Laws used to Impede Naming and Shaming in Business and Human Rights: A Primer

When it comes to regulating corporate human rights abuses, the bulk of research studies how mandatory regulation can protect people from corporate harm. However, we do not know much about regulation that may be used by corporations to disrespect human rights. This article focuses on one issue: the employment of regulation to impede criticism of corporate human rights abuse excessively. Building on the literatures on naming and shaming and excessively restrictive regulation, this study identifies patterns of such employment of the law, beyond the exceptions to the freedoms of expression, association and assembly that are allowed by the International Covenant on Civil and Political Rights. Drawing on archival research of communications of the United Nations Special Procedures, five patterns of employment of the law to benefit companies excessively were identified. First, laws are used to excessively limit the workings of civil society actors that call out corporate human rights abuse. Second, laws are used to excessively restrict information on (potential) abuse. Third, corporations excessively rely upon defamation laws. Fourth, laws are excessively used to limit protests against corporate human rights abuse. Fifth, laws can be used to excessively limit entry of human rights defenders and migrant workers.

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Introduction

The field of business and human rights has been around for five decades but gained significant momentum after the Guiding Principles on Business and Human Rights (UNGP) were endorsed by the United Nations (UN) Human Rights Council (2011). These principles integrate existing standards under international law and are organized around three pillars: the State's duty to protect human rights, corporate responsibility to respect human rights and access to remedy for rights abuses (UN Human Rights Council: 2008). The UNGP clearly distinguish between States' obligations to protect human rights and corporations' responsibilities to respect such rights. Corporate responsibilities exist independently of the ability and/or willingness of States to meet their obligations and do not diminish these obligations. Furthermore, many corporations respect human rights and have a forceful impact, including by 'exporting' rights-enhancing standards to various jurisdictions abroad, lobbying for transnational regulation and joining social movements (anonymized 2023). Many corporations do this because they understand that a good human rights record can provide a sustainable competitive advantage. Any resistance to change is mainly due to a lack of imagination and understanding of conditions where sustainable innovations can serve business interests, including investment and economic growth (Cole 2016; Salter 2019). Yet, these facts should not deter us from studying any connections between regulation and corporate disrespect for human rights.

The UNGP are not flawless. They failed, among others, to refer to extraterritorial obligations of States and to comprehensive gender issues (De Schutter et al. 2012; anonymized 2023). However, they have been effectively leveraged by social movements (including various corporations) advocating for mandatory regulation (Addo 2014; Ruggie 2020; anonymized 2023). As a result, several mandatory regulations with transnational effects were created to protect human rights from corporate abuse, including the German 'Gesetz über die Unternehmerischen Sorgfaltspflicthen in Lieferketten' (2021). While assessments and opinions on the impact of such regulations vary, they represent significant progress compared to the situation 13 years ago.

Throughout the protracted processes leading to these mandatory regulations, certain corporations, industry organizations and politicians have consistently called for 'deregulation' to protect perceived economic interests (anonymized 2023). This perceived dichotomy between regulation and deregulation has led many to mistakenly believe that the mere existence of laws always equates to protection and not violation in the field of business and human rights. For instance, corporate strategic lawsuits against public participation (SLAPPs) have been described as 'baseless lawsuits' (e.g. Lowery 2022), although they often have a legal basis. While the literature has investigated how procedural laws limit opportunities to access justice when corporations violate human rights*,* it has not looked much further (Álvarez Rubio and Yiannibas 2017). A similar research gap was identified by Fisk and Reddy in labor law, a field that partly overlaps with business and human rights (Fisk and Reddy 2020). They wrote that only the trade unions literature consistently examines excessively restrictive regulation nowadays (Evans 2021; Nghia 2010; anonymized 2022a). This is especially problematic because unions are often isolated from other social movements due to their failure to solidarize with women and others experiencing (intersectional) discrimination (Fisk and Reddy 2020).

While regulation often aims to provide protection, particularly for weaker parties, and the Lockean ideal of regulation for good use must be pursued, it addresses only a part of the reality, as long established in socio-legal, realist and critical legal studies**.** UNGP 3b explains in this regard that the State has to 'ensure that other laws and policies governing … business

enterprises, such as corporate law, do not constrain but enable business respect for human rights'.

This article focuses on the specific issue of the conversion of mandatory law into an instrument to excessively hinder legitimate naming and shaming of corporate human rights abuses. Corporate backlash effects against naming and shaming can rely on regulation to curtail the freedoms of expression, assembly and association in ways that are neither proportionate nor necessary for respecting others' rights and reputations or for protecting national security, public order, public health, or morals as elaborated in Articles 19, 21 and 22 International Covenant on Civil and Political Rights (ICCPR) (1966). In such cases, regulation is employed to silence unfavorable information and avoid inviting public scrutiny (Larcker and Tayan 2020). This shapes broader processes of sustainable development and potentially threatens the social fabric by exacerbating rising levels of inequality and increasing the risk of fragility and crisis.

This article aims to determine patterns of how laws are used in excessively restrictive ways to prevent people from speaking out about corporate human rights abuse. To compile the dataset, I, with the help of two research assistants, first manually selected the communications sent by the UN Special Procedures that related to business and human rights issues (including but not limited to those co-written by the UN Working Group on Business and Human Rights) in the first decade since the adoption of the UNGP. Afterwards, I and another research assistant identified categories of regulation that had been used by corporations in excessively restrictive ways.

I have structured this article as follows. After reviewing the literature on 'naming and shaming' and the literature on 'excessively restrictive' regulation, I explain that we used archival data of the UN Special Procedures. The results section discusses five categories of laws that I identified. While the political literature started to study so-called 'anti-NGO' laws, other laws that limit naming and shaming excessively have remained understudied. Finally, I discuss avenues for further research, including research on the implications for social movements.

Naming and shaming

Naming and shaming processes are entangled. Naming is defined as the articulation and communication to a target that it violated certain norms and standards; shaming is the exposure of this information and/or condemnation to audiences that the target values (Haufler 2015; Clark 2013; Friman 2015). There is an ongoing debate on this concept. Following van Erp (2011), this article considers 'condemnation' as optional. It might therefore be guilty of 'lumping' every strategy of 'using information' (Pruce and Budabin 2016). This article does not, however, consider the target's 'shame' as an automatic consequence of shaming (Finnemore and Hollis 2020).

Significant attention has been devoted to the theory and practice of naming and shaming corporate human rights abuses (Bloomfield 2014; Gallagher 2021; Taebi & Safari 2017; Yadin 2023). While it is not a panacea, this focus is warranted as it represents one of the *few* available mechanisms that *can* effectively change the outlook of corporate human rights abuses. Schulz (2015), former director of Amnesty International US, contended that naming and shaming processes offer one of the few means available to further human rights norms. Arthurs (2006) described such processes as the 'Achilles heel' of corporations.

Despite their distinct ontologies, constructivists and liberal institutionalists converge on one point: naming and shaming *can* be (but is not per se) effective. Constructivists Risse and Ropp (2013: 20) argue that 'the more States and other actors care about their social reputation and thus want to be members of the international community in "good standing," the more vulnerable they are to external naming and shaming'. They regard naming and shaming as a mechanism of 'persuasion and discourse'. In the institutionalist tradition, Guzman (2008) similarly underscores the significance of reputation. While Guzman draws from international relations theory and focuses on States, his findings have been applied to corporate targets (Parella 2019). All else being equal, it is generally (but not always) in the target's interest to safeguard its reputation by signaling it is a cooperative partner.

The most substantial pressure can be applied to State and/or non-state targets when domestic actors join forces with transnational advocacy networks (TANs) to name and shame (Keck and Sikkink 1998). Risse et al. (1999; 2013) created a useful lens to analyze human rights change: the 'spiral model'. Accordingly, human rights commitment and compliance by States and corporations can take place when domestic actors advocating for change ('pressure from below') join TANs (including non-governmental organizations (NGOs), States, corporations and international organizations). Mobilization starts with and depends on the health of domestic opposition, which gathers information and raises awareness of human rights abuses. TANs can exert 'pressure from above' by providing connections with a range of target audiences internationally, including customers, investors, shareholders and other stakeholders (Parella 2019; Skeel 2011). The model posits that various mechanisms—persuasion and discourse, coercion, changing incentives and capacity building—work to advance commitment and compliance. Among these mechanisms, persuasion through naming and shaming plays a pivotal role in triggering human rights change (Kamminga 2015; Kinzelbach and Lehmann 2015; Neier 2018). Extra-institutional forms of the mobilization of shame against corporations can take various forms, including artistic events to disseminate corporate information, boycotts, divestment campaigns, petitions, sit-ins, social media posts and whistleblowing. In 'hard' cases, benchmarks and constructive diagnostics are particularly useful (Snyder 2020). All these forms of mobilization are crucial for the success of institutional forms of shaming including in courts and trade disputes (Rajagopal 2003). At first, targets may be pretend-playing and limit themselves to tactical concessions. Yet, even such surface-level changes can initiate processes of identity transformation and internalization of human rights norms (Checkel 2005).

The success of naming and shaming is guided by the economic insight that information shared through this mechanism is a critical resource. Such information mitigates the moral hazard problem that distorts corporate incentives to respect human rights (Johnson 2020). While information alone is never sufficient to ascertain corporate accountability, it represents a vital resource for stakeholders to assess business impact (Fung 2013). A corporation's reputation can be endangered when a violation of a rights norm is known, or because its actions deviate from public statements. Stiglitz, Nobel Prize winner in economics for his work on information asymmetries, recently again emphasized the value of reputational pressures in an amici curiae brief against Cargill and Nestlé in an Alien Tort Statute case in a US court (Oxfam America et al 2020). He contends that corporations proactively address human rights risks in their value chains to gain reputational and economic advantages and avoid having to respond to naming and shaming campaigns that expose human rights abuses and other negative externalities.

Naming and shaming is not always effective. Corporations with a brand name to defend are particularly vulnerable to naming and shaming (anonymized 2022a). They often pressure

their business partners and competitors—including those without a strong brand—to adhere to the same standards to level the playing field (Snyder 2020; anonymized 2023). Competitors of shamed corporations can also decide to alter their behavior to avoid becoming future targets of shaming (Johnson 2020). Export industries that 'cluster' in certain locations to share costs and exchange information and resources are also susceptible (Peterson et al. 2016; Snyder 2020).

From an institutionalist perspective, reputation is only one factor in a target's cost-benefit analysis of compliance (Guzman 2008). Targets may object if they do not anticipate a bottom-line return on their reputation investment or if the payoff of not cooperating is considered large enough. The effectiveness of naming and shaming varies not only among firms and industries but also depends on the nature of the abuses. Furthermore, naming and shaming may not impact the attitudes of customers and other stakeholders due to amongst others, information overload and other cognitive shortcuts as well as disagreements on the importance of corporate respect for human rights (Peattie 2015).

Over the years, Risse et al. (1999; 2013) also refined their model to acknowledge that a target's vulnerability can be offset by social and material resources relative to the sources of external pressure. Targets can thus invest in developing effective counterframes (or backlash effects) that challenge the legitimacy of criticism. This facet of naming and shaming processes has received significantly less attention to date (Kinzelbach and Lehmann 2015; Snyder 2020). This article specifically considers counterframes that employ mandatory regulation in excessively restrictive ways, as conceptualized in the following section.

Excessively restrictive regulation

Regulation is defined as 'those social actions in real or cyberspace that generate political, economic, legal or social norms intended to steer behaviour, with those norms being embedded in institutional frameworks for implementation' (Lange 2020: 95). Only mandatory regulation is studied in this article. The concepts 'regulations' and 'laws' are used interchangeably.

UN Secretary-General Guterres (2020: 8) said that 'an open space for [p]articipation is shrinking [and] [r]epressive laws are spreading, with increased restrictions on freedoms to express, participate, assemble and associate'. Socio-legal studies—beyond the realm of business and human rights—have similarly characterized such laws as 'repressive' (Cheeseman and Dodsworth 2023; Tann 2020), 'bad' (Dickson 2008; Richardson 2009), 'invalid' (Sellers 1992), or 'restrictive' (Berger-Kern 2021; Cooley 2023; Kinzelbach and Spannagel 2018: Obadare and Krawczyck 2022). Such laws feature especially prominently in the critical feminist, queer and race literature (Duggan 1993; Han and O'Mahoney 2014; Middleton 2020). Excluded and marginalized people, particularly those facing intersecting forms of discrimination, are disproportionally impacted by such laws. Legal realism and socio-legal studies, in contrast to legal formalism, have also long studied the role played by regulation in legitimizing social inequalities of power (McCann 2006; Morgan 2007; Nonet and Selznick 1978), as further explained in the next paragraph.

To better understand the nature of these erosive legal frameworks, the following instructive distinction is useful: laws can be excessively restrictive, or laws can be used in excessively restrictive ways (Krygier 2015). In the first category sit laws intentionally designed to 'serve ends contradictory to those of the rule of law' (Krygier 2016). Such laws are as old as rule-making itself, but our increasingly polarized world has seen an alarming surge in these

laws. They proliferated in various contexts following the war on terror since 2001 (Howell 2008), the Ukraine Orange revolution of 2004 (Rutzen 2015), the 2008 financial crisis (Flesher Fominaya 2017), US President Trump's fake news era (Chua 2019) and the COVID-19 pandemic (Lynggaard 2022). All these events in recent history stretched the imagination of what can be regulated by those in power. To date, the literature in neighboring fields of law mostly discusses so-called 'anti-NGO' laws (Bromley et al. 2020; Dupuy et al. 2016; Fransen et al. 2021). The Organization for Economic Cooperation and Development (OECD: 2022) also referred to new regulations that excessively impede naming and shaming, including defamation laws, laws on hate speech and laws on peaceful assemblies in its first report on 'the protection and promotion of civic space'. In the second category sit 'strained interpretations of law' (Ostas 2010). Depending on the background factors, these regulations are ambiguous in instrumental ways or inadvertently produce unintended consequences. Their content may be incoherent, contradictory, easily altered or interact with other regulations to create excessively restrictive outcomes within specific contexts (Bird 2010; Kouwagam 2020). Such laws do not have sufficient precision to regulate conduct in other ways.

The line between these two categories is not rigid. Regulation is inherently ambiguous and open to interpretation. Effects need to be observed in context, as most laws can be 'mobilized' against the rule of law itself (Cummings 2024). Therefore, merely examining *de jure* laws and institutional structures in isolation provides limited insights (Krygier 2015). They depend on their embedding in social structures and what actors come to do with them in context (Krygier 2009). In the end, the *de facto* observable and measurable adverse effects can make law not 'fit for purpose' (Chaudry and Heiss 2022; Passas 2023; Přibáň 2020). Such strategies are not always meticulously devised or considered on purpose. (Of course, this means that the law simultaneously represents a source of opportunity and empowerment, including in litigation as further discussed in the section 'implications for social movements' below.)

Finally, it needs to be emphasized that not all regulatory restrictions to naming and shaming are excessive. Therefore, this article uses the concept of 'excessively restrictive' regulation throughout. Established international human rights regimes provide the yardstick to define when laws are used 'too' restrictively (Chua 2019; Kiai 2015; Passas 2005). UN Secretary-General Annan said in this regard that the rule of law necessitates that 'all persons, institutions and entities, public and private, including the State itself are accountable to laws … consistent with international human rights norms and standards' (UN Security Council 2004: 6).

In the context of 'naming and shaming', this pertains to laws that unreasonably curtail the freedoms to express, assemble and associate beyond the exceptions in articles 19, 21 and 22 ICCPR**.** The ICCPR has 173 States Parties. To be justified, legal restrictions to the freedom of expression shall be necessary for the respect of others' rights or reputations or the protection of national security, public order, public health or morals (article 19(3) ICCPR). Legal restrictions to the freedom of association or the right to peaceful assembly need to be necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health, morals or others' rights and freedoms (articles 21 and 22(2) ICCPR). Any legal restrictions need to be proportionate weighting the impact of the restriction on the exercise of the right (UN Human Rights Committee 2004; 2011; 2020). Not all states have ratified the ICCPR or conventions with similar provisions (such as articles 10 and 11 of the European Convention on Human Rights). For example, the UN Special Representatives referred to Articles 19 and 20 Universal Declaration of Human Rights (1948)—customary norms of international law which also concern freedom of expression and the freedoms of

peaceful assembly and association—in communications on the employment of law by corporations in two communications to Myanmar, not a State party to the ICCPR, that will be further analyzed in the results section below (MMR 14/2013 and MMR 1/2014). Finally, in the context of labor, peaceful assembly and association are core labor rights applying to all 187 International Labour Organization (ILO) Member States 'even if they have not ratified' the relevant conventions (ILO 1998).

Data and methods

UN representatives, as the 'normative power of last resort,' are frequently called upon by TANs and hence are 'creative and productive forces' to be examined (Heydebrand 2001). This study utilizes archival data from the Special Procedures of the UN Human Rights Council, comprising non-remunerated, independent human rights experts with mandates to report and advise on human rights issues from thematic or country-specific perspectives (Burton 2020). These experts are elected for triennial terms, which can be extended for another three years (OHCHR 2008). One of their key responsibilities is to send out communications, reporting on past and ongoing human rights abuses and addressing 'concerns relating to bills, legislation, policies or practices that do not comply with international human rights law and standards' (OHCHR N.d.).

The Special Procedures are authorized to disseminate communications based on information received from any individual, group, civil society organization, inter-governmental entity, or national human rights body (OHCHR N.d.). Consequently, their communications are regarded as the 'most accessible' and 'direct link between victims of human rights violations and the international human rights protection system' (Limon 2018: 4 and 31). While these communications can be directed to governments, corporations, and other actors, the majority are sent to governments. The Special Procedures present the allegations, request clarifications on them, and where necessary, ask that the violations are prevented, stopped, investigated or that remedial actions are taken (OHCHR N.d.). They also recall the applicable human rights provisions in their communications (OHCHR N.d.).

This study involved three principal phases: data collection, thematic identification and pattern identification. The first phase entailed the retrieval of data by downloading the communications of the UN Special Procedures published over a decennium, from 2011 to 2020, from the UN's website https://spcommreports.ohchr.org/. The majority of these communications were downloaded in November 2020, with additional missing communications added in July 2021. The year 2011 was chosen as the inception point because it marks the adoption of the UNGP and because systematic accessibility of communications on the UN's website commenced in December 2010. A total of 5,890 communications were downloaded, available in English, French or Spanish.

In the second phase, all communications thematically linked to business and human rights issues were identified. UN Special Procedures are encouraged to send joint communications when appropriate, but cooperation between Special Procedures is not always straightforward (Limon 2018; Winkler and de Albuquerque 2017). Consequently, while all communications co-authored by the UN Working Group on Business and Human Rights addressed business and human rights issues, not all communications within this thematic field were co-authored by this working group. For instance, communication KHM 1/2011, discussed below, was co-authored by the Special Rapporteur on adequate housing and the Special Rapporteur on the situation of human rights in Cambodia. The thematical identification process, therefore, involved a detailed review of each communication's content, requiring a

deep understanding of the nuances of business and human rights issues to accurately classify the documents. Online grey literature was consulted to ensure that the meanings and implications of the communications were accurately captured. This process culminated in 934 communications (concerning 548 unique cases) being selected.

The third phase involved discerning patterns in laws that excessively impede the naming and shaming of corporate rights abuses. This was achieved through an inductive coding process involving multiple iterations (Timmermans and Tavory 2022). The initial round of 'open coding' was conducted to identify key themes within the data. This stage involved breaking down the communications into discrete parts, closely examining and comparing them for similarities and differences. Additional data were incorporated to refine and expand these themes In parallel, additional literature, such as literature on so-called 'anti-NGO' laws was consulted to inform the coding process. Subsequently, a round of 'focused coding' was performed to identify 'index cases' representative of specific categories, assessing whether laws in other communications exhibited analogous patterns. Focused coding allowed for the synthesis and categorization of the most significant and frequent codes identified during the open coding phase. This involved considering similarities and dissimilarities, revisiting, and sometimes altering the original index cases. The UN's practice of publishing some communications as 'image only' PDFs complicated the coding process.

Personal data were processed during the thematic and pattern identification phases, as the communications contain identifiable information about individuals. Special categories of data, including racial data and trade union membership, were processed only to the extent that they were adequate and relevant for this study. Ethical considerations were paramount throughout this process. We ensured that the intended use of the data was respected and adhered to the principles of data minimization and purpose limitation. Personal data were not retrieved from pseudonymized communications that could be easily re-identified. All factual details reported should be considered as allegations, consistent with the nature of the communications.

Results

The regulations are embedded in a variety of instruments, including counter-terrorism, cybersecurity, immigration, tax and criminal instruments. Five categories could be identified. First, laws can be used to excessively limit the workings of civil society actors such as NGOs, including their registration and (foreign) funding. As noted above, such laws received the most attention in scholarly debates in neighboring fields of law to date. Inter- and supranational organizations also paid the most attention to such laws (Council of Europe 2017; OHCHR 2016; UN Human Rights Council 2016; Young and Echagüe 2017). How such laws may be used for perceived corporate 'gain' is, however, an issue that has remained under the radar. A prime example of such employment is communication ECU 4/2013. The communication explains that the Ecuadorian government allegedly implemented Article 16 Regulation for the Operation of the Unified Information System of Social and Citizen Organizations, known as executive Decree 16 (2013) to dissolve Pachamama Foundation, which worked for Indigenous peoples and the conservation of the Amazon, just days before a planned demonstration. Similarly, Decree 16 allegedly led to the dissolution of Acción Ecológica, another organization dedicated to environmental conservation (ECU 8/2016). In India, the Foreign Contribution Regulation Act (FCRA) (1976), revised in 2010, has allegedly been used to restrict the activities of NGOs. A notable communication concerns the freezing of funds of Greenpeace India in 2015 (IND 7/2015). The Ministry of Home Affairs took this action, allegedly due to Greenpeace's failure to inform authorities about foreign contributions, though it is believed to have been in retaliation for the NGO's campaigns against coal mining activities. This freezing

of accounts is part of a broader pattern of increasing restrictions on civil society in accessing funding in India. Similarly, the Lawyers Collective, an NGO working on sexual harassment at work, allegedly faced suspension of its FCRA registration for six months (IND 2/2016). Finally, in other communications, the application of penal codes has had similar effects. The Amotocodie Initiative, which defends Ayoreo indigenous groups against livestock companies, encountered legal challenges under Article 192 inc 1-03 of the Paraguayan Penal Code ('injury of trust') for allegedly disbursing expenses without apparent real benefits (PRY 1/2011). The Turkish government allegedly used Article 314 of the Penal Code ('being a member of an illegal organization') to raid the offices and homes of members of the Human Rights Association and the Health and Social Service Workers Trade Union (TUR 4/2011).

Second, laws can be used to excessively limit access to resources, fuel censorship or, more generally restrict information on (potential) corporate human rights violations. In BRA 5/2015, the UN Special Rapporteur on contemporary forms of slavery refers to various adopted and proposed regulations, including Bill PLS 432/2013 to implement a constitutional amendment EC 81/2014 on slave labor. This regressive bill attempted to limit public access to the 'dirty list', a transparency database of employers caught using forced labor. The bill tried to restrict the possibility of adding names to the list, even when there were first and second administrative judgments that confirmed forced labor practices. Moreover, BRA 5/2018 pointed out, amongst others, that proposed amendments to law 7802 (1989) regarding pesticide regulation could exempt pesticides produced for export from necessary agronomic, toxicological, and environmental studies. This lack of transparency and regulation entailed severe implications for public health and the environment in importing countries. Similarly, the draft Environment Impact Assessment (EIA) Notification (2020) issued by the Indian Ministry of Environment, Forests and Climate Change posed significant threats to transparency in environmental governance (IND 13/2020). Amongst others, Clause 5(7) excessively restricted the publication of information and public consultation for projects deemed to involve 'strategic considerations', without clarifying the criteria for such categorization. This lack of transparency undermined public participation in environmental decision-making processes. In Cambodia, communication KHM 3/2018 discussed the Minimum Wage Bill, which contained provisions that unduly restricted public discourse on minimum wage issues. Such legal restrictions implied limiting workers' ability to organize and advocate for fair wages, thereby stifling information exchange and public debate on labor rights. Communication GTM 4/2019 reports on the criminalization of land rights defenders through Decree number 33-96 (1996) in Guatemala. This criminalization restricted the dissemination of information regarding land disputes and hindered Indigenous communities' access to legal recourse and advocacy. Various related laws have been proposed and adopted in Guatemala, as detailed in GTM 10/2018, including Bill 5416 aimed at regulating consultation procedures with indigenous peoples (which was discussed without their participation) and Bill 5098 which promoted the use of water resources for the development of hydroelectric projects. Laws can even facilitate widespread surveillance and control over minority groups. China's Counter-Terrorism Law (2015) and its regional implementation in Xinjiang have raised significant concerns (CHN 18/2019). This law provided broad and ambiguous definitions that could be used to justify severe restrictions on freedom of expression, assembly and association, particularly targeting Uyghur populations who were allegedly employed routinely in forced labor conditions (OHCHR 2022). Finally, human rights defenders have been arbitrarily arrested and detained on the basis of criminal law. An Uzbek defender working on labor conditions in Uzbekistan's cotton industry allegedly faced charges of fraud and bribery under Articles 168 and 211 of the Criminal Code, following a police search that confiscated his electronic equipment (UZB 4/2015). In VNM 2/2019, a Vietnamese defender was allegedly charged for his coverage of

protests following a toxic spill from a steel plant owned by a Taiwanese company under Article 258 of the Vietnamese Criminal Code ('abuse of democratic freedoms'). His charges were later changed to charges under Article 88 of this code, criminalizing propaganda against the socialist state. Other defenders who spoke out about the spill were allegedly also charged under Article 88 (VNM 4/2017). In Fiji, under communication FJI 3/2011, trade unionists faced severe restrictions. They were allegedly arrested and charged under various laws such as Section 65(i)(b) of the Crimes Decree (2009) ('urging political violence') and Section 18(1) Public Emergency Regulation (2009). They were not allowed to discuss the effects of the Essential National Industries Act, which itself impinges on freedoms of expression, association and assembly, showing how laws can limit critical discourse on human rights and corporate actions.

Third, the data confirm that corporations excessively rely upon defamation laws, often in the context of SLAPPs (Hall 2019). SLAPPs are legal actions initiated primarily to silence criticism through expensive and lengthy court processes. Such cases are designed to intimidate and harass those who expose human rights abuses, ultimately deterring others from engaging in similar acts of public interest advocacy. Communication AGO 1/2015 detailed the case of a journalist who allegedly faced 24 charges of criminal defamation following the publication of his book which exposed violent and corrupt practices in Angola's diamond mining industry. Communication KHM 1/2011 reported the conviction of a farmer under defamation and disinformation charges under Article 305 of the Cambodian Penal Code after criticizing a company for land grabbing. The company was allegedly owned by the wife of the Cambodian Minister of Industry, Mines and Energy. In MMR 14/2013, Myanmar allegedly deployed defamation laws excessively to curb dissent, imprisoning demonstrators protesting against the Letpadaung Copper Mine project. One of the protestors allegedly faced charges under Article 505(b) of the Penal Code ('disturbance of public tranquillity'). Communication MMR 1/2014 described the arrest of a human rights defender who was allegedly charged under, amongst others, multiple provisions of the Penal Code, Article 505(b) ('disturbing public tranquility'), Article 188 ('disobedience to an order duly promulgated by a public servant'), Article 143 ('membership of an unlawful assembly'), and Article 447 ('trespassing) for organizing protests against the same mining project in Myanmar. Communication THA 8/2015 discussed the indictment of a human rights defender, who allegedly faced charges of criminal defamation under Article 328 of the Thai Criminal Code and computer crimes under Article 14(1) of the Computer Crime Act (2007) after contributing to a report of a Finnish NGO on labor rights violations at a fruit company. Additionally, communication THA 3/2020 highlighted the alleged judicial harassment of, amongst others, migrant workers, journalists and academics by a poultry company. The company allegedly frequently resorted to defamation and libel charges under Articles 326 and 328 of the Thai Criminal Code to intimidate and silence those who expose exploitative working conditions at its farms. Communication PER 6/2017 addressed the case against two defenders from Mining Watch Canada. They allegedly faced accusations of disturbing public order and national security as well as participation in lucrative activities that are not allowed under their migrant status in Peru, following their documentary on the operations of a Canadian mining company.

Fourth, laws are used to limit protests against corporate human rights abuse excessively. The literature discusses this matter in relation to trade unions (Evans 2021). The communications indicate that other actors in advocacy networks experience similar challenges. For instance, in Australia, the Tasmanian Workplaces (Protection from Protestors) Bill 2014 sought to prohibit protest activities that hinder business operations (AUS 3/2014). The bill included provisions such as the prohibition for protesters to enter or remain on business premises if their actions could hinder business activities. It defined protest activity broadly as

‘an opinion, or belief, in respect of a political, environmental, social, cultural or economic issue’, and imposed severe penalties including excessive fines and prison sentences. These measures were justified by the Tasmanian government as necessary to protect economic opportunities and the rights of workers, but they disproportionately restricted freedoms of expression and assembly. Furthermore, in NIC 1/2016, the organizers of a squashed protest against a canal to connect the Atlantic and the Pacific Oceans failed to request a permit as provided by the Nicaraguan Constitution (1987, amended 2014) and Law 872 (2014). But, the conditions to get such a permit were excessively bureaucratic and restrictive. Finally, various communications (ECU 3/2018; GTM 6/2017; IND 16/2011; PER 9/2017; RUS 14/2013) detail how criminal legal provisions were used to excessively restrict protests that call out business and human rights abuse around the world, from Russia to Guatemala. It is useful to give two examples of such laws. CHL 1/2011 highlighted how Chilean anti-terrorism law No. 18314 (2010) was allegedly used to imprison four indigenous activists involved in conflicts with forest multinationals. These companies, their contractors, and some non-indigenous landowners clashed during protests with Mapuche communities. In Malaysia, communication MYS 5/2014 documented excessive police force against protesters opposing an Australian-owned rare earth processing plant. Environmental activists and local residents allegedly faced beatings, charges and arrests under Sections 145 (‘unlawful assembly’), 147 (‘rioting’), and 353 (‘deterring a public servant from discharge of his duty’) of the Penal Code.

Fifth, laws can be used to excessively limit entry or exit.[1] Such laws have been used to expel activists and workers who question corporate rights abuses. To begin, legal frameworks can hinder the flow of international solidarity and support for local activists. Such practices were mentioned in two communications introduced above. Under communication FJI 3/2011, a trade union delegation from Australia and New Zealand was refused entry in Fiji, while under communication MYS 5/2014 an Australian woman human rights defender who participated in the protests opposing the plant was detained and deported from Malaysia under section 39(b) of the Immigration Act 1959/63. Similarly, members of Mother Nature Cambodia, including its Spanish founder, faced excessive legal challenges in Cambodia (KHM 2/2016). The founder’s visa was allegedly not renewed after 13 years, leading to his deportation. Finally, communication KOR 3/2012 sheds light on the case of the former president of the Seoul-Gyenggi-Incheon Migrants Trade Union who was allegedly denied re-entry in South Korea on the basis of the Immigration Control Act (1992) despite holding a valid visa. He, a transgender Philippine national, previously faced challenges on the basis of the Foreign Workers Employment Act No 6967 (2003), illustrating the intersection of labor rights and immigration control in suppressing the union activities of minorities. More generally, legal frameworks can be employed to actively undermine the rights of migrant workers, exacerbating their vulnerability to exploitation and abuse. RUS 1/2016 highlighted Russian measures imposed on North Korean migrant workers under an extradition treaty between Russia and North Korea of 2015. The treaty facilitated the return of workers who fled harsh conditions in North Korea, contravening the principle of non-refoulement and excessively limiting the right to leave (articles 3(1) and 12(2) ICCPR). This legal arrangement underscored how international treaties can be used to reinforce oppressive regimes and prevent asylum seekers from escaping persecution. LBN 4/2018 highlighted the plight of two Kenyan migrant workers in Lebanon. The two women allegedly risked deportation, after being victims of an alleged hate crime, under the migrant labor system ‘Kafala’ that ties foreign workers directly to their sponsor after being physically assaulted (Kassamali 2021). Finally, communication THA 3/2012 addressed

[1] The UN Special Procedures referred to violations of art 19, 20 and 21 ICCPR, as well as to violations of various other ICCPR articles and other treaties in these communications.

a bill to deport pregnant migrant workers, forcing them to return to their home countries to give birth. This proposal would have severe implications for the rights and health of pregnant workers, potentially leading to unsafe abortions and loss of employment. The regulation exemplified how legal measures can be leveraged to control and exploit vulnerable labor populations, especially women facing intersectional discrimination, prioritizing economic and political objectives over human rights.

While this analysis provides original and rich insights, the research cycle remains ongoing. The findings aim to open new questions and to enable other researchers in the field of business and human rights to identify and anticipate new patterns in their work. The limitations of this archival research indicate pathways for future research. To begin, the dataset that has been used is inherently limited. The study of additional data points would serve to provide a more comprehensive analysis. Additional data from other UN bodies—such as the UN treaty bodies and the Universal Periodical Review—are relevant. Data from relevant ILO committees and the OECD Observatory of Civic Space can also be analyzed. Furthermore, it needs to be acknowledged that the analysis of data collected by international organizations is limited, given the political arrangements within which they operate. Amongst others, the 'analysis of causes is not taken far enough back' and the focus is excessively on storytelling, hard repression and certain jurisdictions (Marks 2011; Kinzelbach and Spannagel 2018)). Notably, the discussed patterns mentioned above refer mainly to laws in the Global South. Yet, they exist all over the world (Chua 2019). Excessive restrictions on naming and shaming abuses of the right to a safe, clean, healthy and sustainable environment including in jurisdictions from the so-called Global North are particularly worrisome. Only one example from the core Anglosphere, in Australia, could be identified above. However, the Human Rights Law Centre et al. (2021) describe various excessively restrictive uses of regulation in their report on 'laws that silence climate activism and the political power of the Australian fossil fuel industry'. There are other examples. Amongst others, Di Ronco (2021) reported that the Italian decree 53 (2019) aggravated penalties for resisting the police during public protests and has been used to suppress protestors who oppose the Trans Adriatic Pipeline to fight for their right to a safe, clean, healthy and sustainable environment.

Furthermore, a report commissioned by the European Parliament refers to various cases in which SLAPPs are being used by businesses in the European Union (EU) in excessive ways (Borg-Barthet et al. 2017). While the impact of the employment of laws in excessively restrictive ways is more subtle and limited in highly democratized countries, the EU (2024) recently introduced a Directive to defend critical voices from unfounded and abusive lawsuits in cross-border cases. This anti-SLAPP directive introduces safeguards such as early dismissal of unfounded cases and requiring claimants to cover legal costs and damages if their case is dismissed.

Further contextual research can be useful for three reasons. First, it allows to collect data from the Global South *as well as* the Global North (cf Timmermans and Tavory 2022: 49). Second, the data seems to indicate that people facing (intersecting) disadvantages—such as migration status and low income—suffer disproportionally from any unequal features of the law (Crenshaw 1989). UN Special Procedures often pay attention to such issues in their communications because Special Procedures with specific thematic expertise for certain people (older persons, migrants, indigenous peoples, gender) join forces to write communications (anonymized 2023). Fieldwork would allow to also identify in-depth relational patterns by interviewing people with lived experience. Third, as noted above, laws need to be assessed 'in action' in order to fully understand their effects. It is not only certain laws that may have an

overly impeding effect (contrary to the rule of law), but especially *how* these laws are employed in context by corporate actors (Krygier 2015). This directs us towards a study of the contextual conditions in which laws are developed, applied and sustained. The preamble of the UN Charter (1945) sets as an objective in this regard to 'establish *conditions* under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained' (emphasis added). Notably, legal transplants are central in the 'law and development' literature, but when it comes to excessively restrictive regulation, legal transplants might well be used as a reaction *against* social engineering from donor States that try to restrain power (Heydebrand 2001). For example, it needs to be assessed whether excessively restrictive (colonial) laws that had fallen into disuse are used to muzzle those who speak out on corporate human rights abuse. It is even possible that political and business interests are synchronized to a larger extent than assumed to date in legal research. The criminal charges that have been brought by the state against human rights defenders, as noted above, point in this direction. Fransen et al. (2021: 14) also write in this regard in their study on anti-NGO laws that 'especially human rights NGOs and labor NGOs experience repression and perceive regulatory restrictions as constraining [when they] confront the … perspective on national economic growth'. Similarly, Lehoucq and Taylor (2020: 182) posit that legal mobilization—further discussed in the next section—aimed at changing business behavior 'necessarily involves states institutions and state actors'. Accordingly, the divide between actions directed at States and corporations 'is perhaps more porous than might be imagined' (182)

Implications for social movements

Finally, this section discusses another pathway for future research, focusing on the implications for social movements. We are only beginning to understand how the excessive restrictive employment of laws challenges social movements (van der Vet 2021). The dangers and fears of retaliation to anyone who challenges such practices could be great enough to effectively silence any opposition. People may prefer to self-censor (Stern et al 2012). Furthermore, the described practices can be an incentive to reject engagement with the law altogether. Co-optation and autonomy have long been contrasted in the literature on law and social movements (Piven and Cloward 1978).

Yet, impaired domestic communities that can and want to name and shame can probably not use the 'normal' tools available. They must engage in some of the very behavior that is discouraged or opposed, and thus have to deal with an extra layer of challenges (Levitsky 2015; Richardson 2009). As explained in the literature review above, naming and shaming by transnational partners is an important remedy when the space for domestic opposition shrinks (Keck and Sikkink 1998; Kinzelbach and Lehmann 2015), and against those who suppress mobilization itself (Chua 2019). In transnational orders, legal norms 'dynamically and recursively change' because 'norm making and practice at the international, national, and local levels interact' (Shaffer and Halliday 2021).

Current sociological and political research on mobilization against excessively restrictive NGO laws has identified tactics of domestic *or* international NGOs (without linking the two to any great extent) (Fransen et al. 2021; Cheeseman and Dodsworth 2023). Yet, two studies provide a first account of transnational mobilization against excessively restrictive laws (Fransen et al. 2021; Cheeseman and Dodsworth 2023). Both studies focus only on new laws restricting NGOs designed to serve ends contradictory to the rule of law. The summarized insights are that opportunities created by a higher level of democracy are utilized by TANs through sustained action over time, framing that resonates with legislators (including the formal

and informal rules they have to adhere to), use of tempered advocacy (including the use of less polemic language) and shifting the focus to the implementation of regulation in a non-restrictive way. Similar indications (for other types of laws) can be found in NGO reports on corporate human rights abuse that provide organizational and legal expertise across jurisdictions. For example, the International Center for Not-for-Profit Law (2022) adjusted its short-term goals to avoid varied legal risks. Similarly, the Philippine NGO Bantay Kita and the international NGO Publish What You Pay strengthened their involvement in the Extractive Industries Transparency Initiative (which is backed up by various 'good' extraterritorial laws (anonymized 2023)) in response to new laws that prevent payment disclosures (International Center for Not-for-Profit Law 2022). Furthermore, NGOs opposing excessively restrictive laws joined forces in regional networks (DefendDefenders 2016).

Future research can use these initial findings as a stepping stone for developing a comprehensive and empirically informed model that covers tactics used by social movements, accounting for both advocacy causes and organizational strategies, against various types of regulations that impede naming and shaming corporate human rights abuses. Importantly, such mobilization can also involve corporations and political elites (Berger-Kern 2021).

Strategic litigation requires specific attention as a catalyst for legislative reform. While the societal impacts of strategic litigation have also been questioned (Albiston 2011; Calavita 2016; Rosenberg 2023), it is a valuable 'political' strategy to publicize and redefine the terms of the dispute (McCann 1994; Simmons 2009). The literature on legal opportunity structures studies how structural and contingent factors, such as rules on legal standing, hinder or promote access to justice (Hilson 2002; Vanhala 2018). When movements then manage to pass or circumvent such factors, domestic courts can and do achieve individual and systemic change for laws that violate international human rights law (Roach 2021). Accordingly, litigation can serve to clarify and improve interpretations of legal frameworks (Bedner and Berenschot 2023). Strategic litigation by social movements is not preempted by corporate approaches that employ laws in excessively restrictive ways (Galanter 1974). Legal skill cannot always be acquired with more resources (Dugard and Langford 2011; LoPucki and Weyrauch 2010). Nevertheless, substantial support structures can enable civil society actors to position themselves as 'repeat players' who do not merely occasionally resort to the courts (Epp 1998; Kahraman 2018). Finally, judges—exposed to critical schools of litigation, international law and developments in other jurisdictions—combine formalistic and non-formalistic expressions to convey legitimacy and sophistication.

Conclusion

While corporations—especially those with longer value chains—may find it difficult to respond appropriately to naming and shaming (Risse et al. 2013), they may also actively and excessively resist doing so. Such backlash effects received significantly less attention in the literature. This article specifically studied regulatory strategies employed to excessively impede naming and shaming of corporate human rights abuse. In such instances, the freedom of expression, the freedom of association or the right of peaceful assembly are excessively limited, beyond the exceptions allowed by Articles 19, 21 and 22 ICCPR.

The following five patterns of employment of the law to benefit companies excessively were identified. First, laws can be used to excessively limit the workings of civil society actors such as NGOs that call out corporate human rights abuse. Second, laws can be used to excessively limit access to resources, fuel censorship or, more generally restrict information on (potential) corporate human rights violations. Third, corporations excessively rely upon

defamation laws, often in the context of SLAPPs. Fourth, laws are excessively used to limit protests against corporate human rights abuse by trade unions as well as other activists. Fifth, laws can be used to excessively limit entry. Human rights defenders and migrant workers who question corporate rights abuse have been unduly expelled.

Future research in business and human rights can (or should) refine and expand these findings in various ways. While the least powerful are disproportionally impacted, ultimately, the employment of laws to excessively restrict naming and shaming is concerning for everyone involved in the current neoliberal era as well as for non-participating non-human species and future generations. Societies become less resilient and rulemaking loses effectiveness and legitimacy. The dataset's inherent limitations indicate pathways for future research using data from various organizations and other sources. Acknowledging the contexts of international organizations that collect the data, with a noted focus on storytelling and certain jurisdictions, there is a need for supplementary contextual research to understand the disproportionate impact of excessively restrictive laws on people who are subject to (intersectional) discrimination and the practical application of laws by corporate actors. Finally, future research can investigate the phenomenon of transnational mobilization against the excessively restrictive employment of regulation in order to gain insights into changes in social movement tactics and organizational strategies.

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