1 Introduction: Learning and Unlearning Business and Human Rights

Until recently, human rights and business were perceived as two separate domains. Human rights, traditionally understood as a shield and protection for human beings against the abuse of governmental power and discretion, were seen as having few direct implications for business. As a consequence, private actors like corporations were not on the radar of human rights scholars. At the same time, those concerned with corporations and corporate responsibility, both in practice and in theory, hardly adopted a human rights perspective. Human rights, for them, were a part of the larger legal, regulatory, and policy frame within which corporate practices were taking place, but they were not themselves a part of corporate responsibility engagements. Hence, bringing business and human rights together was intuitive neither for human rights scholars nor for corporate responsibility researchers. Accordingly, and somewhat paradoxically, learning "business and human rights" (BHR) actually means unlearning both business and human rights, at least to some degree. For a certain taken-for-grantedness of "business as usual" often provides fertile ground for corporate human rights violations and the inadequacies of the current international legal system offer the shield for these violations to be carried out with impunity. Opening a space for a conversation, let alone a theorization, of BHR requires us to look beyond the confines of established doctrines. To develop an understanding of what is possible and to break free from the limits of conventional thinking, we need not only to learn but also at times to unlearn particularly paradigmatic knowledge, in order to make space for new, innovative, and perhaps even revolutionary ideas.

1.1 Unlearning Human Rights: Challenging Traditional Human Rights Thinking

Traditional human rights thinking has revolved around the state as the main guarantor and provider of human rights. The conceptual and doctrinal rootedness of this state-centrism was for a long time too strong for a broader and more systematic discussion on BHR to emerge. Such a discussion would have gone

against the very definition and foundations of human rights. However, the neoliberal global expansion of markets, which set in during the 1970s, accelerated throughout the 1980s, and reached its peak in the 1990s, put the certainties of the Westphalian state-based international order into question and profoundly reshuffled power relations in the transnational economic and political arena (Chapter 9). The promise of growth and prosperity led governments to deregulate and liberalize their domestic economies, making them fit for participation in global markets. Relinquishing some of their policy autonomy was the price governments had to pay in order for their domestic economies to be competitive in the global market place. At the same time, global markets created unprecedented opportunities for multinational corporations to expand their reach and grow in size and power. Once firmly subject to the tight grip of governmental regulation, global businesses increasingly escaped governmental controls. Thus, economic globalization created so-called governance gaps – which multinational corporations, with their transnational organization and agility, were able to exploit. Governance gaps can be defined as spaces that are beyond the reach and control of public regulatory authority and in which the activities of private actors remain unchecked and transgressions of any kind often remain largely unaccounted for. John Ruggie (Box 2.2), who became the United Nations Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (SRSG) in 2005 (Chapter 2), as well as the BHR literature more generally (see e.g. Simons & Macklin 2014), later denoted such governance gaps as the very root cause of the "business and human rights predicament" (Ruggie 2008: 3).

Hence, BHR as a discussion that addresses these emerging new global constellations requires us to think anew about both the role of business in our global society and the notion of human rights as ethical and legal principles with relevance not only for governments but also for non-governmental actors, and particularly business. The challenge BHR students and scholars face is thus not only learning new approaches but also unlearning some of the "certainties" that have traditionally obstructed our view to include business in the human rights discourse. In this vein, this textbook provides guidance both in learning and unlearning human rights.

1.2   Unlearning Business: Challenging Corporate Social Responsibility

BHR as a new discussion at the intersection of human rights and corporate responsibility not only challenges traditional human rights thinking but also confronts more conventional notions of corporate responsibility. Much of the theory and practice of corporate responsibility over the past five decades has taken place under the banner

of corporate social responsibility (CSR). The idea of CSR as a more or less distinct corporate practice and as a field of scholarly inquiry started to emerge in the 1950s and thus is much older and more established than BHR. It has traditionally served as an "umbrella term" (Jonker 2005: 20; Scherer & Palazzo 2007: 1096) for a variety of issues and questions discussed in connection with corporate responsibility. Accordingly, it is of little surprise that BHR is often perceived as a "subset of CSR" or just another "CSR issue" – or even as one and the same thing. However, equating the two discussions or reducing BHR to "merely" a dimension of CSR is both conceptually and historically flawed.

1. *Conceptually*, human rights have not played a prominent role in the long-standing discussion of CSR. While the CSR discussion has certainly dealt with issues and problems that can essentially be characterized as human rights challenges at their core – examples include sweatshop labor, clinical trials, or the invasion of privacy in recruiting and hiring processes – it has rarely addressed them as actual human rights issues. This is no coincidence. Traditionally, CSR has been viewed essentially as private responsibility, that is, as a sort of voluntary, residual responsibility within a given framework of state regulation (Wettstein 2020). Such an understanding is based on "a clear line between private economic activities on the one hand and public political activities on the other" (Scherer & Palazzo 2007: 1106). According to this model, governments alone are in charge of the public domain of which human rights are seen to be a part. While this does not give corporations a free pass to do as they please within the private space provided by the state, they are not generally seen to have any responsibility for broader public concerns. From this point of view, human rights are not commonly perceived to be a part of the private responsibilities of businesses in CSR theorizations.

2. *Historically*, the emergence of BHR in the 1990s coincided with the internationalization of the CSR discussion and an expansion of its focus on related issues such as sweatshops and child labor. Nevertheless, despite this overlap, BHR did not emerge as a logical extension of CSR. Rather, as will be shown in Chapter 2, BHR was introduced as a new and separate discussion, whose precursors are found outside of CSR and which evolved in parallel rather than as an integral part of CSR. More concretely, while the CSR discourse is rooted in management and business scholarship in a broad sense, BHR by and large originated in legal scholarship. Accordingly, the BHR discussion has traditionally involved different actors – both as a social movement and as an academic discussion – and followed a different logic than CSR. In particular, BHR tends to focus much more on accountability mechanisms and particularly on the role of binding regulation, while CSR has become almost synonymous with voluntary, business-led initiatives for the promotion of responsible business practices:

> Corporate Social Responsibility (CSR) and Business and Human Rights (BHR) are like two close cousins—they are intertwined concepts focused on companies engaging in responsible and socially beneficial activities—but both concepts have key differences and hence distinct identities based on their origins. They are in essence two different but overlapping discourses: CSR growing out of scholarship from the business academy and BHR emerging from the work of legal academics and human rights advocates focused on formalistic notions of rights and remedies (Ramasastry 2015: 237).

It is against the background of these profound differences between a BHR and a CSR perspective that BHR has been viewed not as a subset or an issue of CSR, but rather as its critique. CSR has come under increasing criticism for its soft and voluntary approach, its lack of force, and a resulting lack of impact in regard to the transformation of business practices. BHR, with its focus on accountability and binding measures, has been characterized much more as a confrontation of and challenge to this CSR paradigm and thus as an alternative approach to corporate responsibility.

1.3 Learning BHR: The Human Rights Perspective on Corporate Responsibility

In the assumption of CSR as essentially a private responsibility, we find the basic chasm between conventional CSR approaches and BHR also from a normative perspective. While a CSR perspective on corporate human rights responsibility implies their shift into the realm of private responsibility, a BHR perspective would advocate for a shift in the opposite direction – that is, for an extension of corporate responsibility into the public realm and thus for a reinterpretation of corporate responsibility as inherently political in nature. As public or political responsibilities, corporate human rights responsibilities will differ in a number of ways from the conventional understanding of CSR as private responsibility (Wettstein et al. 2019).

First, human rights entail a different normativity than we commonly associate with private responsibility. As mentioned above, CSR has traditionally been perceived as voluntary or optional, as praiseworthy corporate goodwill beyond the call of duty. This view was defining for CSR in the 1970s and 1980s when CSR was often equated with charitable donations by companies to good causes. While CSR has evolved dramatically since then, such perceptions still linger and remain widespread today (McCorquodale 2009: 391; Kolk 2016; Bansal & Song 2017), particularly among companies themselves (Obara & Peattie 2018). In contrast to this perspective, human rights responsibilities are not a voluntary, discretionary, or subjective matter. The very point of rights, as Chapter 3.1 will show, is that they can be

claimed; respecting human rights is not a charitable act, but owed to the rights-holders. Addressing human rights claims as a private responsibility risks emptying them of their essential character as rights and turning them into a function of mere corporate goodwill.

Second, public responsibility entails a strong call for public accountability. It is not a coincidence that BHR scholars tend to favor a much stronger and more interventionist role of the law and of governments than scholars in the CSR field (Wettstein 2016). They tend to call for a more rigid enforcement of responsibility through legal and policy means rather than emphasizing the alleged benefits of more flexible, private initiatives in coping with managerial "realities" on the ground. Again, this is a direct reflection of the different roots of the two fields, with BHR being shaped predominantly by legal disciplines, which focus not only on prescribing but also on enforcing the respective responsibilities (Wettstein 2016). Against this background, Ramasastry (2015) has characterized the shift of perspective from CSR to BHR as one from responsibility to accountability.

Third, human rights are commonly seen as unconditional, universal, and equal rights (Chapter 3.1.2). All human beings have them equally and at all times, merely by virtue of being human. Accordingly, at least the most fundamental responsibility to respect these rights is also unconditional. Most importantly, this responsibility holds irrespective of what domestic laws say. Human rights, and the respective responsibilities, cannot simply be legislated away by law and policy-makers. For companies this means that they are responsible to observe human rights, even if doing so conflicts with the laws of the country in which they operate. The reference to national laws has long served as an excuse for companies to justify low and often untenable social, labor, and environmental standards in their operations. This is no longer an option with reference to human rights. The most authoritative policy framework in the BHR space, the UN Guiding Principles on Business and Human Rights (UNGPs) (Chapter 10), leave no doubt about the hierarchy between national laws and human rights norms: "The responsibility to respect human rights . . . exists over and above compliance with national laws and regulations" (Ruggie 2011a: 13).

Fourth, and directly related to the previous point, human rights provide a strong and universal reference point for responsible corporate conduct (Giuliani, Macchi, & Fiaschi 2014; Ramasastry 2015). The focus of CSR has traditionally been less defined, allowing for wide variation in form and content of respective initiatives and instruments. Therefore, CSR tends to be more susceptible to moral relativism (Chapter 3.1.3.2) that can potentially undermine, rather than advance, responsible business in foreign contexts. Thus, at least conceptually, the reference to an internationally agreed normative framework is one of the perceived strengths of BHR, because it leaves less room for corporations to use discretion in the interpretation of their own responsibilities (Giuliani, Santangelo, & Wettstein 2016; Nieri & Giuliani, 2018).

1.4   Rationale and Structure of the Book

Learning BHR requires us not only to break free from the doctrines that have traditionally obscured the intersection between corporate responsibility and human rights but also to transcend the boundaries of disciplinary silos. By its very nature, BHR spans different disciplines. Therefore, having a basic understanding of how different disciplines approach the field and of the key questions and issues raised by them, is essential to gain a truly holistic understanding of BHR. However, the reality often looks different. Conversations in the different disciplines, despite all belonging to and exploring different aspects of BHR, often share little common ground. They look at different issues, from different perspectives, and address them with different language. The rationale of this textbook is to overcome such disciplinary silos by providing a common foundation to build on. This will not necessarily change the conversations in the different disciplines. But it opens them up to other disciplinary perspectives and thereby enables BHR students and scholars to better access, understand, and contribute to the conversations in other disciplines. In short, the goal is to provide the common foundation that is necessary to have a truly interdisciplinary conversation about BHR.

The book integrates legal, ethical, and managerial insights on BHR. *Legal perspectives* deal with the role and applications of laws and jurisprudence in and for BHR, both in the domestic and international arenas. *Ethical perspectives*, at their core, are concerned with the application of normative theory to the BHR domain. They are commonly grounded in moral and political philosophy, but they naturally depend also on social, cultural, and political contexts. *Managerial perspectives* entail a more pragmatic implementation view, which takes into consideration the managerial realities and contexts in which such implementation occurs and the obstacles and constraints that managerial conditions often impose. While these are the three dominant perspectives that inform the book, insights from other disciplines such as political science, international relations, and social sciences more generally, are relevant and included in the book as well. Importantly, the book is not structured along disciplinary perspectives. Hence, there is not a legal, an ethical, and a managerial part of the book. Rather, all three perspectives tend to be present throughout the entire book. The goal is integration rather than separation of the different disciplinary perspectives. However, it is unavoidable that certain perspectives are dominant in some chapters, particularly when some of the disciplinary foundations are laid. That said, all these chapters also contain reflection, critique, and complementary insights from the other disciplines.

Each chapter in this book contains a variety of "textbook features" designed to support the process of studying and learning BHR:

- *Cross-references*: Whenever the book touches on content that is elaborated in-depth elsewhere, readers will find cross-references to navigate easily and conveniently to this elaboration.
- *Contextual boxes*: There are text boxes throughout the book that provide further contextual information on selected content. Such information is not critical to understanding the core BHR content, but is rather aimed at broadening readers' understanding of BHR. Some contextual boxes contain discussion questions to further reflect on the content.
- *Short cases*: The book features multiple short cases, outlining and discussing specific BHR challenges. The short cases have been selected to illustrate specific content discussed in the chapters. The cases contain a number of discussion questions at the end to guide readers' reflection and deliberation and animate classroom discussions on them.
- *Study and reflection questions*: At the end of each chapter there are two sets of review questions. Study questions are designed to quiz readers on the contents of the chapter. Reflection questions aim at motivating readers to reflect beyond the immediate contents of the chapter by pointing to some broader implications and challenges deriving from them.
- *Internet sources*: At the end of the book, readers will find a collection of blogs and helpful internet resources and websites in the BHR domain. These websites provide useful information, tools, and guidance on a variety of BHR-related contents. The collection contains resources featuring general BHR-related information, as well as more specific information relating to BHR practice and BHR accountability.

The book is divided in five main parts and 16 chapters. Part I provides some basic foundational knowledge to prepare readers for a deeper exploration of BHR in the subsequent parts. It consists of chapters 2 and 3. Chapter 2 provides a brief overview of the history of BHR as a movement and an academic field. The goal of this historical overview is to provide readers with a sense of the emergence, evolution, and basic shape of the field, in order to enable them to better see how the different parts and chapters of the book fit within a broader overall outlook on the field. Chapter 3 gives a basic introduction to human rights, both from legal and non-legal perspectives. Understanding different and sometimes conflicting approaches to human rights is of critical importance not least because different takes on BHR are often rooted in deviating underlying accounts of human rights.

Part II sets the scene by taking a preliminary look at the intersection between business conduct and human rights. Chapter 4 looks at how business can be implicated in human rights violations in a conceptual sense. It introduces an important distinction between direct and indirect corporate human rights violations and distinguishes between various forms of corporate complicity. Subsequently,

Chapter 5 provides a more issue-centered overview of various corporate involve-ments in human rights abuse. It aims to give a sense of the breadth and complexity of the BHR challenge.

Part III engages with the foundations of corporate human rights responsibility. At the center of this part of the book is the question of how such responsibility can be justified. Chapter 6 explores this question from the three constitutive perspectives of the book, analyzing ethical, legal, and pragmatic foundations to ground corporate human rights obligations. Subsequently, Chapter 7 assesses the nature of such obligations, how extensive they are, and what they entail. This chapter is approached predominantly from an ethical perspective. Chapter 8 concludes the third part of the book with a close look at how companies tend to implement their human rights responsibilities and what challenges typically arise.

Part IV is concerned with questions related to holding companies accountable for their human rights responsibilities. Chapter 9 introduces corporate human rights accountability conceptually in the broader context of global governance. In doing so, it provides a frame for the different accountability mechanisms that are dis-cussed in the subsequent chapters. Chapter 10 is devoted to the UNGPs and their foundation, the UN Protect, Respect and Remedy Framework (UN Framework). The UNGPs are the authoritative global BHR standard, which is why they warrant a special assessment in this book. Chapter 11 complements this perspective on the UNGPs with an evaluation of a number of other international soft-law standards and initiatives in the BHR domain. The subsequent two chapters look at hard law and policy solutions. Chapter 12 does so at the domestic level. It focuses specifically on policies and laws with extraterritorial effects as well as on so-called foreign direct liability. Foreign direct liability denotes the attempt to hold corporations liable in the domestic courts of their home states for human rights violations committed abroad. Chapter 13 looks at hard law solutions at the international level. In particular, it assesses international investment law and arbitration as well as the potential of a new international treaty on BHR as possible avenues of corporate human rights accountability.

Part V concludes the book by reflecting on BHR from more context-specific perspectives. Chapter 14 puts the focus on a number of industries and displays their respective industry-specific BHR issues, challenges, and solutions. Chapter 15 explores four emerging discussions in the BHR field and thus provides indications of some future key trends in BHR. Finally, Chapter 16 concludes the book with a brief reflection on the future of BHR in and for a post-pandemic world after COVID-19.