend to compete with one another for foreign business. This may be achieved in part by keeping social and environmental regulation weak and labor costs low. This results in the oft discussed governance gaps, where multinational corporations operate outside the jurisdictional reach of their home state, in host states, which are encouraged to keep their corporate laws and regulations flexible. The result is a race to the bottom, where a deceleration of state control of corporations is accompanied by an acceleration of violations of human rights, environmental standards, and good governance practices.[3]

What happens when multinational corporations deliberately target states with high levels of poverty and low regulatory standards precisely to avoid the overhead costs associated with doing business in developed economies? What happens if a corporation operates in a state, which allows for, or is involved in, the commission of human rights violations? Is it justifiable for a corporation to still make a profit? Or,

[3] Bonita C. Meyersfeld, "Institutional Investment and the Protection of Human Rights: A Regional Proposal," in *Globalisation and Governance* (ed.), Laurence Boulle (Siber Ink South Africa, 2011), 174.

more likely, what happens when there is an incoherent regulatory system and a multinational corporation exploits that incoherence to maximize its profits, knowing that human rights violations and poverty may follow? And what happens if these scenarios play out to the detriment of the Global South and the advantage of the Global North and emerging economies?

When tested by the reality of global and economic exigencies, the pillars reveal fractures, some of which are hairline and can be fixed; others are structural and undermine the entire framework.[4]

2.2 *Design Flaw in the Consultation Around and Construction of the Pillars*

The GPs, as with all international instruments, are the product of heavily negotiated processes involving varying levels of power and control. Within this highly politicized context, the Global North has been the key driver of the GPs. While the Global South has not been absent, there are, however, two important questions to consider: *who* in the Global South has been engaged; and have they been engaged *to the same extent* as big business and states from the Global North?

On the whole, the Special Representative of the Secretary-General's (SRSG) consultation occurred with powerful and privileged individuals or groups in empowered locations.[5] The individuals who attended the consultations were state agents, law firms, trade unionists, academics, and activists who represented victims. The formally reported consultations all took place in major cities. The consultations (funded mostly by governments and corporations) occurred in Geneva (4), Johannesburg (2), Bangkok (1), London (2), Oslo (1), Brussels (1), New York (4), Bogota (1), Berlin (2), The Hague (1), Copenhagen (1), Boston (3), New Delhi (1), Buenos Aires (1), Salzburg (1), Paris (1), Toronto (1), and Moscow (1). Thirteen of the cities are in the Global North (if one includes Moscow) and five of the cities are in the Global South. The SRSG consulted in eight Western European cities; one African city; two Asian cities; three cities in North America; two cities in Latin America, and one in Eastern Europe.[6]

The African consultation took place in Johannesburg, the financial powerhouse of sub-Saharan Africa and the economic capital of an emerging market force. Johannesburg is the epicenter of South Africa, where the majority of wealth and

[4] Bilchitz, "A Chasm Between 'Is' and 'Ought'? A Critique of the Normative Foundations of the SRSG's Framework and the Guiding Principles" in The Human Rights Obligations of Business: A Critical Framework for the Future (eds.), S. Deva and D. Bilchitz (2013) 1, at 5–10. See also Surya Deva, *Regulating Corporate Human Rights Violations – Humanizing Business* (London /New York: Routledge, 2012).

[5] While there were engagements with local and indigenous communities, the details of the GPs were hammered out in boardrooms.

[6] "UN Secretary-General's Special Representative on Business and Human Rights, Consultations, Meetings and Workshops," Business and Human Rights Resource Centre, accessed 3 August 2014, http://business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights/consultations-meetings-workshops.

corporate power remains in the hands of the white minority of the population. This consultation could never claim to be representative of Africa as a whole or of the varying interested parties within the continent.

There are very practical reasons why the SRSG's focus was on the Global North (for example, the proximity to the UN headquarters in Geneva and New York), but it remains a truism that the GPs cannot be claimed to be informed by, or respond to, the full rubric of interests across the globe. This is not a critique of the GPs' accuracy, efficacy or their impetus in advancing the business and human rights debate. However, it is about their appropriateness for full-blown implementation.

The practical omission from *high-level* consultations of people living in poverty; people living in conflict situations; people working in rural areas; and workers themselves, means that the GPs have been informed largely by one set of constituents to the exclusion of others.[7]

This is a key challenge for the Intergovernmental Working Group (IGWG) on a binding instrument (established in terms of the binding instrument resolution).[8] It will be essential to the legitimacy of the treaty process that full consultation is undertaken, not only in New York and Geneva, but in impoverished areas globally.

2.3 *The "Be Patient" Mantra*

Does the participation deficit impact the viability of implementing the GPs? Yes. In time, the GPs may gain traction but this will not be soon. The GPs pragmatically call for an incremental approach to achieving accountability for corporate human rights violations. But are such remedial steps sufficiently meaningful when compared with the continued problem of economic exploitation? For the most part, the remedial steps imposed on corporations are characterized by voluntarism and corporate social responsibility – corporate accountability relies entirely on regulation by the host state, which often is not able to mitigate the harmful status quo. Whatever the strengths or weaknesses of these steps, they are, ultimately, (i) determined by those with power and, with few exceptions, (ii) come with little evidence of sacrifice or a commitment to change on the part of the empowered.

The "be patient" mantra may be practical but it is one-sided request. Those who must be patient are people living in poverty while those who benefit from delayed reform are those living in comparable wealth. It suits those who have the power to delay reform and it is an indescribable sacrifice for those in poverty to wait.

At the same time, one cannot ignore the politics of pragmatism. The SRSG has shifted the global discussion around business and human rights to an unprecedented

[7] The ideal of participation by affected populations is at the heart of UN Guiding Principles on extreme poverty and human rights, which demands the participation of people living in poverty in crafting solutions to extreme poverty, see paragraphs 4 and 5 of the Preamble to the UN Guiding Principles on Extreme Poverty and Human Rights, A/HRC/21/3, 2012.

[8] Binding Treaty Resolution.

point of engagement. We therefore have two competing, coexisting realities: (i) business (and some states) will not easily reform and they need to be led cautiously to a standard of human rights compliance; and (ii) human rights violations continue to affect communities, whose suffering will continue while multinational corporations slowly become comfortable with the idea of human rights compliance. This delay becomes especially difficult when those crafting the position have not partnered equally with those suffering from the status quo.

The limited participation of affected individuals and communities from the consultation process has had an impact on the content of the GPs as well as the extent to which the victims of human rights violations do and will endorse them. This is indeed a flaw in the construction of the Pillars.

The GPs therefore provide a structure that is compelling in design but relies greatly, perhaps detrimentally, on the variables of robust state and corporate conduct, with no clear consequences for noncompliance. These design flaws are not abstract considerations. They are the daily manifestation of human rights violations, particularly in the Global South.

These structural flaws will not be attenuated without addressing: (i) the inaccurate disaggregation and categorization of the multitude of players relevant to business and human rights; and, (ii) the inaccurate diagnosis of the harm that needs to be healed. In the next two sections I address each of these problems.

3 DISAGGREGATING THE PLAYERS

3.1 *The Three Interest Groups*

The business and human rights debate oscillates around three broad interest groups: the state; the corporation; and civil society. This delineation is inaccurate and either excludes, or collapses, several distinct interest groups into this triad of players. This is one of the key weaknesses in the UN response to cross-border corporate conduct, creating the potential to elide important viewpoints. Some examples of this improper categorization are discussed below.

3.2 *Government and Business*

The GPs draw a distinction between the role of the state and that of business. This distinction, however, is often artificial. There are many occasions where the interests of the state (in the form of the government) and big business are aligned. This occurs mainly in two contexts: the illegitimate context of corruption of foreign officials by corporations and, the legitimate context of a government having pro-business policies that may be beneficial to corporations operating in the country but prejudicial to its impoverished citizens. Government and business, in other words, often

represent the same interests, even where those interests may risk human rights violations and the perpetuation of poverty.

3.3 *Government and Citizens*

Similarly, a government and its citizens are not always pursuing the same goals and may have divergent interests. The GPs rely on the assumption that state actors will act in the best interests of the people they govern. This is not always the case. Government representatives generally make policy decisions based on the short-term view of the next political cycle. Such short-term political interests may not be consistent with long-term social benefits. The theory of pillars one and two, therefore, depends to some extent on an oft artificial conflation of government and citizen interests. The GPs' reliance on the state to regulate business assumes the fiction that the state will, or can, act in the best interests of its citizens. We see this for example in the South African National Development Plan and the associated large-scale infrastructural development legislation.[9] These plans seek to grow the economy and may well increase South Africa's GDP. The real question, however, is whether this plan is pro-poor and will alleviate the poverty in which the majority of the country lives. Increasing GDP is only in the interests of the people of a country if it reaches them. This is exacerbated by the proliferation of illicit capital flight, with South Africa coming in at number two in the sub-Saharan region for the highest levels of capital flight after Nigeria.[10]

The development and growth plans of governments in the Global South do not always advance the eradication of poverty. It is too simple to suggest that corporations working in such jurisdictions should avoid doing harm when a fundamental component of their operations, with the support of a complicit government, involves the flow of profits out of the country. It is not the norm that MNC profits flow into impoverished communities.[11]

Therefore, government interests are not always distinct from those of business. Similarly, the interests of government do not always include advancing the interests of their citizens, especially those living in poverty.

3.4 *Civil Society and Victims*[12]

The international debate has also collapsed several distinct players under the heading of "civil society." Civil society is not the same as affected communities and

[9] "Infrastructure Development Act, 2014," and "National Development Plan, 2030," accessed 3 August 2014, http://www.gov.za/issues/national-development-plan/.

[10] Dev Kar and Devon Cartwright-Smith, "Illicit Financial Flows from Africa: Hidden Resource for Development, a Working Paper of Global Financial Integrity, a Program of the Center for International Policy (CIP)" 1 (2010).

[11] Deva, *Regulating Corporate Human Rights Violations* (2012).

[12] I recognize the difficulty in using the term "victim", which has connotations of weakness and dispossession. I use the term respectfully and without subscribing to the notion of victimhood.

affected communities are not the same as workers. Each has a distinct contribution, which should inform the development of a global business and human rights regime, and each has differing (albeit overlapping) interests.

The label "civil society," includes a range of actors with vastly differing interests and contributions. NGOs from the Global North have more funding to address human rights violations but less proximity to the violations themselves. Global South NGOs tend to come from cities and are serviced by individuals with sufficient power and privilege to exercise the rhetoric of outrage against the abuse of power. The "victims," however, remain largely outside this realm of this form of advocacy.

The victims, who have the most knowledge about, and experience of, corporate-related human rights violations, are seldom core to the business and human rights discussion at the UN level. Their input is not central to the development of the policies intended to remediate the problems such peoples experience. So-called grassroots NGOs or community movements have limited resources and the imperative of daily survival mean that they cannot pursue the same level of engagement as NGOs, government and business. Unless there is a deliberate mandate and funding for the engagement of impoverished and affected communities, the international discourse – be it around the implementation of the GPs or the development of a treaty – will be wanting.

3.5 *Workers and Affected Communities*

Finally, workers and affected communities are not the same. They often coexist but workers experience a range of human rights violations that relate to their direct engagement with the corporate player. Affected communities have different experiences, which are often indirectly linked to corporate activity. There is also a multitude of types of affected communities, including: the community that springs up around a mine, consisting of workers' families and social networks; the community in one part of a country that sends its members to mines and factories to work in another part of the country; the community that supports agricultural workers; the community that supports factory workers; and the community that comprises home-workers. Within these categories there is further disaggregation based on gender, age, bodily ability, sexual orientation, religion, tribal affiliation, class and health, all yielding different imperatives.

In contrast, business has been broken down into several distinct categories, such as extractives, agriculture, financial services, retail, production, and construction. The GP consultation process, however, has not undertaken this nuanced examination in respect of victims of human rights violations.

The proper categorization of affected groups may ensure a more inclusive process and more responsive policies in relation to corporate-related human rights violations. In order to advance global corporate accountability, policy makers must

develop a much more nuanced understanding of the distinct players. It is important for two reasons: first, we will not get the solution right without the *equal* input of those at the heart of the violation; second, we risk the solution belonging to some, and not to all. The solution as it currently exists is crafted from a perspective of a few who claim to know the perspective of all.

4 WHAT IS THE HARM?

The harm that needs to be addressed is not the Bhopal gas leak or Niger Delta devastation. These are examples or *symptoms* of the harm that needs to be addressed by global regulation. We have to acknowledge that the majority of tragic human rights violations occur regularly and largely in the Global South as a result of projects designed to secure the flow of profits to the Global North.

The GPs do not address or attenuate this problem. The problem forces us to question the very global structures in which the GPs were developed. This is the structure of Global North versus Global South (with BRICS and emerging economies combining characteristics of both i.e., that they are both the recipients of human rights violations and the perpetrators of human rights violations in other developing or least developed economies). The harm is that global corporate profit relies on, and often exacerbates, poverty in the Global South. And yet poverty is not identified as a human rights violation as such under international law. The current international law regime identifies certain socio-economic rights as human rights; however, an accumulation of the violations of the rights to water, to health, to housing or justice, – we call this "poverty." Yet poverty is not considered a human rights violation or a breach of international law.

But poverty is not an accident. Poverty is structural and continues *not* because of deficiencies in the people living in poverty but because of global trade and economic regimes, political and government policies, and an entrenched inequality which is well documented by developmental specialists.[13] If we accept that poverty is a structure,[14] then we can identify winners and losers in this normative framework. The loser is the Global South, battling continued poverty, thereby making such states prime targets for corporations looking for low overhead costs, lax regulations, and high levels of impoverished people who are compelled to work for indigent wages (i.e., nonliving wages).

It is also impossible to ignore the colonial gloss that continues to inform international law. For example, the prime focus of international criminal law has been African heads of state. In all these cases African leaders are responsible

[13] Amartya Sen, *Development as Freedom* (Oxford University Press, 1999); "The Rigged Rules of Global Trade," Oxfam International, accessed 3 August 2014, www.oxfam.org/en/campaigns/trade/rigged_rules. and " Pricing Farmers Out of Cotton: The costs of World Bank reforms in Mali," *Oxfam Briefing Paper* (2007), accessed 3 August 2014, www.oxfam.org/sites/www.oxfam.org/files/pfooc.pdf.

[14] Oxfam, "The Rigged Rules of Global Trade."

for unspeakable human rights violations. The issue is not that such leaders are prosecuted. The issue is who is *not* prosecuted. The international criminal justice system is largely silent about the array of human rights violations and violators that emanate from the Global North. For example, Charles Taylor was targeted for his involvement in fueling the Sierra Leone conflict and financing the rebel factions. However, the individuals and corporations which bought the timber or diamonds, providing the funds for the war, escaped liability. The millions of dollars sent outside Liberia and Sierra Leone, often housed in banks in the Global North, remain out of reach of the citizens of these countries. And as the global loan and aid machine begins to grind into effect, Liberia will depend on aid and loans (often with unfair repayment conditions) while its natural resource wealth remains outside the country.

This one-sided approach to international criminal justice, fuels the narrative of Africa as dangerous and delinquent, with leaders who cannot be trusted with human rights standards. The architects of poverty, former colonial countries, and aid and loan agencies, sit as judges of African states and insulate their own corporate foot soldiers from any liability, either for committing human rights violations or for benefiting from and exacerbating structural poverty.

The GPs are embedded in this doctrinal preference that has created a reality in which the Global North benefits from the trade and economic status quo, a status quo they have no interest in changing; but a status quo that must shift if we are serious about mitigating corporate-linked human rights violations.

5 WHAT NEXT? PRECONDITIONS TO ADVANCING HUMAN RIGHTS PROTECTION?

Following the 2014 UN Human Rights Council's adoption of the Ecuador / South African sponsored resolution to work towards a binding treaty, the business and human rights debate has become more obviously polarized. There is no need to take an "either/or" approach to a treaty or GPs. Both options are simultaneously viable and flawed solutions. The GPs may infiltrate state and corporate conduct, achieving some level of consciousness and change. A treaty steps away from voluntarism and towards formal legal obligations for human rights violations. However, it is also true that the governance gaps in the globalized marketplace will remain and that the GPs are not designed to attenuate this. It is also true that a treaty will be a long-term solution but one that may provide a watered-down set of harms for which corporations may be held liable.

The polarization is not about the content of each approach; it is about power. The strongest economic powers in the Global North aggressively reject a treaty; those supporting the treaty on the whole hail from the Global South. Advanced plans to implement the GPs are from the Global North, with the European Commission and OECD favoring the GPs.

What does this polarization represent? It represents a rift that is about something larger: the increasing rejection of the status quo of economic hegemony. The UN system set about crafting a global solution, penned by the Global North. Even with the best intentions, the UN would always have difficulty claiming that a solution crafted by the Global North would be a global solution. The long, languishing dialogue around business and human rights has not included *as partners* the mothers of miners, the children who pick fruit, or the informal trader in inner cities across the world. Truly, the business and human rights debate and the GPs are neither global nor authoritative because they represent the views of those with power.

Therefore, there are two preconditions to any solution to the business and human rights problem, be it the GPs or a treaty: (i) strong regional alliances; and (ii) the recalibration of the value of human labor.

5.1 *Regional Alliance*

Developing economies ought to act in regional solidarity when imposing human rights compliance standards on outside corporations.[15] A regulatory body operated by a set of united developing states, could exercise a range of protective functions requiring human rights compliance by *both* states and corporations (possibly with adjudicative functions). The Corporate Responsibility Coalition (CORE Coalition) proposal, for example, encapsulates this notion of a cross-border regulatory body with an advisory and policy-making mandate accompanied by a dispute resolution mechanism.[16]

Imagine the same kind of body for an entire region, or group of regions, which regulates the role of corporate actors to achieve enhanced trade and human rights standards. A collaborative regional approach will help to reverse the pattern of state polarization in many developing regions. This pattern is one which has seen a cycle of static comparative advantage, where states loosen their labor protection system and ownership requirements of their natural resources in order to woo investors away from neighboring states with comparatively stronger regulatory frameworks. Powerful political collaboration can create a strong de facto system which, if well balanced, can both incentivize foreign investment and effectively constrain the extent to which investors can operate in a manner that compromises the region's human and natural resources.

The Southern African Development Community (SADC) offers a useful case in point. SADC members are rich in natural resources. However, members have not leveraged this shared strength to create human rights compliance requirements for foreign investors and MNCs. SADC is actually mandated to "promote sustainable and equitable economic growth and socio-economic development that will

[15] Meyersfeld, "Institutional Investment," p. 201.

[16] Jennifer A. Zerk, "Filling the Gap: A New Body to Investigate, Sanction and Provide Remedies for Abuses Committed by UK Companies Abroad" A report prepared for the Corporate Responsibility (CORE) Coalition, (2008).

ensure poverty alleviation with the ultimate objective of its eradication [. . .] through regional integration."[17] This mandate is linked to the objective of promoting "self-sustaining development on the basis of collective self-reliance, and the interdependence of Member States"[18] acting in accordance with "human rights, democracy and the rule of law."[19]

Clearly, SADC Member States have an obligation to eradicate poverty, pursue economic development through cooperation and collaboration, and protect human rights. This mandate of cohesive development and human rights protection provides the structure under which SADC must carry out its activities. These activities also include investment by and in SADC member states.[20] The SADC Treaty is very specific in this regard, identifying "trade, industry, finance, investment, and mining" as areas in which member states must cooperate.[21]

SADC's mandate to develop the region arguably requires the creation of a regulatory framework that protects the region's natural and human resources from improper exploitation. Individual states (who compete with each other and, in doing so, may allow reduced human rights compliance to secure foreign investment), through a regional body, could create standardized investment requirements which would mitigate the race to the bottom phenomenon. The regional raising of standards will create a chain of control that enhances human rights compliance by otherwise exploitative MNCs.

Such a body could operate in much the same way as large stock exchanges and apply an equivalent of the stock exchanges' listing requirement. The Johannesburg Stock Exchange, for example, requires listed companies "to show that it applies a core set of principles" relating, *inter alia*, to "environmental, social and economic sustainability, with good corporate governance underpinning each."[22] The Investment Committee of the OECD similarly has recognized and focused on reporting to ensure compliance with human rights standards in corporations' sphere of influence.[23] Regional bodies have a ready-made comparator to pursue regional regulation.

5.2 *The Power of Contractual Negotiations and Recalibrating the Value of Human Commodity*

Reform also requires the recalibration of the financial value attributed to different forms of work. Labor, management, and ownership are categories of work that are valued differently in the global marketplace. The latter two are seen to be far more economically valuable than the first. This type of value system is ripe for change.

[17] Treaty of the Southern African Development Community, Art 5(1)(a).
[18] SADC Treaty, art 5(1)(d). [19] SADC Treaty, art 4(c).
[20] SADC Treaty, art 2(2)(a)(i) and 14(1)(m). [21] SADC Treaty, art 21(3)(c).
[22] Johannesburg Stock Exchange SRI Index, Background and Selection Criteria, JSE and EIRIS, 2007–9, pp. 2–3.
[23] 2003 Annual Report on the OECD Guidelines for Multinational Enterprises, pp. 21–22.

The mining industry provides a useful example to explain this disparity. There are five entities required for the extractive process. Without anyone of these players mining is not possible. The players are: (i) the government: as custodian or regulators of the minerals in the ground, the government legitimizes extraction; (ii) financiers: the cost of mining requires the commitment of financial institutions, without which large-scale extraction could not occur; (iii) the mining company: mining companies have the expertise and project management experience indispensable to large-scale extraction; (iv) miners: no matter the extent of mechanization, mining projects will always need human beings to go underground. Without the individual miner, large-scale extractive mining is not feasible. Finally, mining projects need (v) the mine-affected communities, including both the sending community from where workers hail and the affected community that services the mine and its workers.

Although the mining project needs each entity's input equally, the output each receives differs vastly. This unequal sharing of the profits from the mining project is due, in part, to factors such as the surplus or deficiency of skills, labour, and education. However, it is also due to the inheritance of a particular historic moment, over 200 years ago, when the value of an individual was based on their race or gender. The work of white men has been, and continues to be, valued more than the work of others, even where the contribution of all is equally valuable.

When it comes to negotiating the contractual terms that ascribe value to human work, we should be injecting notions of danger, life expectancy, and difficulty of work together with principles of skills scarcity and education, which currently dominate the determination of human capital's value.

How does one ameliorate this imbalance in the value of work? Mining again provides a useful portal of analysis. The negotiation between mines and people living in poverty occurs in a context of information asymmetry and the exigencies of poverty. For example, South African mining law requires mines to adopt a social and labor plan in order to obtain a mining license.[24] In negotiations with mine affected communities and government, mining corporations must detail the way in which the mining project will improve human lives on a long-term basis through housing, education, sanitation, and other such initiatives. South African law, however, also allows the practice of mining companies to suspend operations for over eighteen months for so-called "care and maintenance."[25] Corporations have used the "care and maintenance" suspension to raise more capital when they encounter unexpected impediments to the extractive process. This temporary closure undermines the promise of poverty alleviation as migrant workers return home, without pay, for years. When a company negotiates with a community, they will not disclose the

[24] Mineral and Petroleum Resource Development Act (MPRDA), 2004.

[25] Republic of South Africa, Mineral and Petroleum Resources Development Act, 2002, www.dmr.gov.za/publications/summary/109-mineral-and-petroleum-resources-development-act-2002/225-mineraland-petroleum-resources-development-actmprda.html.

possibility of a "care and maintenance" long-term closure during the life of the mine. Such negotiations are vastly different from negotiations between a mining company and a bank, for example, in large part due to the asymmetry of information.

Governments need to engage in regional exchanges and implement strategies to ameliorate this information asymmetry and unbalanced bargaining leverage. With stronger negotiating bases, the extraordinary value of human labor can better come to the fore. This, in turn, would be a step towards meaningful poverty alleviation and, with that, the reduction in corporate-linked human rights violations.

How can governments and communities achieve this? If communities who experience mining can represent and negotiate on behalf of communities yet to be affected, this could enhance information symmetry and equality of arms in the negotiation around mining. Governments, civil society and corporations should *facilitate* this engagement but the engagement should be from one community to another. This enhances information, equalizes negotiation and could lead to a far more stable – and equal – corporate project.

These suggestions are not without their faults and unintended consequences. However, they do highlight the structural inequality and myopic acceptance of a very harmful status quo: where the leaders of the Global South continue to be scuppered by conflict and the workers of the Global South continue to be valued at a radically reduced rate.

6 CONCLUSION

The UN system, as it pursues reform, should ask itself honestly whether it includes persons living in poverty as agents of change or as subjects of change. If the former, a different type of process and nature of discussion must begin. If the latter, we must resign ourselves to a deeply fractured and potentially unsuccessful battle to mitigate the problem of corporate-related human rights violations. We must also ask why we speak so little about the global trade regime, which institutes subsidy policies and trade barriers that perpetuate and entrench poverty. The topic is central to the business and human rights debate and without a rich and honest assessment of the harm caused by trade, the business and human rights discussion will remain just that: a discussion.