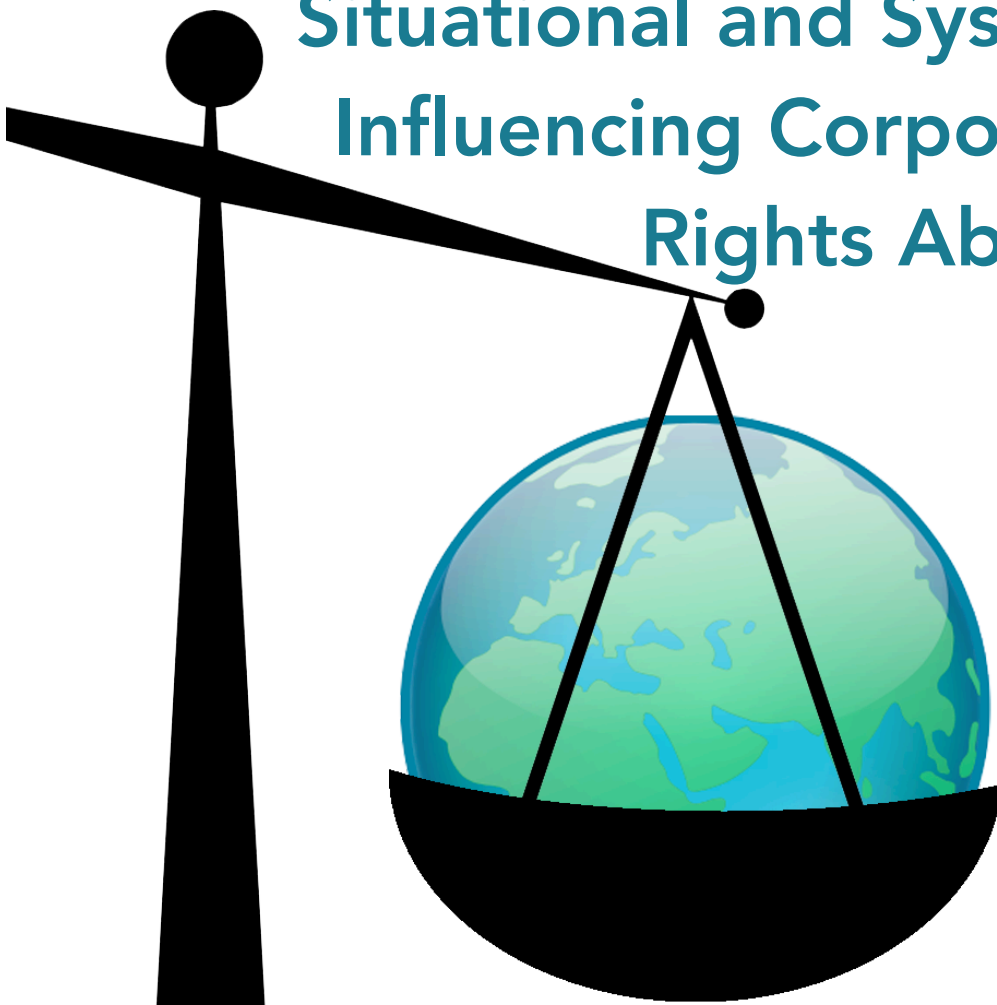
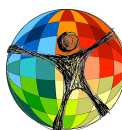


Reshaping the Bad Barrel: Strategies for Human Rights Organizations to Mitigate the Situational and Systemic Forces Influencing Corporate Human Rights Abuse



INTERNATIONAL HUMAN RIGHTS INTERNSHIP WORKING PAPER SERIES



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Introduction

On April 24th, 2013, the collapse of the Rana Plaza garment factory complex killed 1,133 workers. It has been labeled the worst man-made disaster in Bangladesh's history.¹ Unfortunately, this was not the first time a disaster like this occurred and it likely will not be the last.² While experts have called this tragedy a failure in governance,³ it raises a pertinent question about corporations continuously implicated in these kinds of incidents and the people who work for them: After so many disasters, why are warning signs not met with caution?

To borrow an anecdote from a professor of business ethics;⁴ when asked how many would go on to work in business, no one in a class of philosophy students raised their hand. He attributed this reluctance to consider a potential career in the business world as due to a perception that to work in business one must be unethical. However, in all likelihood, the vast majority would end up working in some kind of corporate setting. Also likely is that the majority of people who work in corporate settings can be described as generally 'good' persons.

If this true, why do corporations do 'bad' things?

This paper will seek to answer this question by examining the corporation as an organization. Organizations are social contexts, and currently little is known about how corporate social responsibility ("CSR") activities are influenced by the context in which managers and employees find themselves.⁵ Calling on sociological theories, management

¹ Centre for Policy Dialogue, "100 Days of Rana Plaza Tragedy: A Report on Commitments and Delivery" (September 2013), online: Centre for Policy Dialogue <<http://cpd.org>>.

² The Financial Express, "Absence of good governance held responsible for Rana Plaza tragedy" (4 August, 2013), online: ProQuest Central <<http://search.proquest.com/docview/1417240671?accountid=12339>>.

³ *Ibid.*

⁴ Professor Chris Macdonald, Associate Professor, Ted Rogers School of Management, Ryerson University & Director of the Jim Pattison Ethical Leadership Education and Research Program.

⁵ Timothy M Devinney, "Is the Socially Responsible Corporation a Myth? The Good, the Bad, and the Ugly of Corporate Social Responsibility" (2009) 23:2 Academy of Management Perspectives 44; Herman Aguinis & Ante Glavas, "What We Know and Don't Know About Corporate Social Responsibility: A Review and Research Agenda" (2012) 38 Journal of Management 932.

literature, and a case study on Gap Inc., this paper will posit ways in which the situational forces acting on a corporation's human components beget indifference to the kinds of human rights abuses endemic to the world's leading multinational enterprises ("MNEs"). It will also be shown how the workings of the global legal system play a role in perpetuating this detrimental social context. Finally, focus will be turned to human rights organizations⁶ ("HROs") as actors in a unique position to foster improved corporate respect for human rights by improving the global legal system and combatting the negative situational forces at work within corporations.

⁶ For the purposes of this paper, 'human rights organization' will be used to refer to any non-governmental organization aimed at affecting greater respect for human rights in some way.

I. The Bad Barrel: Situational Forces Within the Corporation

Zimbardo notes that most of our institutions – law, medicine, religion, for example – are founded on the perspective that good and evil come from one's disposition.⁷

"Culpability, illness, and sin, they assume, are to be found within the guilty party, the sick person, and the sinner."⁸ Accordingly, the question routinely asked is: Who is responsible?⁹ Who is the proverbial 'bad apple' spoiling the barrel? Alternatively, Zimbardo focuses his attention away from the individual as the cause of evil and examines ways in which situational conditions influence the behavior of individuals, asking instead: Is the barrel spoiling the apples? Zimbardo further looks at the ways in which situational conditions are created and shaped by systems of power, ultimately analyzing the role of the 'barrel makers.'¹⁰ He posits that systems, not just dispositions and situations, must be taken into account in order to understand complex behavior like that of a corporation.¹¹

A. Outlining the Bad Barrel: Bureaucratization in the Divisional Form

Zimbardo defines a situation as "the behavioral context that has the power, through its reward and normative functions, to give meaning and identity to [an] actor's roles and status."¹² To analyze the behavior of the corporation in this way, we need to examine the shape of the barrel: the structure of the modern corporation.

⁷ Philip Zimbardo, *The Lucifer Effect* (New York: Random House, 2007) at 7.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid* at 9-10.

¹¹ *Ibid.*

¹² *Ibid* at 445-446.

According to Mintzberg, the effective organization will favour "some type of logically consistent clustering of its elements as it searches for harmony in its internal processes and consonance with its environment."¹³ Most modern corporations of at least a medium scale can be said to be structured according to what Mintzberg calls "the Divisionalized Form." An organization of this kind is a market-based structure with a central headquarters overseeing a set of divisions, each charged with serving its own markets.¹⁴ This form has gained prominence in business practice as it allows for a large number of divisions to report up to one central headquarters without the need for close coordination.¹⁵ This is particularly useful for conglomerates and MNEs who operate in several markets. It is found in pure or partial form among the vast majority of the world's largest corporations, and also in unions and government.¹⁶

The main concern of the headquarters is to find a mechanism to coordinate the goals of the divisions with its own, without sacrificing divisional autonomy.¹⁷ A corporation will do this by standardizing the outputs of the divisions, relying on performance control systems to impose performance standards, and monitoring their results.¹⁸ The use of said performance standards depends on two assumptions: i) each division must be treated as a single integrated system with a single, consistent set of goals; and ii) those goals must be operational ones which lend themselves to quantitative measure for performance control.¹⁹ Accordingly, each division is driven to employ what Mintzberg calls "Machine Bureaucracy," i.e. using highly specialized, routine operating tasks, very formalized procedures, and large-sized units in the operating core.²⁰ In bureaucracies, rules and regulations permeate the

¹³ Henry Mintzberg, "Structure in 5's: A Synthesis of the Research on Organization Design" (1980) 26:3 Management Science 322. Mintzberg identifies the basic parts of the organization as: i) the strategic apex: top general managers of the organization; ii) the operating core: employees producing or directly supporting the production of the basic products and services of the organization; iii) the middle line: managers in a direct line of formal authority between the people of the strategic apex and those of the operating core; iv) the technostructure: analysts outside the formal "line" structure who apply analytic techniques to the design and maintenance of the structure and to the adaptation of the organization to its environment; and v) the support staff: groups that provide indirect support to the rest of the organization (*ibid* at 323).

¹⁴ *Ibid* at 335.

¹⁵ *Ibid*.

¹⁶ *Ibid* at 336.

¹⁷ *Ibid* at 335.

¹⁸ *Ibid*.

¹⁹ *Ibid* at 336.

²⁰ *Ibid* at 332.

entire structure, formal communication is favored at all levels, and decision-making tends to follow the formal chain of authority.²¹ It is only at the strategic apex, located in the corporate headquarters, that major decisions can be made.²²

Knowledge and values are vested in a firm when they are institutionalized in the form of either standard or contingent rules and procedures and incentives to follow these rules are built into the control system.²³ The divisions may be bureaucratized to a greater or lesser extent based on the internal incentives for performance control used by headquarters to evaluate the divisions.²⁴ The costs of control and monitoring increase with firm size, and, therefore, the optimal level of bureaucratization increases with the size of the firm as measured by its number of employees.²⁵ Thus, it can be assumed that larger, multinational companies must bureaucratize to a greater extent to maintain efficiency. While subsidiaries and supply chain affiliates are not divisions of a corporation per se, headquarters must nevertheless use many of the same tactics to coordinate the operations of these entities with their own.

In sum, two key features shape the corporate 'barrel,' so to speak. First, most corporations will be structured into divisions each reporting the central headquarters. Second, for this to work efficiently, each division must be bureaucratized to a greater or lesser extent through the use of rules and regulations, formalized communication, performance standards, and incentive systems.

B. Organizational Bureaucracy: History and Current Practices

Weber describes bureaucratization as creating a rule of law within an organization; individual power is removed and rules become sources of influence.²⁶

²¹ *Ibid.*

²² *Ibid.*

²³ Ronald Wintrobe, "The Optimal Level of Bureaucratization within a Firm" (1982) 15 *The Canadian Journal of Economics* 649 at 660.

²⁴ *Ibid* at 650.

²⁵ *Ibid* at 661-662.

²⁶ Max Weber, *The Theory of Social and Economic Organization* (New York: The Free Press, 1964) at 329-332.

He warns that bureaucratization can cause the “alienation of man” such that an individual’s options for actions and freedom are in effect reduced.²⁷ Michels suggests that therein lies a paradox: we cannot have the benefits of large institutions such as nation states, trade unions, political parties (and surely corporations) without turning over effective power to the few at the top.²⁸ Upon studying the German Social Democratic Party, he found that even organizations grounded in democratic and egalitarian values are susceptible to the situational forces of bureaucracy.²⁹

Of course, in practice the modern corporate form is more dynamic than the traditional image of a Weberian bureaucracy. Although corporate organization can usually be depicted in terms of hierarchical or networked lines of authority and delegation, sociologists have observed unscripted and interstitial practices that produce outcomes unintended by those at the strategic apex.³⁰ In addition to direct observation and bureaucratic review, large-scale complex organizations also rely on diverse techniques of surveillance, review, and revision to achieve organizational goals and internal rule of law.³¹ However, while the organizational map of some corporations has evolved from a pyramid to a network, many conventional firms remain committed to the idea of ultimate authority located at the top.³² “Management systems,” which consist of distributed roles, standardized rules, and prescribed procedures (often linked through information technology), have become the preferred means of assuring compliance with internal rules in many organizations.³³ Like the standard bureaucratic form, however, management systems also decentralize responsibility while inscribing roles, rules, and routines.³⁴ An example of such a system will be discussed in the case study that follows.

²⁷ Max Weber, Hans Heinrich Gerth & C Wright Mills, *From Max Weber: Essays in Sociology* (New York: Oxford University Press, 1946) at 196-198; Seymour Martin Lipset, *Revolution and Counterrevolution: Change and Persistence in Social Structures* (New Brunswick: Transaction Books, 1970) at 175.

²⁸ Robert Michels, *Political Parties: A Sociological Study of the Oligarchical Tendencies of Modern Democracy* (New York: Dover Publications, 1959).

²⁹ *Ibid.*

³⁰ Susan S Silbey & Tanu Agrawal, “The illusion of accountability: Information management and organizational culture” (2011) 77 *Dr et Soc* 69 at 69.

³¹ *Ibid.*

³² *Ibid* at 70.

³³ *Ibid* at 74.

³⁴ *Ibid.*

C. The Effects of Corporate Bureaucracy and Their Implications for Human Rights

Zimbardo notes that it was the good workers at Enron, WorldCom, and Arthur Andersen who looked the other way when the “books were being cooked.”³⁵ It is rare that the character flaws of a lone actor fully account for corporate misconduct.³⁶ More often, harmful business practices involve the tacit cooperation of others and reflect the values, attitudes, beliefs, language, and behavioural patterns that define an organization’s operating culture.³⁷ Given that the majority of modern corporations will seek to bureaucratize their divisions and will do so to a greater extent the larger the firm becomes, it can be argued that the situational forces of this structure have a role to play in the systematic commission of human rights abuses by the corporate world.³⁸ This section will analyze the divisionalized form through the lens of two situational forces Zimbardo argues beget perpetration of harmful actions by good people - deindividuation and dehumanization - and from this deduce the likely reasons for which corporations routinely abuse human rights.

i. Deindividuating Forces

Zimbardo posits that deindividuation occurs whenever a perpetrator can act anonymously. Any situation that makes people feel anonymous, “as though no one knows who they are or cares to know,” reduces an individual’s sense of personal accountability.³⁹ Anonymity is something that can be conferred on others by treating an individual as an “undifferentiated ‘other’ being processed by the System.”⁴⁰ The effect of anonymity is

³⁵ Zimbardo, *supra* note 7 at 317.

³⁶ Lynn Sharp Paine, “Managing for Organizational Integrity” (1994) 72:2 Harvard Business Review 106 at 106.

³⁷ *Ibid.*

³⁸ It should be noted that this analysis does not purport to paint all corporations with one brush. Corporate structures will differ and do evolve. What this paper suggests is that these forces are present to a greater or lesser extent in any corporation whose structure resembles the divisionalized form.

³⁹ Zimbardo, *supra* note 7 at 301.

⁴⁰ *Ibid.*

compounded if a situation or some form of authority gives individuals permission to engage in anti-social or violent actions.⁴¹

The hallmark of a bureaucracy is positions with formal duties.⁴² When an individual holds a position, it is not the individual that has the power, but the position itself.⁴³ Formal positions will affect the behavior of both those occupying the position and those subject to their authority. When the roles assigned are essentialized, each person must become what the role demands when occupying it.⁴⁴ In his famous Stanford Prison Experiment, Zimbardo observed how ordinary university students readily and quickly adopted the randomly assigned roles of guards and prisoners, with the guards employing violent and demeaning means of control over the prisoners.⁴⁵ As a further illustration of this phenomenon, Zimbardo recalls the experiment conducted by Stanley Milgram in which two out of three volunteers administered shocks up to 450 volts to other persons - despite their cries of pain - because they were told to do so by someone they perceived as a figure of authority.⁴⁶ Zimbardo relates this to Hannah Arendt's notion of the "banality of evil" in which she describes a "new type of criminal, who [...] commits his crimes under circumstances that make it well nigh-impossible for him to know or feel that he is doing wrong."⁴⁷

The very formalized rules, procedures, and standardized incentives for performance that characterize the divisions within a corporation are designed for the purpose of begetting conformity. It is this process that arguably treats individuals as "undifferentiated others" thereby deindividuating them. An individual will lose their personal identity in corporate behaviour and will not act as she would if segregated from the corporation.⁴⁸ An individual's sense of accountability for the corporation's actions will be impeded when performance monitoring and incentives emphasize responsibility for only a narrowly defined set of tasks.

⁴¹ *Ibid.*

⁴² Weber, Heinrich Gerth & Mills, *supra* note 27 at 196-198.

⁴³ *Ibid.*

⁴⁴ Zimbardo, *supra* note 7 at 321.

⁴⁵ *Ibid* (see Chapter 10 for analysis of Stanford Prison Experiment).

⁴⁶ *Ibid* at 271.

⁴⁷ *Ibid* at 288; Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin Books, 1994) at 276.

⁴⁸ Edwin H Sutherland, *White Collar Crime: The Uncut Version* (New Haven: Yale University Press, 1983) at 235.

Essentialized roles encourage the people occupying them to behave in accordance with what the role requires. As was observed in Zimbardo's and Milgram's experiments, if a role legitimizes a course of action, albeit harmful or indifferent to harm, it is likely the individual will nevertheless proceed. This kind of rationalized behaviour allows for easier transgression of social norms.⁴⁹ All of this suggests that, if thinking about corporate impact on human rights is not made an essential part of an individual's role within the corporation or incentivized in any way, it is unlikely that routine consideration of this impact will occur.

ii. Dehumanizing Forces

Dehumanization is the process by which the humanity of potential victims is effaced, thus devaluing them in the eyes of the perpetrator.⁵⁰ There are certain features of corporate bureaucracy that beget this phenomenon. Due to the increased rationality of corporate organizational behaviour, the corporation comes to resemble the "economic man" with the explicit and consistent objective of maximum pecuniary gain.⁵¹ Because the goals of bureaucratic divisions must be operational ones that lend themselves to quantitative measure, it is reasonable to assume that, through the process of standardizing outputs for these goals, the impact of corporate behaviour on human life becomes reduced to a kind of economic calculus, often in terms of negative externalities. Reducing impact on human life to a 'cost of doing business,' is arguably akin to effacing the humanity of potential victims of corporate human rights abuses in that their "value" becomes economic, capable of being weighed against other costs and benefits. This kind of quantification and economic calculus arguably result in the kind of devaluation of human life that Zimbardo argues is a precursor to perpetration.

⁴⁹ *Ibid.*

⁵⁰ Zimbardo, *supra* note 7 at 295.

⁵¹ Sutherland, *supra* note 49 at 236.

D. A Would-Be Rights-Respecter: the Case of Gap Inc.

Gap Inc. ("Gap") is a multinational company headquartered and directed out of the United States with an extensive global supply chain and thus emblematic of the divisionalized form. Gap was selected as a case study because it is a company who, despite a "genuine commitment to ethical leadership and social responsibility," has nevertheless been implicated in a number of incidents in the past two decades that can be described as abuses of human rights.⁵² Research shows the implementation of CSR measures cannot achieve "idealistic policy purposes" if corporate management implements them half-heartedly.⁵³ For Gap, however, implementation is arguably not half-hearted. The company has developed extensive CSR measures and is candid about its setbacks.⁵⁴ Gap's attempts at integrating social responsibility into its practices suggest that a top-down implementation of strategy cannot by itself mitigate abuses of human rights in the course of doing business.

⁵² Indu Perepu, "Gap Inc.'s Ethical Procurement Practices", online: (2010) ICMR Center for Management Research BECG103 at 2 <<http://www.icmrindia.org>>.

⁵³ Christine Parker & Sharon Gilad, "Internal Corporate Compliance Management Systems: Structure, Culture and Agency" in Christine Parker & Vibeke Nielsen, eds, *Explaining Compliance: Business Responses to Regulation* (Cheltenham: Edward Elgar, 2011) 170 at 171.

⁵⁴ Gap Inc., *Gap Inc. 2011/2012 Social & Environmental Responsibility Report* at 5, online: Gap Inc. <<http://www.gapinc.com/content/csr/html.html>>. Gap uses Shift, a leading NGO that focuses on implementation of the UN Guiding Principles, to review its Social & Environmental Responsibility report and offer reflections on the implications of the UN Guiding Principles for the company's efforts to respect human rights (*ibid* at 18). Gap has been identified as one of the World's Most Ethical Companies by Ethisphere and was among Corporate Responsibility Officer's Best Corporate citizens (Perepu, *supra* note 52 at 2-3).

i. Gap Inc.: History and Current Operations

Gap began producing quality clothes at a low cost because it designed its own clothes, chose its own materials, and monitored manufacturing very closely.⁵⁵ However, by the mid-1990s, the then-CEO's vision involved making Gap a ubiquitous global brand and it opened stores at a rapid pace.⁵⁶ Gap was overseeing six different clothing brands,⁵⁷ and each brand had its own division for design, merchandising, marketing, and retail while buying and logistics were handled centrally.⁵⁸ The company grew quickly, and by 2000 several top designers and executives left the company "disillusioned with how bureaucratic the organization had become."⁵⁹

ii. The Evolution of Gap's CSR Strategy

Keen to ensure workers at its suppliers' facilities were treated properly, Gap came out with sourcing guidelines in 1992.⁶⁰ The guidelines covered labour, environment, and health and safety standards throughout Gap's supply chain and placed responsibility for implementation on the manufacturer with minimal oversight provided by quality assurance personnel.⁶¹ In 1995, Gap was informed of serious labour rights violations in its factory in El Salvador. This prompted Gap to develop the industry's first independent monitoring program involving local labour rights NGOs.⁶² A year later, Gap came out with its Code of Vendor Conduct, and a global compliance team of 100 people was formed to approve and monitor the factories of suppliers.⁶³ The compliance team was made responsible for managing the inspection and enforcement of the code at suppliers' factories by visiting the

⁵⁵ John R Wells & Elizabeth A Raabe, "Gap Inc.", online: (2006) Harvard Business School case 706-402 at 5 <<http://www.iveycases.com>>.

⁵⁶ *Ibid* at 6.

⁵⁷ Gap, Banana Republic, Old Navy, Athleta, Piperlime, and Intermix.

⁵⁸ Wells & Raabe, *supra* note 55 at 12.

⁵⁹ *Ibid* at 6.

⁶⁰ Perepu, *supra* note 52 at 3.

⁶¹ Sean Ansett, "Mind the Gap: A Journey to Sustainable Supply Chains" (2007) 19 Employee Response Rights Journal 295 at 297.

⁶² *Ibid*.

⁶³ Perepu, *supra* note 52 at 3.

factories, conducting inspections, reviewing documentation, and interviewing workers.⁶⁴

Remediation plans were developed and follow-up visits took place to ensure recommendations were implemented.⁶⁵ If a new factory failed to comply, production would halt until all outstanding issues were corrected.⁶⁶

In spite of these developments, in 1999, Gap was brought to court over indentured labour, non-payment of overtime, and intolerable living conditions for foreign contract workers in the United States Commonwealth of Saipan.⁶⁷ This second wake-up call signaled to Gap that monitoring alone was not a panacea, and the company implemented a set of separate guidelines for foreign contract workers.⁶⁸ In order to build a better control structure, the global compliance team was taken out of the sourcing department and began reporting directly to the Chief Administrative Officer.⁶⁹ Gap also launched the Global Alliance for Workers and Communities alongside Nike, the World Bank, and the International Youth Foundation in order to conduct needs assessments in factories and target capacity-building programs to address those needs.⁷⁰

Nevertheless, in 2000, a BBC report alleged that child labour was being used in Gap contracting factories in Cambodia.⁷¹ Subsequently, a “vision for the future” was created for social and environmental responsibility and a cross-functional committee was set up to better integrate the social responsibility team with other divisions.⁷² In 2002, a rating system was established to assess the overall level of compliance of a given factory through quantifiable measures indicating the number and type of violations committed.⁷³ In 2003 and 2004, Gap began its foray into multi-stakeholder engagement by joining the Ethical Trading Initiative and Social Accountability International (“SAI”).⁷⁴

⁶⁴ *Ibid.*

⁶⁵ Ansett, *supra* note 61 at 298.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ Perepu, *supra* note 52 at 7.

⁷⁰ Ansett, *supra* note 61 at 299.

⁷¹ *Ibid.*

⁷² Perepu, *supra* note 52 at 7.

⁷³ *Ibid.*

⁷⁴ Ansett, *supra* note 61 at 74.

By 2007, the rating methodology had again been updated, and the number of items verified on compliance team visits had increased. However, ratings were still assessed quantitatively.⁷⁵ In October of that year, another instance of child labour and poor working conditions was reported in one Gap's sub-contractor facilities in New Delhi.⁷⁶ In response, Gap improved supply chain tracking by requiring vendors to provide details of their sub-contracting plans and internal monitoring systems, among other specifications.⁷⁷ Since then, Gap has entered into partnership with several other NGOs⁷⁸ and engaged third-party auditing of its monitoring program conducted by SAI and Verite.⁷⁹ Despite all these efforts, in 2010 Gap was implicated in a factory fire in Bangladesh that killed 29 and injured more than 100 others.⁸⁰

Today, Gap's Senior Vice President and Executive Vice President of Global Responsibility report to CEO Glenn Murphy, and Gap's Board of Directors oversees the company's social and environmental responsibility efforts.⁸¹ The Social and Environmental Responsibility team works in partnership with the Supply Chain, Corporate Affairs, and Legal divisions, among others, and each of these divisions includes its own sustainability professionals.⁸² On top of this, Gap has numerous partnerships with labour rights organizations, environmental groups, multi-stakeholder initiatives, community-based organizations, trade unions, industry associations, investors, academics, factory owners and managers, workers, shareholders, governments, and other companies.⁸³ Gap's Human Rights Policy applies globally within both their wholly-owned operations and across their supply chain.⁸⁴ Gap even has Social Responsibility Specialists with a deep knowledge of relevant issues working on the ground who are locally hired and speak the languages of the regions where they work. These Specialists interview workers, gain their trust, and learn over time

⁷⁵ Perepu, *supra* note 52 at 8.

⁷⁶ *Ibid* at 11.

⁷⁷ *Ibid*.

⁷⁸ e.g. the Business Leaders Initiative on Human Rights and the Better Cotton Initiative (*ibid*).

⁷⁹ *Ibid* at 8, 10.

⁸⁰ Gap Inc., *supra* note 54 at 43.

⁸¹ *Ibid* at 9.

⁸² *Ibid*.

⁸³ *Ibid* at 11.

⁸⁴ *Ibid* at 17.

which agents and factories have good or bad reputations and practices.⁸⁵ Yet, Gap continues to be accused of abusing human rights.⁸⁶

All of this begs the question: in spite of good faith attempts at social responsibility, are Gap and companies like it doomed to fail?

E. Is Compliance Possible?

Insight can be gained from examining Gap's CSR journey. First, nearly all of Gap's CSR innovations were reactionary. There appears to be an unfortunate paradox in that it takes some kind of harmful company action to spur organizational change. To this effect, research suggests that the most likely time for companies to implement a comprehensive compliance system is when there is a crisis of legitimacy brought on through a major incident of some kind.⁸⁷ Second, Gap's compliance management system approached the company's problem of repeat complicity in human rights abuse in what can be described as a bureaucratic fashion. Certain employees are specifically given a compliance role, they report directly to the company's top officers, and employ quantitative performance measures.

Meanwhile, the role of the majority of Gap's employees does not incorporate considerations of human rights.⁸⁸ Gap had a third-party partner review its human rights practices and policies in its supply chain, but the report does not extend to the company's owned and operated facilities.⁸⁹ While Gap conducts "root cause analyses" and reviews its management systems to assess the underlying causes of ongoing violations,⁹⁰ these analyses

⁸⁵ *Ibid* at 19.

⁸⁶ See e.g. Charles Kernaghan, *Gap and Old Navy in Bangladesh: Cheating the Poorest Workers in the World* (October 2013), online: Institute for Global Labour and Human Rights <<http://www.globallabourrights.org>> (highlights recent transgressions in Gap's supply chain).

⁸⁷ Parker & Gilad, *supra* note 53 at 180. Most recently, Gap has helped launch the Alliance for Bangladesh Worker Safety, a comprehensive, multi-stakeholder approach to addressing fire and building safety through factory inspections, safety training and readiness, worker empowerment initiatives, and financial assistance to factories and affected workers in Bangladesh (Gap Inc., *supra* note 54 at 19).

⁸⁸ Employee compliance training programs provide information to targeted employee audiences on non-discrimination and harassment, wage and hour compliance, workplace accommodations, anti-corruption, competition law and compliance, and data privacy and security (*ibid* at 24).

⁸⁹ *Ibid* at 33.

⁹⁰ *Ibid* at 39.

are not for the purposes of educating Gap employees.⁹¹ It can thus be argued that the average Gap employee is given a certain degree of anonymity with respect to the company's implication in human rights abuses since respecting human rights is not a part of most employee roles. In keeping with Zimbardo's theory, it is likely this deindividuating force impedes the kind of proactive measures Gap's CSR strategies aim to elicit. Furthermore, Gap's compliance system uses quantitative metrics. Reducing human suffering to a set of numerical scores has a dehumanizing effect which likely makes it easier for employees to be unreactive to the true human suffering these scores are meant to represent.

A management system, like Gap's compliance system, is a means of routinely observing, recording, and self-reflexively responding to the organization as it performs its work.⁹² Ideally, compliance responsibilities would be incorporated into procedures, operations, performance review systems, and incentives such that they are a "part of everybody's job, not just a 'nice' policy statement by top management, nor something that is delegated to compliance professionals."⁹³ However, the task of adequately recording and disseminating information about the social determinants likely to produce human rights abuses in the developing regions in which Gap and many other MNEs source their products is extremely challenging. This challenge is made even more difficult by the fact that the vast majority of corporate employees have likely never had any real exposure to human rights abuses in practice. Furthermore, using quantifiable metrics as a means of assessment is likely to impede any real understanding of the true effects of these abuses.

This paper argues two things are necessary for genuine and effective corporate respect for human rights. First, the strategic apex must feel motivated to implement a compliance system of some kind by something other than social pressure following a disastrous incident. Second, this compliance system must be capable of adequately reducing the situational forces that beget perpetration and indifference thereto. While the design of

⁹¹ *Ibid.*

⁹² Silbey & Agrawal, *supra* note 30 at 75.

⁹³ Andrew Newton, *The Handbook of Compliance: Making Ethics Work in Financial Services* (London: Financial Times Prentice Hall, 1998) at 74 cited in Parker & Gilad, *supra* note 53.

this system is beyond the scope of this paper, roles for HROs will be set out for both reforming the law and transforming corporate culture such that systems of this kind are more likely to be developed and successfully implemented.

II. Making the Bad Barrel: The Systemic Forces of Law

Moving along in Zimbardo's analysis, our question is now: How are the situational conditions at work in the corporation shaped by systems of power? Who, or what, is creating the 'bad barrel'? Zimbardo defines a system as consisting of those agents and agencies whose power and values create and modify the rules and expectations for "approved behaviours" within their sphere of influence.⁹⁴ In his analysis of the systemic factors that led to the horrific events at Abu Ghraib, Zimbardo emphasizes the perceived lack of accountability for interrogator actions.⁹⁵ He writes that, in effect, the CIA "operated under its own rules and beyond the law," and similarly, President Bush and his advisers came to believe that they were "above national and international law," capable of creating a legal regime to suit themselves.⁹⁶

Of course, a comprehensive analysis of the systemic determinants of corporate behaviour would be undoubtedly complex and would necessarily draw on several diverse factors. While this analysis in whole will not be attempted here, this paper will examine the impact of the legal system on corporate behaviour and suggest that several of the legal doctrines attempting to regulate corporate activity in effect create a space that projects indifference to corporate abuses of human rights by allowing corporations to systematically act with impunity. This systemic lack of accountability signals to corporations that they are above the law and provides no impetus for improving their human rights records.

Although emerging economies are increasingly producing powerful corporate actors, this paper will focus on jurisdictions in the European Union, the United States, and Canada as these regions currently house the majority of corporate headquarters.⁹⁷

⁹⁴ Zimbardo, *supra* note 7 at 438.

⁹⁵ *Ibid* at 394.

⁹⁶ *Ibid* at 432.

⁹⁷ International Federation for Human Rights (FIDH), *Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Recourse Mechanisms* at 180, online: FIDH <<http://www.fidh.org>>.

According to the European Center for Constitutional and Human Rights (“ECCHR”), current legal systems in Europe do not provide comprehensive protection from human rights violations by MNEs, and the implementation of existing law through courts and law enforcement agencies is insufficient.⁹⁸ As will be shown, North American legal systems are no better off, with recent decisions of courts in the United States indicating a shift in judicature in favour of MNEs.⁹⁹ It is argued here that four phenomena resulting from the global legal status quo act as contributors to the creation of the bad barrel by providing corporations with no impetus to adapt their inner workings to the demands of human rights: i) limited liability within corporate groups; ii) legal commodification; iii) the multiple hurdles in extraterritorial litigation; and iv) the limited deterrent effects of corporate civil and criminal liability.

A. Limited Liability Within Corporate Groups

There are two characteristics of legal personality that beget both the perpetration of and impunity for corporate abuses of human rights. The first is the autonomy of every corporate actor, and the second is that one legal person may own another.¹⁰⁰ As a result, it is possible to construct large and complex networks of legally autonomous persons owned by shareholders of a parent or controlling entity.¹⁰¹ It is thus possible to disperse operations globally but in a way that significantly delinks the liability of the entire enterprise for the actions of any of its parts.¹⁰² In broad terms, a parent company may participate in human rights abuses committed by its subsidiaries or supply chain either by commission of the abuse – taking part in the decision leading to the harm – or omission – failing to act despite

⁹⁸ European Center for Constitutional and Human Rights (ECCHR), “European Cases Database: Analysis” at 6, online: <<http://www.ecchr.de>> [“European Cases”].

⁹⁹ *Ibid.*

¹⁰⁰ Larry Catá Backer, “Multinational Corporations as Objects and Sources of Transnational Regulation” (2007-2006) 14 ILSA J Int’l & Comp L 499 at 505.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

an ability to prevent the harm.¹⁰³ However, except in the rarest of occasions, a parent company will only be held legally responsible for the actions and omissions carried out through its directors or officers, not for the actions of its subsidiaries or affiliates.¹⁰⁴

Because of this, it is difficult to prove a parent company caused a tort, committed a crime, or in any way directly participated in the facts of a human rights case.¹⁰⁵ For human rights lawyers, this implies the need for meticulous research into the working relationships, decision-making processes, and supervisory procedures among all companies involved in order to understand the concrete influence of the parent company on specific operations causing the abuse.¹⁰⁶ These impediments to a complainant's ability to even launch a case is one way in which the legal system projects an air of indifference to the actions of MNEs. By fictionalizing corporate law such that corporations controlled by the same individuals are nevertheless treated as having autonomous agency, the legal system sends the message that headquarters of an MNE need only incorporate a new entity to shield itself from liability. Without a sense of responsibility for the actions of all the corporate entities they control, the directorate and management of parent companies will not be motivated to ensure compliance throughout their operations in the manner required to eliminate the situational forces discussed in the preceding section.

B. Legal Commodification

Legal commodification is the ability of economic entities to choose among legal regimes.¹⁰⁷ In a global environment in which states compete for investment funds for the development of their economies, favourable regulatory regimes will serve as a commodity

¹⁰³ FIDH, *supra* note 97 at 235.

¹⁰⁴ Claudia Müller-Hoff, "Strategic Human Rights Litigation: Can It Be Used Effectively against Transnational Corporations?", online: (September 2011) 15:4 Aportes DPLF 24 at 25 <<http://www.dplf.org/>>.

¹⁰⁵ FIDH, *supra* note 97 at 235.

¹⁰⁶ Müller-Hoff, *supra* note 104 at 25.

¹⁰⁷ Catá Backer, *supra* note 100 at 505.

through which each competing state will seek to lure economic activity.¹⁰⁸ This results in a regulatory “race to the bottom” in which states will systematically remove red tape to attract MNEs to their jurisdictions. This problem is often compounded by corruption and weak political institutions endemic to developing countries, which allow MNEs to exert even more influence on the policies of their host states.¹⁰⁹ The majority of the human rights violations of European companies take place in Africa followed by Latin America, whereas corporate human rights violations in Asia are more frequently linked to American companies.¹¹⁰ With the regulatory power of states generally extending no further than their borders, MNEs are able to move assets, operations, and activities such that political borders become incidental to these activities.¹¹¹ MNEs can take advantage of differences in territorial regulation in deciding the means of local investment, especially given a legal context in which the free movement of capital is encouraged.¹¹²

All of this has led Catá Backer to conclude that the “ability of the largest economic enterprises to negotiate agreements with states gives them a position similar to nation states able to negotiate treaties,” and “[w]here such activities are concluded by [MNEs], it appears that sovereign authority has slipped from the state and its citizens to foreign organizations.”¹¹³ While some states have attempted to extend notions of enterprise or related-entity liability to corporate groups, these efforts are still in their initial stages and many flounder due to government resistance to extraterritorial projections of state power.¹¹⁴ In effect, MNEs are able to self-regulate in nearly the entire territory in which they operate.¹¹⁵ This further supports the conclusion that the legal system signals a lack of accountability to corporations. Legal commodification permits corporations to bargain for impunity, which suggests that impact on human rights is simply another cost of doing business that can be

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid* at 506.

¹¹⁰ ECCHR, “European Cases”, *supra* note 98 at 3, 8.

¹¹¹ Catá Backer, *supra* note 100 at 504.

¹¹² *Ibid.* For example, Glencore (now Glencore-Xstrata) gained its impressive market share in the commodities industry by targeting conflict areas and allegedly using corrupt measures (Ken Silverstein, “A Giant Among Giants” *Foreign Policy* (25 April 2012), online: *Foreign Policy* <<http://www.foreignpolicy.com>>).

¹¹³ Catá Backer, *supra* note 100 at 506.

¹¹⁴ *Ibid* at 505.

¹¹⁵ *Ibid* at 508.

lessened by avoiding regulation. As a result, there are no incentives for corporations to improve their human rights record.

C. Hurdles in Extraterritorial Litigation

One might assume the optimal path to corporate legal accountability is via extraterritorial application of the laws of the home state and/or recourse to the courts of the home state.¹¹⁶ However, rules of private international law generally include flexible recognition and enforcement conditions that permit parties to take advantage of differences in legislation between countries.¹¹⁷

In both the E.U. and Canada, the applicable civil liability law is that of the state in which the damage occurs.¹¹⁸ Because human rights abuses by MNEs mostly occur in the Global South, the law of European countries and Canada is not readily applicable in these cases.¹¹⁹ In the United States, the *Alien Tort Claims Act*¹²⁰ ("ATCA") has been a long-time source of extraterritorial accountability of corporations. However, in the most recent case against Royal Dutch Petroleum,¹²¹ the Supreme Court of the United States narrowed its scope such that the ATCA applies only when the activities in question have a connection with the United States beyond the existence of a corporate presence in the country.¹²² ECCHR and other HROs involved in the case consider the decision unsatisfactory as it effectively ignores the ATCA's international dimension.¹²³

¹¹⁶ Jérémie Gilbert, "Corporate Accountability and Indigenous Peoples: Prospects and Limitations of the US Alien Tort Claims Act" (2012) 19 International Journal on Minority and Group Rights 25.

¹¹⁷ Veerle Van Den Eeckhout, "Competing Norms and European Private International Law – Sequel to Promoting Human Rights within the Union: The Role of European Private International Law" (2008) at 3, online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1259334>.

¹¹⁸ EC, *Regulation No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)*, [2007] OJ L 199/40, art 4(1); Stephen GA Pitel & Nicholas S Rafferty, *Conflict of Laws* (Toronto: Irwin Law, 2010); *Tolofson v Jensen*, [1994] 3 SCR 1022, 120 DLR (4th) 289.

¹¹⁹ ECCHR, "European Cases", *supra* note 98 at 5.

¹²⁰ 28 USC § 1350.

¹²¹ *Kiobel v Royal Dutch Petroleum Co.*, 621 F Supp (3d) 111 (2013).

¹²² ECCHR, "Kiobel Case: ECCHR supports victims of corporate abuse before US Supreme Court" (1 July 2013), online: ECCHR <<http://www.ecchr.de>>.

¹²³ *Ibid.*

Further legal hurdles include determining which state can claim jurisdiction over a company and securing recognition and enforcement of foreign judgments by a forum court.¹²⁴ In the European Union, the Brussels I Regulation¹²⁵ stipulates that a legal person may only be sued in the Member State in which it is domiciled. This requirement will not be satisfied if a plaintiff attempts to summon a non-European subsidiary before a Member State court.¹²⁶ Complainants making claims in countries with a common law tradition will have lengthy procedural struggles due to the doctrine of *forum non conveniens* by which national courts can reject cases if they deem a foreign court more suitable to address it.¹²⁷ The rationale for the doctrine is to avoid complainants having significant tactical ability to choose a forum that best advantages them.¹²⁸ This now seems somewhat misplaced given that corporations already maintain a degree of influence in determining the law that applies to them. Furthermore, the criteria for *forum non conveniens* are not coherent,¹²⁹ and the doctrine has been used as a ground for dismissing cases alleging human rights abuses by corporate headquarters in their jurisdictions of incorporation.¹³⁰ In order for claimants to clear the procedural hurdle of *forum non conveniens*, they must prove the nature of corporate decisions made in the jurisdiction of the parent company, which is difficult to establish in fact.¹³¹

¹²⁴ FIDH, *supra* note 97 at 216.

¹²⁵ EC, *Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction on the recognition and enforcement of judgments in civil and commercial matters*, [2000] OJ, L 12/1 ["Brussels I"].

¹²⁶ Veerle Van Den Eeckhout, "Corporate Human Rights Violations and Private International Law" (2012) 4:2 Contemporary Readings in Law and Social Justice 178 at 184.

¹²⁷ ECCHR, "European Cases", *supra* note 98 at 4.

¹²⁸ Pitel & Rafferty, *supra* note 119 at 118.

¹²⁹ ECCHR, "European Cases", *supra* note 98 at 8, footnote 20.

¹³⁰ In *Sinaltrainal et al. v. Coca Cola Company et al.*, 256 F Supp 2D 1345 the claim was dismissed on the grounds that the complainants had failed to prove the existence of a sufficiently close link uniting the paramilitary security forces and the Colombian government, the defendants' involvement with the Colombian government in carrying out acts of torture, and the existence of an armed conflict to begin with.¹³⁰ In *Sequihua v Texaco, Inc.*, 847 F Supp 61 (1994), Ecuadorian citizens who felt that Texaco's operations were causing air, water and soil pollution filed suit in US courts under the ATCA. A New York federal court dismissed the suit on appeal, on the basis of *forum non conveniens*. Sequihua demonstrates how easily dismissal for inconvenient forum could be justified on the basis of public policy (Rogge, *infra* note 131). In *Recherches Internationales Québec v Cambior Inc.*, [1998] QJ No 2554 the Quebec Superior Court rejected jurisdiction on the grounds that the mere fact that the impugned corporation was domiciled in Quebec did not constitute a special link in assessing the appropriateness of the jurisdiction. The court also rejected the complainant's argument that Guyana's judicial system failed to guarantee the right to a fair trial.¹³⁰ A claim against Cambior Inc. was subsequently brought in Guyana, but it was dismissed by the Guyanese court, and the victims were ordered to pay for the expenses Cambior incurred during the trial.¹³⁰ In *Assoc. canadienne contre l'impunité (A.C.C.I.) c Anvil Mining Ltd.*, 2012 QCCA 117, 228 ACWS (3d) 394 the Quebec Court of Appeal denied jurisdiction for a case alleging corporate complicity in a military repression of an insurrection in the DRC on the grounds of *forum non conveniens*. Despite the fact that the case failed to yield an equitable result in DRC courts, the Quebec court dismissed the claimants' request to hear the case on the grounds that Anvil Mining's Canadian office had not been open long-enough to be implicated in the impugned incident.

¹³¹ Malcolm J Rogge, "Towards Transnational Corporate Accountability in the Global Economy: Challenging the Doctrine of *Forum Non Conveniens* in *In Re: Union Carbide, Alfaro, Sequihua, and Aguinda*" (2001) 36 Texas Int'l L J 299.

With respect to criminal claims, in order to identify the appropriate jurisdiction for the case, claimants must determine whether a corporation or individual director of the parent company may be held criminally liable in a particular forum court.¹³² For jurisdictions like the United States that employ active personality principle, complainants must also establish the nationality of the alleged perpetrators.¹³³ Ultimately, the forum court's legislation and other principles of extraterritoriality may also impede criminal liability of a legal person.¹³⁴

These hurdles contribute to the ease with which corporations can transgress human rights norms with impunity since they undermine the prospect of successful litigation. By adding loopholes to accountability, the legal system signals its indifference to corporate human rights abuses.

D. Failed Deterrent Effects of Corporate Civil & Criminal Liability

One of the driving policy reasons behind civil and criminal liability is deterrence of risky and/or socially undesirable behaviour. However, these areas of the law are arguably failing in this end by instead offering impunity to those parent companies who do not attempt to regulate the human rights impacts of their subsidiaries and affiliates.

¹³² FIDH, *supra* note 97 at 286.

¹³³ *Ibid* at 330.

¹³⁴ *Ibid* at 286.

i. Civil Liability

As mentioned above, the individual legal personalities of corporate entities makes it very difficult to bring civil compensation claims against parent corporations for actions taken by any of their subsidiaries or affiliates. Bringing claims against these sub-entities is also made difficult by under-regulation and weak judicial institutions in the developing regions in which they operate. Furthermore, these entities are often undercapitalized, insolvent, or uninsured, thus rendering compensation claims futile.¹³⁵

While the recent United Kingdom decision *Chandler v. Cape Plc*¹³⁶ has made inroads in bringing the legal fiction of corporate groups closer to reality, the likely effect of this doctrine is to further encourage ignorance of human rights abuses committed by subsidiaries and affiliates by the parent. For responsibility to be established, complainants must show that the parent i) had or ought to have had superior knowledge of some relevant aspect of the harm in the particular industry; ii) knew or ought to have known that its subsidiary's system of work is unsafe; and iii) foresaw that the subsidiary or its employees would rely on it using its knowledge for protection.¹³⁷ If this doctrine were applied to Gap's past failures, it is likely that Gap headquarters would be found liable since its compliance system meets these criteria. Of course, it is desirable that victims of the tortious acts of Gap's subsidiaries be compensated for their loss. This paper is not advocating a reversal of the *Chandler* doctrine. However, it is problematic that, according to this doctrine, Gap could likely escape liability by *not* instituting a compliance system or instituting a less-effective one. The legal system should aim to reward responsibility and punish indifference, not the other way around.

The available remedies for breaches of civil liability also propagate corporate impunity. Even when financial penalties are ordered, they do not have a strong deterrent

¹³⁵ *Ibid* at 179.

¹³⁶ [2012] EWCA Civ 525, [2012] 3 All ER 640. The court in *Chandler* held that, in appropriate circumstances, the law may impose on a parent company responsibility for the health and safety of its subsidiary's employees (*ibid*).

¹³⁷ *Ibid* at para 80.

effect in practice.¹³⁸ Despite ever-increasing corporate fines and awards in damages,¹³⁹ corporate human rights abuses and recidivism continue. For example, Total, Bayer, and the Shell-Group – all Global 500 companies – appear at least five times each in recorded proceedings.¹⁴⁰ Furthermore, these corporations together are involved in more than one quarter of all recorded proceedings.¹⁴¹ Not only is this evidence that corporations emerge relatively unscathed from civil liability suits, but also that (large) profits can be made while breaching standards of civil responsibility.

ii. Criminal Liability

While the stigma and sanctions of the criminal law typically offer greater deterrence, the peculiarities of corporate personality limit the criminal law's check on corporate power.¹⁴² Corporate crime cannot be combatted effectively through the commonly used 'identification' approach to criminal liability.¹⁴³ Even if prosecutors have established without a doubt that a criminal offence has been committed by and in the interest of a corporation, complex organizational structures and company hierarchies make it difficult or impossible to ascertain with sufficient certainty who is the individual offender.¹⁴⁴ This ultimately amounts to a structural lack of responsibility.¹⁴⁵

Furthermore, national laws generally avoid the question of how to deal with offences committed by a corporation that is part of a group of companies.¹⁴⁶ As with civil liability, to establish a parent's criminal liability for crimes committed by its subsidiaries and subcontractors abroad, an adequate causal link must be proved between the parent's

¹³⁸ ECCHR, "European Cases", *supra* note 98 at 6.

¹³⁹ From 1991 to present, the largest corporate fines ranged from USD 900 million to 246 billion (David Benoit & Stephen Grocer, "Where J.P. Morgan's Settlement Sits in History of Corporate Fines" *The Wall Street Journal* (19 October 2013), online: WSJ.com <<http://www.online.wsj.com>>).

¹⁴⁰ ECCHR, "European Cases", *supra* note 98 at 6.

¹⁴¹ *Ibid.*

¹⁴² Mark Pieth & Radha Ivory, *Corporate Criminal Liability: Emergence, Convergence, and Risk* (New York: Springer, 2011) (SpringerLink) at 4.

¹⁴³ Megan Donaldson & Rupert Watters, 'Corporate Culture' as a Basis for the Criminal Liability of Corporations at 65, online: Business & Human Rights Resource Centre <<http://www.reports-and-materials.org/>>.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ FIDH, *supra* note 97 at 277.

participation and the commission of the offence.¹⁴⁷ While a parent company may be charged with complicity for acts committed abroad by a subsidiary, if the interference of the parent in the management of its subsidiaries is minimal, the distinction between the various legal persons will limit the charges of co-liability against the parent.¹⁴⁸ Again, like the rule in *Chandler*, this may encourage parent companies to avoid interfering in the management of its subsidiaries since doing so would open them up to liability.¹⁴⁹ As such, it too signals to corporations that they need only incorporate another entity in order to act criminally with impunity.

In sum, the aspects of the legal system discussed above project an air of indifference, impunity, and general lack of responsibility for the harmful actions of corporations, and in some cases even reward and incentivize transgressions of important legal norms. These systemic forces offer no incentive for corporations to combat the situational forces of deindividuation and dehumanization that propagate said abuses by instituting or improving an existing compliance system. While a global overhaul of the law as it pertains to business is politically infeasible, there are nevertheless ways in which HROs can work to change the systemic and situational forces that lead to corporate abuses of human rights.

¹⁴⁷ *Ibid* at 278.

¹⁴⁸ *Ibid*.

¹⁴⁹ John Coffee, "Corporate Criminal Liability: An Introduction and Comparative Survey" in Albin Eser, Günter Heine & Barbara Huber, eds, *Criminal Responsibility of Legal and Collective Entities* (Freiburg: *Ius crim*, 1999) 9 at 12.

III. Human Rights Organizations as Change Makers

This paper advocates two strategies for change: i) an internationally coordinated law reform campaign to better adapt the laws pertaining to corporations to the realities of how corporations function in practice and ii) agents working within companies helping all employees to resist the forces of deindividuation and dehumanization. HROs are the ideal actors for both these tasks. They play an important part in bringing issues to the forefront of the international agenda, and scholars have noted the influence of these organizations during the UN Decade of International Law, particularly in the drafting of the Rome Statute.¹⁵⁰ Furthermore, they have unparalleled expertise in human rights and the capacity for grassroots engagement with all kinds of individuals and organizations. This section will discuss approaches HROs can take to elicit change in the short- and long-term.

A. Changing Systemic Forces: Advancing a Model of Aggregative Criminal Liability

Corporations cannot be directed to better behaviour by threats posed to the organization as a whole.¹⁵¹ Instead, the legal system must put an increasingly direct focus on the processes of corporate decision-making.¹⁵² Ideally, the law would engage internal management capacity to make corporations responsible for and responsive to external social goals like respect for human rights.¹⁵³ Top management ought to give clear instructions on how to deal with various risks inherent to their business and monitor adherence to these

¹⁵⁰ Catherine Tinker & Paul Szasz, "The Role of Non-state Actors in International Law-Making During the UN Decade of International Law" (1995) 98 Proceedings of the Annual Meeting (American Society of International Law) 177.

¹⁵¹ Christopher D Stone, *Where the Law Ends: The Social Control of Corporate Behavior* (New York: Harper & Row, 1975) at 120-1; Parker & Gilad, *supra* note 53 at 170.

¹⁵² *Ibid.*

¹⁵³ Parker & Gilad, *supra* note 53 at 171-172.

instructions.¹⁵⁴ A company's fault ought to lie in its failure to institute protective mechanisms that would have prevented harm from occurring.¹⁵⁵ Recognition that corporate crimes are more often crimes of *omission* rather than *commission* reinforces the inadequacy of the traditional derivative theories of corporate liability.¹⁵⁶

Aggregative or organizational models of criminal liability treat corporations as capable of committing crimes through "established internal patterns of decision-making or, in other words, through corporate culture or (dis)organization."¹⁵⁷ Consequently, the corporation is treated as the principal offender, but in a way that adds together the different acts, omissions, and states of mind of individual stakeholders, particularly corporate officers and senior managers.¹⁵⁸ Central to the understanding of corporate criminal responsibility in this way is a company's organogram, its internal regulations, and the procedures that reflect the corporation's particular organizational culture.¹⁵⁹ Unlike the civil and criminal liability regimes discussed in the preceding section, this model does not encourage inaction and indifference by shielding the corporation or its upper-level management from liability if they were not directly involved in the commission of human rights abuses. Taking corporate culture into account increases the breadth of application of corporate criminal liability substantially and in so doing increases a corporation's incentives to improve internal controls, since a failure to do so will increase its risk of prosecution.¹⁶⁰ This feature currently exists in Australian federal criminal law: a corporation may avoid liability for misconduct of its "high managerial agents" by proving that it exercised due diligence to prevent said misconduct.¹⁶¹

While no corporate culture provisions to date directly allow for the veil to be pierced, conceptually these provisions may pave the way for challenges to limited liability within corporate groups in that they focus attention on the actual process of corporate decision-

¹⁵⁴ ECCHR, "The responsibility of European corporations for human rights violations abroad: To what extent does corporate due diligence extend to subsidiaries? The Danzer, Nestlé and Lahmeyer cases", online: ECCHR <<http://www.ecchr.de>> ["Due Diligence"].

¹⁵⁵ James Gobert & Maurice Punch, *Rethinking Corporate Crime* (Edinburgh: LexisNexis Butterworths Tolley, 2003) at 59.

¹⁵⁶ *Ibid.*

¹⁵⁷ Pieth & Ivory, *supra* note 142 at 5.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.* at 31-32.

¹⁶⁰ Donaldson & Watters, *supra* note 143 at 61.

¹⁶¹ *Criminal Code Act 1995* (Cth), s 12.3(3).

making and line of authority, rather than on the formal legal structure of these groups.¹⁶² This could give rise to new understandings of the physical elements of offences, and even to the creation of an offence of failing to adequately supervise corporate subsidiaries.¹⁶³

Furthermore, there is no conceptual reason why an aggregative model of liability could not extend to actions committed by contractors acting as agents of the corporation.¹⁶⁴ This would thus not only encourage preventive action with respect to compliance within each individual corporation, but of parent companies for their subsidiaries and subcontractors.

Additionally, incorporating corporate culture factors in sentencing allows for close attention to the organizational deficiencies that permit the impugned conduct and for the imposition of more sophisticated remedial measures, such as the adoption of sophisticated compliance systems and employee education.¹⁶⁵ Special exculpatory rules relating to the existence and effectiveness of compliance systems would incentivize good faith attempts at instituting said systems. For example, in the United States, corporations are able to mitigate their punishment or avoid indictment on the basis of the adequacy of their compliance systems.¹⁶⁶ In effect, it may be possible to use the criminal law to 'rehabilitate' offending corporations thus preventing future harm.¹⁶⁷ To keep out of trouble, every company ought to define its particular risk profile and design tailor-made compliance systems to meet those needs.¹⁶⁸ For example, as was the case with Danzer AG in the Democratic Republic of Congo, if a corporation is operating in a region where police and military forces are known to be prone to violence, it must monitor its subsidiary in the region and prevent the subsidiary from giving cause for police operations.¹⁶⁹ For corporations operating in regions of armed conflict, as Nestle was in Colombia, a parent company ought to prevent its subsidiary from

¹⁶² Donaldson & Watters, *supra* note 143 at 79.

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid* at 62.

¹⁶⁶ Pieth & Ivory, *supra* note 142 at 33.

¹⁶⁷ *Ibid* at 25.

¹⁶⁸ *Ibid* at 3.

¹⁶⁹ ECCHR, "Due Diligence", *supra* note 154 at 2.

cooperating with parties to the conflict.¹⁷⁰ Similarly, apparel companies like Gap must preempt the use of phony pay slips faking compliance with legal hours and wages.¹⁷¹

This paper is not advocating that criminal liability be bestowed solely on the organization at the expense of holding responsible individuals liable. Where the criminal act is a failure to do something it is possible that the corporation is the more appropriate actor to hold liable.¹⁷² However, efforts at deterrence ought not be focused solely at the organizational level. One problem with corporate liability is that it has the potential to undermine personal responsibility of individuals within the corporation if prosecutors are able to take the “short-cut of proceeding against corporations rather than against their more elusive personnel.”¹⁷³ Those most responsible for criminal behaviour should be punished for this behaviour, and if this is an individual, it would be unjust to only prosecute the corporation.¹⁷⁴ While some patterns of corporate human rights abuse are the result of poor internal policies and systems, if there are officers or employees who intentionally, negligently, or recklessly acted in a way that caused these abuses to occur, these individuals ought to be held liable as well.

The aggregative model is a step in the right direction as it would prevent corporations with weak or nonexistent compliance systems from acting with impunity and would reward corporations with robust systems by limiting their liability or lightening their sentences. Furthermore, were this model to contribute to the development an offence for failing to supervise a subsidiary, it would remedy the previously discussed shortcomings of the law relating to corporate groups. Unlike the legal status quo, this model does not project an air of indifference to corporate abuses of human rights. It signals the need for vigilance and encourages organizational adaptations to pre-empt these abuses.

¹⁷⁰ *Ibid.*

¹⁷¹ Kernaghan, *supra* note 86 at 31.

¹⁷² Donaldson & Watters, *supra* note 143 at 72. See e.g. article 102(2) of the Swiss penal code which states that the failure of the corporation to take all reasonable and necessary steps to prevent the offending action supplies the physical element of the offence (*Code penal suisse 311.0 du 21 décembre 1937*).

¹⁷³ Brent Fisse & John Braithwaite, *Corporations, Crime and Accountability* (Cambridge: Cambridge University Press, 1993) at 1, 2-8.

¹⁷⁴ Donaldson & Watters, *supra* note 143 at 74.

For those HROs seeking to combat the systemic forces contributing to corporate human rights abuses, there is a role to play in law reform efforts, advocacy, information collection, and relaying claims to the relevant prosecutorial authorities. Getting to know how a corporation functions internally may not be an easy feat for the average HRO, but helping the justice system to strengthen its capacity to do so can go a long way in facilitating legal claims against MNEs, especially in those jurisdictions in which civil claims can be launched alongside criminal ones. While some research exists on aggregative models of corporate criminal liability around the world,¹⁷⁵ there is still much to be done to uncover best practices, synthesize case law, and share information across jurisdictions. Due to the globalized nature of the economy, efforts in law reform are more likely to shift systemic forces in the short-term if they are internationally coordinated, starting with jurisdictions in the European Union, the United States, and Canada. HROs need to harness their capacities for research and advocacy in the short-term to be able to change systemic forces for the long-term.

B. Combatting Situational Forces: Heroism & Human Rights Education

The most important role for HROs is to combat the situational forces at work in the corporate form by helping all corporate employees orient their choices such that potential human rights abuses never materialize. This extra-legal role is so crucial since legal compliance alone is unlikely to unleash the kind of moral imagination and commitment necessary for sustained organizational change.¹⁷⁶

Just as Arendt spoke of the banality of evil, Zimbardo speaks of the banality of heroism. The first step in changing behaviour is recognizing that neither evil nor heroism is necessarily the direct consequence of a person's inner pathology.¹⁷⁷ Both traits can emerge

¹⁷⁵ See e.g. Donaldson & Watters, *supra* note 143 and Pieth & Ivory, *supra* note 142.

¹⁷⁶ Sharp Paine, *supra* note 36 at 110.

¹⁷⁷ Zimbardo, *supra* note 7 at 485-486.

when situational forces play a role in moving individuals across a decisional line.¹⁷⁸ By making heroism an egalitarian attribute of human nature, rather than a rare feature of a select few, heroic acts can be fostered in all settings.¹⁷⁹ This is achieved by conveying the message that every person is a hero in waiting who will be counted on to do the right thing when the moment of decision comes.¹⁸⁰ Human rights work is heroic by most standards, and HROs ought to teach individuals within corporations how they too can do this work in the course of their own.

i. Challenging Deindividuation: Social Models & Identity Labels

One way in which HROs can encourage heroism is through the use of social models. Research has shown that models persuade more effectively than words, and altruistic models increase the likelihood that those around them will engage in positive behaviour.¹⁸¹ An initiative exemplifying this is the Bertha Foundation's¹⁸² scholarships offered to social innovators who attend MBA programs at the University of Cape Town. Social innovators interacting with other MBA students is likely to stimulate broader interest in socially responsible business.¹⁸³ Another example is Oliver Wyman's Non-Profit Fellowship¹⁸⁴ through which consultants take time off from their respective roles at the firm to work in non-profit settings around the world. The experience gained in these fellowships will undoubtedly inform their work upon return to the private sector. HROs might also consider other ways in 'rights-respecting models' can be inserted into corporate settings: public-private partnerships, internships, consulting roles, and fellowships coordinated among the private and civil society realms, etc.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid* at 488.

¹⁸⁰ *Ibid* at 486.

¹⁸¹ *Ibid* at 451.

¹⁸² The Bertha Foundation's mission is to create more progressive and just societies through activism, media, law, and enterprise.

¹⁸³ "Bertha Scholarships", online: University of Cape Town Graduate School of Business <<http://www.gsb.uct.ac.za/>>.

¹⁸⁴ "Here's Another Way that Consultants Change the World", online: Oliver Wyman <<http://www.oliverwyman.com/>>.

Another means of inspiring heroism is through identity labels. Zimbardo writes that when a person is given a label, they will perform the actions to which it corresponds.¹⁸⁵ For example, if a person is told that he or she is helpful, altruistic, and kind, that person is more likely to do helpful, altruistic, and kind behaviours for others.¹⁸⁶ Exemplary corporate conduct typically reflects an organizational culture and philosophy that is infused with a sense of responsibility.¹⁸⁷ Thus, when engaging with corporate employees, HROs ought to label all employees as human rights defenders and emphasize that all are responsible for promoting and protecting human rights. Furthermore, in order to combat the social conditions that make people feel anonymous, HROs ought to engage with employees on an individual level as much as possible.

ii. Challenging Dehumanization: Education & Sentimentality

Research shows that firms are more likely to engage in CSR when their structures are open to relationships with society.¹⁸⁸ However, operationalization of business and human rights norms has to date focused primarily on states and global civil society organizations instead of the set of actors to whom their activity is targeted: people who work in business.¹⁸⁹ Actors in corporate command chains must be targeted if HROs are to bridge the gap between the discoveries of adverse human rights impacts and preventing further damage.¹⁹⁰ One way of bridging this gap is by incorporating human rights education into training programs for all employees. Because HROs have in-depth, contextualized knowledge of the

¹⁸⁵ Zimbardo, *supra* note 7 at 451.

¹⁸⁶ *Ibid.* For example, researchers found that telling someone that he or she is “a generous person” increases compliance with a request to make a large contribution to prevent multiple sclerosis (*ibid.*).

¹⁸⁷ Sharp Paine, *supra* note 36 at 108-109.

¹⁸⁸ RA Johnson & DW Greening, “The effects of corporate governance and institutional ownership types on corporate social performance” (1999) 42 *Academy of Management Journal* 564.

¹⁸⁹ Larry Catá Backer et al, “Democratizing International Business and Human Rights by Catalyzing Strategic Litigation: The Guidelines for Multinational Enterprises and the U.N. Guiding Principles of Business and Human Rights From the Bottom Up” (2013) 9:1 *Coalition for Peace and Ethics Working Papers* at 11, online: [Business & Human Rights Resource Centre <http://www.business-humanrights.org/>](http://www.business-humanrights.org/).

¹⁹⁰ *Ibid.*

social determinants of human rights abuses, they are well-positioned to design and/or conduct this training.¹⁹¹

HROs have long been active in human rights education ("HRE").¹⁹² Through HRE, accountability becomes more than simply the exercise of judicial options; it relates to the construction of a culture of human rights in which individuals have the capacity and responsibility to make a difference.¹⁹³ Access to knowledge about the social determinants and effects of human rights abuses increases an individual's appreciation for the consequences of her actions and sensitizes her to the exigencies of accountability.¹⁹⁴ Nevertheless, while knowledge transfer is important, facts alone are unlikely to combat dehumanizing forces. Rorty writes that progress toward a culture of appreciation of human rights is achieved through "sentimental education."¹⁹⁵ Narratives have a powerful effect and encourage learners to develop a sense of justice and solidarity with others.¹⁹⁶ An example is the Centre for Social Justice's Education and Human Rights program, which trains teachers and students in elementary schools using critical reflections of narratives highlighting gender equality, pluralism, diversity, citizenship, and peace.¹⁹⁷ Similarly, the John Jay College of Criminal Justice educates police personnel on human dignity by focusing on role-playing exercises and allowing participants to communicate their own definition of dignity through a personal narrative.¹⁹⁸

This kind of education can be adapted to corporate settings. A report by the Institute for Global Labour and Human Rights tells the stories of individuals affected by poor working conditions in a Gap factory.¹⁹⁹ This research reveals the human element of Gap's sourcing

¹⁹¹ For example, research by the MFA [Multi-Fibre Arrangement] Forum has shown which specific practices of apparel brands most significantly undermine manufacturers' ability to comply with codes of conduct: i) unstable relationships; ii) downward pressure on prices; iii) increased quality demands; iv) shorter time pressures; v) changes to orders; vi) and cancellation of orders (Amy Galland & Patricia Jurewicz, *Best Current Practices in Purchasing: The Apparel Industry*, online: As You Sow <http://www.asyousow.org/publications/Apparel_Report.pdf>). This kind of research should be directly communicated to all employees in an apparel company in a way that emphasizes impact on human suffering.

¹⁹² Monisha Bajaj, "Human Rights Education: Ideology, Location, and Approaches" (2011) 33:2 Hum Rts Q 481 at 484.

¹⁹³ George Andreopolous, "Human Rights Education and Training for Professionals" (2002) 48 Education and Human Rights 239 at 246.

¹⁹⁴ *Ibid* at 243.

¹⁹⁵ Richard Rorty, "Human Rights, Rationality, and Sentimentality" in Christopher J Voparil & Richard J Bernstein, eds, *The Rorty Reader* (Sussex: Wiley-Blackwell, 2010) 351 at 362.

¹⁹⁶ Audrey Osler & Juanjuan Zhu, "Narratives in teaching and research for justice and human rights" (2011) 6:3 Education, Citizenship and Social Justice 223 at 244.

¹⁹⁷ Bajaj, *supra* note 192 at 499.

¹⁹⁸ Andreopolous, *supra* note 193 at 243.

¹⁹⁹ Kernaghan, *supra* note 86.

practices: workers are “visibly sick, exhausted and dazed from grueling and excessive hours,” “physical punishment and illegal firings are the norm,” “pregnant women are illegally terminated and denied their legal paid maternity leave.”²⁰⁰ These narratives combat dehumanization by reintroducing the human element that is so easily effaced in facts and figures.

²⁰⁰ *Ibid* at 6.

Conclusion

Corporations are not necessarily implicated in disasters like Rana Plaza because the people who work within them are unethical, negligent, or indifferent. The organizational structure of the modern corporation regrettably fosters situational forces that facilitate routine complicity in human rights abuses. While there are many systemic factors contributing to this phenomenon, the law's treatment of corporations perpetuates it by signaling that corporations are above accountability and creating situations in which they can profit from transgressions of important social norms.

There is no one solution to these problems. However, HROs are in a unique position to effect change given their capacities for law reform, grassroots organization, and education. Goals in the short-term ought to include advocating a shift to an aggregative model of corporate criminal liability and cooperative efforts geared at corporate employees including social models, identity labels, and narrative-based human rights education. By creating the impetus for the institution of better compliance systems and helping these systems function by influencing employees to be human rights heroes, HROs can be at the forefront of a new era of corporate accountability and respect for human rights.

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