





The B Corp movement has pushed a powerful model of socially responsible business that has the potential to advance human rights. But it has so far failed to engage human rights advocates—to its detriment.

# Do Benefit Corporations Respect Human Rights?

BY JOANNE BAUER & ELIZABETH UMLAS

Illustration by DAVID DORAN

**O**n July 5, 2006, the nonprofit B Lab marked its first full day of operation by issuing a “Declaration of Interdependence” that envisioned “a global economy that uses business as a force for good.” With that, the B Corp movement was launched to re-envision the purpose of the corporation, and thereby transform the relationship between business and society.

B Corps (the “B” stands for “benefit”) are companies that the now-influential B Lab certifies as “having met a high standard of overall social and environmental performance.” These companies, now numbering about 2,000 globally, “act as the leaders” of the B Corp movement.<sup>1</sup> B Lab has also pushed for legislation granting legal status to benefit corporations, a new corporate form that requires companies “to create a material positive impact on society and the environment and to meet higher standards of accountability and transparency.” Adopting this structure enables enterprises to maintain a business goal of delivering social good without fear of retaliation from shareholders. As of July 2017, 33 US states (includ-

ing Delaware, where nearly half of the Fortune 500 companies are incorporated), plus the District of Columbia, had passed legislation allowing companies to register as benefit corporations, and seven more states were considering bills.

In a December 2010 TEDx talk, B Lab cofounder Jay Coen Gilbert portrayed B Corps’ work as a revolutionary struggle to “evolve the system of capitalism” through a “seismic shift” from the 20th-century model of “shareholder capitalism,” in which companies deliver the highest return to their shareholders even at the risk of harming the environment and society, to a 21st-century model, in which the power of business is unleashed to solve social problems. In short, B Corps promised to “return business to its proper role in society: creating shared and durable prosperity.”

These words resonate with us, as advocates in a separate cause to create socially and environmentally responsible business: the business and human rights (BHR) movement. BHR seeks to hold all business enterprises accountable for their involvement in human rights harms and to promote corporate respect for human rights.

The BHR movement today encompasses a broad range of players, including international and local NGOs; socially responsible investors; businesses; government and United Nations officials; and academics teaching in schools of business, law, and public policy.

From the vantage point of the BHR movement, the B Corp movement's proposition to build positive social impact into corporate purpose through legislation is noteworthy, because it enables business enterprises to intrinsically value a social good. The BHR movement, by contrast, tends to rely on "the business case" to convince executives that respecting human rights is good for the bottom line. Translating respect for human rights into profits is sometimes not feasible, and it rests on the perverse notion that a company should avoid harming people only if it is profitable to do so. Could the B Corp movement hold the key to solving this problem?

The movements to establish socially responsible business, which shifted into high gear after the 2008 financial crisis, have hit a critical juncture. In the wake of populist sentiment that put Donald Trump in the White House, "America First" is being promoted through environmental and financial deregulation, including gutting labor protections and turning back advances in mandatory corporate reporting on social impacts that were introduced in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. These actions threaten to devolve into a corporate "race to the bottom," where social and environmental standards are pushed aside. The need to strengthen these movements and provide incentives to corporations to serve the public good and not just their bottom line has never been more important.

The B Corp movement appears to share several goals with the BHR movement. Both call for corporations to respect human rights; to maintain a "wide aperture" so that all impacts on people and communities are understood and addressed; and to establish standards of conduct, transparency, and accountability. Yet until recently, few B Corp proponents seemed aware of the human rights standard widely accepted within the BHR movement, the UN Guiding Principles on Business and Human Rights (UNGPs). And BHR proponents have rarely acknowledged the standards developed by the B Corp movement under its B Corp certification scheme or the emergence of benefit corporation legislation. This disconnect should end.

### A FOCUS ON RIGHTS HOLDERS

The BHR movement arose in the 1990s, a decade that witnessed a series of high-profile, corporate-related tragedies, including: the poisoning of the Lago Agrio community in the Ecuadorian Amazon by oil and gas giant Texaco (bought by Chevron in 2001); the Nigerian military government's execution of the "Ogoni Nine," a group of environmental activists from the Niger Delta who had peacefully protested Royal Dutch Shell's operations in the region; and the global boycott of Nike following the discovery of child labor in the Southeast Asian factories to which the company subcontracted production.

The opening of new markets following the end of the Cold War accelerated the growth of companies with large supply chains and global operations serving multiple markets—so-called globally integrated enterprises<sup>2</sup>—and exposed more people to corporate-related harms. Human rights and labor organizations shone a light on these abuses, which spurred public outrage and helped the formation of a movement to address the unchecked power and reach of business.

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The BHR movement combined international human rights organizations, such as Human Rights Watch and Amnesty International, and local, regional, and national human rights groups. Their joint strategic effort emphasized national and international law and policy to regulate business behavior. The movement sought to build a system of corporate accountability for human rights harms by establishing the norm that business should not violate the rights defined in the International Bill of Human Rights<sup>3</sup> and the Core Conventions of the International Labor Organization (ILO).<sup>4</sup>

This strategy focused on "rights holders" affected by company activity, what some have called a "bottom-up" approach. In this way, advocates have sought to address the shortcomings of corporate social responsibility (CSR), a "top-down" process driven by companies, where management is concerned primarily with risks (mostly reputational) to the company and itself decides which social issues the company will choose to address. As BHR advocates see it, a hazard of such discretionary CSR programs is that companies sometimes use them to deflect attention from socially irresponsible corporate practices—or carry out their chosen CSR programs without making serious efforts to track and address their broader human rights impacts.

In 2005, the UN Human Rights Council created a mandate for a Special Representative of the UN Secretary General on Business and Human Rights (SRSG). UN Secretary General Kofi Annan appointed John Ruggie, who saw his mission as closing the "governance gap" between the "scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences."<sup>5</sup> In the course of six years of research and consultation, Ruggie developed a nonbinding standard, the UNGPs, which was unanimously adopted by the Council in 2011.

The UNGPs consist of three pillars: the state duty to protect, the corporate responsibility to respect, and access to remedy. The principles do not seek to create new obligations under international law but instead elaborate "the implications of existing standards and practices for States and businesses." The second pillar outlines what the corporate responsibility to respect entails: namely, that businesses should "avoid infringing" on human rights and "should address adverse human rights impacts with which they are involved." This can be done only through a process of "human rights due diligence," in which companies establish policies and systems to identify, prevent, mitigate, and account for their human rights impacts, and then publicly communicate these measures—and, ideally, the outcomes of the measures.<sup>6</sup> The UNGPs' language of human rights "impacts" sees companies as duty bearers toward rights holders, whereas the CSR movement focuses on companies as managers of risk to themselves.

Although no international treaty exists to make business enterprises the subject of international legal obligations (though one is under deliberation at the UN), the BHR approach expects companies to respect the rights of workers, communities, and consumers, as out-

lined in existing treaties. In this formulation, regardless of the profit implications, business is obliged to know its impacts and to ensure that it does not harm people's rights. But companies that fail to comply with the UNGPs face few consequences. For this reason, one strand of the BHR movement has pushed for a set of international rules that would bolster the UNGPs and require business to respect human rights.

Although legislation has emerged in some countries that mandates the UNGP concept of human rights due diligence, voluntary approaches fueled by the business case must do much of the heavy lifting. This generates a problem: In the human rights paradigm, rights holders are entitled to have their rights respected regardless of how this affects a company's bottom line. Yet, without the law, and with market pressures to bring high returns to shareholders, there are few brakes on business practices that harm people.

This business dynamic can generate perverse incentives, as Christine Bader, a former adviser to Ruggie, pointed out in an interview with *The Conference Board Review*: "If my company is thinking about investing in a conflict zone, I might make the case that we need to hire 30 community liaison officers and set aside this much money for partnerships with international NGOs; that might mitigate some of the risks—for instance, that we might be complicit in genocide. But if I present it as an ROI [return on investment] calculation, I might end up in a conversation in which I'm asked, 'What if we hired only ten community liaison officers—would that mean there's only a 50 percent chance that we'd be complicit in genocide?'"

The very point of adopting human rights conventions against genocide is to ban deliberating this way. The question is how to get businesses to internalize this.

### THE B CORP ADVANTAGE

By elevating the company's social mission to the same level as profit making, the B Corp movement appears to provide a way to get business to internalize human rights. Although laws vary by state, lawyers William Clark and Larry Vranka note in their influential 2013 white paper "The Need and Rationale for the Benefit Corporation" that benefit corporation legislation requires the corporate entity (a) to have "a corporate purpose to create a material positive impact on society and the environment"; (b) to have "expanded fiduciary duties of directors which require consideration of non-financial interests"; and (c) to report on its social and environmental performance against a third-party standard.

Consideration of stakeholders, including workers, communities, and consumers, is thus built into the company's operating procedures through the legal mandate. Proponents of benefit corporation legislation argue that such laws are necessary to protect directors of "mission-driven companies" from being sued by shareholders for failure to maximize stock values, because courts "often fall back on shareholder primacy."

While it is hard to pin down an exact figure, since no official nationwide records are kept, journalist Marc Gunther recently asserted on B Lab's website that there are 4,400 benefit corporations. In December 2015, Italy passed benefit corporation legislation. The United Kingdom has a similar legal form predating benefit corporations, the Community Interest Company (CIC), which places company assets into an "asset lock," securing those assets for community benefit.

B Lab created its certification system to ensure that companies, regardless of where they incorporate, achieve high standards of benefit and to enable businesses incorporated in states and countries that do not yet have a benefit corporation law to participate. The roughly 2,000 certified B Corps span 42 countries and more than 120 industries, from agricultural services to electronics to waste management. There are more benefit corporations because virtually any company can register as a benefit corporation. Indeed, setting a standard was precisely B Lab's aim.

Each B Corp is subject to an impact-assessment process, the B Impact Assessment, and must earn at least 80 out of 200 points to receive certification. Since each of the five areas of assessment (such as "workers" and "community") is worth about 40 points, a score of 80 means that a company is doing well in more than one category, B Lab explains. Yet this sets a low bar: A company could just as easily qualify by achieving a relatively poor score of 16 or 17 out of 40 points in each of the five areas. As part of the certification process, a company must also "implement an amendment to its articles of incorporation ... to the maximum extent available under current corporate law."<sup>7</sup>

B Lab identifies three key characteristics shared by benefit corporations and certified B Corps. First, they have as their mission the use of business to help solve social and environmental problems. Second, they embrace transparency: Both entities must, according to B Lab's Benefit Corporation Information Center website, publish reports that assess "their overall social and environmental performance against a third-party standard." Third, directors of benefit corporations and certified B Corps must "consider the effect of decisions not only on shareholders, but also on other stakeholders, such as workers, community, and the environment." In theory, shareholders of benefit corporations can sue directors if they fail at this. In practice, it is unlikely: So far this accountability mechanism has not been tested.

Both benefit corporations and certified B Corps are required to pay attention to the whole business, and not just select elements of their operations. With the exception of Delaware, benefit corporations are required by law to create "general public benefit," and depending on the state, the naming of "specific public benefits" may be optional. By design, the general corporate purpose condition keeps the firm from creating benefit in one area while doing harm elsewhere. For example, a coffee company cannot choose to address its environmental impact while ignoring working conditions of coffee pickers. The "do no harm" requirement of benefit corporations and certified B Corps mirrors the goals of the BHR movement, where all rights of all people must be respected. And the requirement echoes the UNGPs' warning that a company cannot "offset" human rights violations with good deeds, as conventional companies that do not have an internal system for addressing negative impacts are particularly inclined to do.

In principle, therefore, both benefit corporations and certified B Corps are obliged to take human rights into consideration, not because doing so will increase profits, but because of their explicit mission to take stakeholder interests into account—and that cannot exclude their human rights. In achieving their social mission through the marketplace, the B Corp movement essentially turns the business case on its head. Instead of saying that doing good can be good for profits, it argues that making profits should be in the service of doing good. In this way, the movement shows by example

what many in the BHR movement would like to see—that companies must value human rights intrinsically, as an end goal of the corporation, rather than as a means to higher profits.

### HUMAN RIGHTS AND SOCIAL BENEFIT

But to what extent does the B Corp movement consider human rights within its definition of social benefit? The answer is, not much. Publicly, with few exceptions, B Corp movement leaders do not use human rights language—vocabulary that positions the company’s stakeholders as rights holders to which the company owes a duty of care. Nor do the public documents of benefit corporations or certified B Corps typically refer to international human rights standards, even if they do focus on issues broadly defined as human rights-related, such as fair wages and limited working hours.<sup>8</sup>

Among the key individuals of the B Corp movement we interviewed, including staff at B Lab, most told us either that they had not heard of the UN-led BHR movement or, if they had, that they were not paying much attention to it. The benefit corporation statutes to date all follow the model legislation “to create material positive benefit,” but do not explicitly require companies to address human rights. According to John Montgomery, a California lawyer and B Corp advocate, human rights “could easily come in” because these laws allow companies to select one or more specific benefits for their charters, along with general public benefit. But companies have to opt to do so.

B Lab’s state-by-state listing of legally registered benefit corporations does not inspire confidence. For example, as of early 2017, Nevada had about 220 legally registered benefit corporations. Less than two years earlier, the figure was close to 500, higher than in any

other state. The list included trucking companies, gaming companies, and a “taco grill.” By 2017, the taco grill disappeared, but the tally included pest control and pool services companies. The Nevada Secretary of State’s office could not explain why the number plunged.

Many of the Nevada businesses listed as benefit corporations have no websites, making it hard for the public to know their business policies and practices or to hold them to their commitment to provide benefit. And, at the time of our research, the only certified B Corp among the registered benefit corporations in Nevada was a one-woman law firm. B Lab cofounders Coen Gilbert, Bart Houlahan, and Andrew Kasoy alluded to the ambiguity of some benefit corporations when they wrote in the Fall 2012 *Stanford Social Innovation Review* that the social performance of legally registered benefit corporations will be better than conventional businesses “assuming they ultimately behave like [B Lab] Certified B Corporations.”

By contrast, B Lab’s certification standard, the B Impact Assessment (BIA), is publicly available. We reviewed the 2014 and 2016 versions and found only a few instances of the term “human rights” or allusions to human rights ideas. The BIA contains five sections: Governance, Workers, Community, Environment, and

Customers. A brief subsection, “Human Rights and Labor Policy,” within the Workers section includes a question on whether the company has a written handbook (accessible to workers) that covers fundamental rights, such as workers’ right to freedom of association and collective bargaining. Likewise, in the Community section, companies are asked to disclose if they have a code of conduct that holds suppliers accountable for performance on child labor, freedom of association, and freely chosen employment—all of them ILO Core Conventions.

We also came across questions in the BIA that implicitly acknowledge potential and actual negative impacts, such as whether the company has a documented standard procedure for investigating the root causes of workplace accidents and whether the company’s “significant suppliers” are screened for negative (environmental and social) practices or regulatory noncompliance (e.g. child labor). In addition, the assessment contains some impressive human rights-related elements, such as indicators for living wage and precarious work, as well as questions that address human rights-related issues within supply chains, such as average length of relationships with significant suppliers, with fewer and longer relationships being associated with better labor rights practices in supply chains.

But the BIA generally lacks assurances that the company respects the rights of communities, workers, and other stakeholders, and only

## In the effort to feed growing demand for their products and services, can companies become too big to respect human rights? Consider Wal-Mart Stores or Walt Disney.

weakly captures the negative human rights impacts that concern BHR advocates. For example, the “Community” section does not contain information on “land grabbing”—large-scale land acquisition by private investors resulting in displacement—or on violence by police or private security companies in connection with the company’s operations. Instead, the section emphasizes charitable giving and civic engagement. The “Workers” section asks, “Have your company’s human rights and labor practices been certified or reviewed by an independent third party during the last 12 months?” But the questionnaire does not press companies for the results of the independent review.

Even to the limited extent that the BIA picks up human rights harms, such findings do not necessarily preclude certification: A company can reach the required score of 80 without ensuring fundamental rights. For example, New Seasons Market, a grocery store chain in the Pacific Northwest, is a certified B Corp that labor organizations have accused of maintaining an anti-union climate that violates worker rights. Likewise, a company can be certified without conducting a human rights impact assessment (HRIA), a comprehensive accounting of impacts on all human rights. An HRIA is central to the “human rights due diligence” that undergirds the UNGPs’ second pillar, Corporate Responsibility to Respect.

After the five sections, the BIA contains a Disclosure Questionnaire (DQ) where human rights harms can turn up. The DQ asks candidate companies to indicate “true” or “false” to statements such as the following (and if they answer “true,” to provide a detailed explanation):

*Overtime work for hourly workers is compulsory.  
Company keeps workers’ original ID cards/passports.  
Construction or operation of Company involved large-scale  
land conversion and/or degradation.*

The DQ also asks whether the candidate company employs individuals on “zero-hour contracts.” The zero-hour system—which the ILO describes as having no guaranteed minimum hours for workers—has been associated with exploitation and increasingly precarious work in certain industries. The DQ also requests that the company disclose whether it has been the subject of formal complaints to a regulatory agency or been assessed any fines or sanctions in the past five years for practices and policies in areas such as diversity, employee safety, environmental issues, financial reporting, “geographic operations or international affairs,” labor issues, political contributions, taxes, or bribery. These indicators have some overlap with the red flags that the BHR movement has highlighted: forced overtime, forced labor through document retention, and land grabs.

The trouble with the DQ—the very place where human rights violations would likely turn up—is that it is unweighted and thus does not necessarily affect certification. This contradicts the principle that B Corps must create “general public benefit” and not “specific public benefit.” That said, B Lab’s Standards Advisory Council reserves the right to refuse to certify any company based on the DQ and background checks, says B Lab’s Dan Osusky, who manages the certification standard.

The human rights gap of the BIA can be explained in part by the common association of human rights with negative impact. Since the BHR movement emerged from outrage over abuses by multinationals operating in poor, weakly governed countries, avoiding harm has been its primary focus. By contrast, the B Corp movement is about “doing good.” It grew out of the vision that corporations are the necessary ingredient, together with governments and civil society, to solve the world’s social and economic problems. In his 2013 book *Just Business*, Ruggie writes that his UN mandate on business and human rights was “meant to encompass the second and less glamorous CSR strand: the risk that companies cause or contribute to adverse social impacts” rather than the positive “business opportunity” strand of CSR. To B-Lab’s cofounders, however, preventing harm is the purview of the state, not the private sector. According to Kassoy and Gilbert, “In contrast to many countries ... in the United States human rights are generally conceived as negative rights that government is supposed to protect. As a result, even the most vulnerable in our society increasingly rely on the private sector to provide ... goods and services [and] employment.”<sup>9</sup>

While a number of human rights-related metrics are implicit in the BIA, its overall tenor rewards companies for positive social behavior rather than requiring them to respect human rights, as the UNGPs assert. For example, where disclosure on corporate lobbying is solicited in the weighted part of the assessment, it mentions only *positive* lobbying—for example, to persuade the state to deliver on the provision of goods such as health and education. It does not

mention the potential *negative* effects of corporate influence on politics that can undermine rights, such as pushing for the relaxation of worker protections. And where companies are asked to disclose the diversity of their workforce, directors, or suppliers, the BIA describes this as an “opportunity to highlight diversity in various areas” of a company, as opposed to framing inclusion or nondiscrimination in human rights terms.

Human rights, therefore, have an ambiguous status in the B Corp movement. It is not that human rights standards have no influence within B Lab. Rather, human rights indicators of corporate harm, as defined by companies’ impacts on the full range of international human rights provisions, are marginalized in the B Lab assessments. That said, the BIA contains the seeds of international human rights standards, which could be expanded and made more explicit to better capture B Corps’ impact on human rights.

### THE PROBLEM WITH SCALING UP

In their white paper on benefit corporation legislation, Clark and Vranka assert that social enterprises face difficulties reaching scale without compromising their mission: “As officers and directors of these entities consider investments, mergers or liquidity events, the default position tends to favor the traditional fiduciary responsibility to maximize returns to shareholders over the company’s social mission.”

According to B Lab, the problem stems from a lack of “systemic infrastructure” that can “allow *the entire private sector* to act as if people and place mattered.” And for them, the B Corp form, which “redefines success in business,” is the answer.<sup>10</sup> In a Skoll Foundation video, B Lab cofounder Kassoy explains, “Long before we came around and invented the name ‘B Corp,’ there were entrepreneurs trying to use their businesses as a force for good. What all those people were limited in doing was scaling and having an impact beyond their business.” The underlying message is twofold: Social enterprises can and should scale, and the “entire private sector” can thereby be transformed.

This raises a second critical problem for the B Corp movement: the contradiction between its vision of unbounded scaling up B Corps and the ability of large enterprises to respect human rights. To be fair, the BHR movement also has not adequately tackled this challenge.

The difficulties of scaling up mission-driven businesses are well known. The Body Shop (bought by L’Oréal), Stonyfield Farms (bought by Danone), Odwalla and Honest Tea (bought by Coca-Cola), Green & Black’s (bought by Cadbury), Plum Organics (bought by Campbell Soup), and Ben & Jerry’s (bought by Unilever) all began as social enterprises. After each of these businesses achieved brand recognition, it was acquired by a large conventional corporation that recognized the consumer demand for products perceived as “ethical.”

The Ben & Jerry’s experience, which is sometimes cited as the case that spawned the B Corp movement, has received the most attention. Brad Edmondson reported the story and interviewed key figures in his 2014 book *Ice Cream Social: The Struggle for the Soul of Ben & Jerry’s*. In 2000, the ice cream company known for its three-part mission—“to make the world’s best ice cream, to pursue progressive social change, and to provide fair compensation to employees and shareholders alike”—was acquired by Unilever, the world’s third-largest consumer goods company. The sale happened against the wishes of the founders, because “arbitrators” began buy-

ing up the stock once they got wind of Unilever's offer. To turn down the sale, bankers warned Ben & Jerry's, would mean an immediate and dramatic financial loss to the company and a serious threat to its future. The experience of Ben & Jerry's spurred critics of the acquisition to support benefit corporation legislation partly as a means to shield future social enterprises from unwanted acquisition.

Ben & Jerry's social mission survived acquisition, the company has since become a certified B Corp itself, and the purchase is even thought to have influenced Unilever's "collective consciousness" to a degree, Edmondson reports in his book. And yet the sale continues to be viewed by many advocates for socially responsible business as a loss. "Ben & Jerry's has a heritage of being an edgy, cutting-edge company," cofounder Ben Cohen said in a 2013 speech quoted by Edmondson. "But the reality is that Ben & Jerry's is owned by a major corporation that is not particularly edgy."

Entrepreneur Judy Wicks, who along with Cohen and others has been a key member of the Social Venture Network, a social enterprise incubator, appraises the sale even more harshly. In the early days, Wicks and other proponents of social enterprise had hoped that companies such as Ben & Jerry's could become big enough to "take on the big bad corporations and show that large companies could be led by their values." But her thinking evolved, according to Edmondson: "I used to see Ben & Jerry's and the Body Shop as little oases of good in a big, bad world. But now I understand that they're just chain stores owned by multinationals. And chain stores are like invasive species to local economic ecosystems."

When large corporations acquire social enterprises, they sever the connection between these smaller entities and the communities they were intended to serve. This connection means being close enough to stakeholders—employees, customers, suppliers, communities, the local environment—to ensure that the company is building their interests into its business model. Wicks' lament indicates the need for deeper thinking about the limits to scale; the extent to which social enterprises can influence conventional corporations, particularly in areas such as human rights; and the constraints to changing capitalism from within the private sector.

A similar lesson can be drawn from the certified B Corp Etsy's decision in April 2015 to issue an initial public offering (IPO) of stock. Etsy is an online store for handicrafts that allows buyers and sellers of crafts to "connect directly," according to its website. On its B Corp profile page, Etsy says it tries to empower "very very small businesses," foster "local living economies," and provide buyers with authentic "authorship and provenance." Its supporters "view it as an antidote to global mass production and consumption."<sup>11</sup>

A month ahead of the IPO, an article in *The New York Times* titled "Etsy's Success Gives Rise to Problems of Credibility and Scale" recounted how exploding demand for crafts had left some sellers unable to fill orders. While Etsy had originally allowed sellers to list only their own items, it "relaxed" those standards in response to demand and allowed outsourcing of production in 2013. This move led to accusations that some sellers had resorted to mass production. "Handmade businesses aren't infinitely scalable, just by the definition of the term," one former Etsy seller told the *Times*. "As Etsy has gotten bigger, it's gotten more like eBay." And while the company "does police" so-called "resellers," the *Times* article noted that "it acknowledges in its prospectus that it cannot fully vouch for the standards of

its sellers and the manufacturers they work with." Etsy's "authenticity," and thus its credibility, were being called into question.

In the days leading up to the IPO and for about six months afterward, the *Times* coverage periodically raised questions regarding scale and Etsy's ability to remain true to its "artisanal roots" as it grew. B Corp proponents did not seem to share these concerns. For example, within the Purpose of the Corporation LinkedIn group at the time of the Etsy IPO, the burst of messages from B Corp supporters did not pick up on these criticisms. Instead, they emphasized the IPO as a milestone for the B Corp movement and wondered whether Etsy would convert to a benefit corporation by 2017, as required to maintain its certified B Corp status. The Etsy story raises the question of what B Corp proponents have learned from the Ben & Jerry's experience of struggling to stay true to its values as it grows.

There is strong evidence that a business enterprise can become too large to adhere to the UNGP requirement that companies conduct human rights due diligence throughout their operations. This notion of "too big," however, has not received much attention by the BHR movement. Ruggie himself skirts these issues within the UNGPs. In the Commentary to Guiding Principle 17 on human rights due diligence, he acknowledges that for businesses that "have large numbers of entities in their value chains it may be unreasonably difficult to conduct due diligence for adverse human rights impacts across them all. If so, business enterprises should identify general areas where the risk of adverse human rights impacts is most significant ... and prioritize these for human rights due diligence."

This statement sits in tension with the Commentary to Guiding Principle 12 on Foundational Principles: "Because business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights, their responsibility to respect applies to all such rights."

In the effort to feed growing demand for their products and services, can companies become too big to respect human rights? Take Wal-Mart Stores, the world's largest company in terms of revenue, with more than 11,000 stores and 2.3 million employees. Over the past decade, the company has made several attempts to address its human rights impacts in select areas, with uneven results. For example, in 2008 it joined an initiative with Tiffany and other jewelry companies, the advocacy group Earthworks, and Conservation International to push gold mines from which it sources to adopt strict social and environmental standards, verified by a third party. Yet, with 245 million customers per week, Wal-Mart was unable to find enough gold from these sources to meet demand, even for just their one clean gold product line, Love, Earth jewelry. The partnership ended in 2011 when Earthworks, Great Basin Resource Watch, and Western Shoshone Defense Project called out the company for not living up to the promised environmental standards in mining or labor standards in the manufacturing of the jewelry line.

Or consider Walt Disney. It has more than 7,000 licensees and vendors that collectively produce branded products at more than 30,000 manufacturing facilities in more than 100 countries. On its website, the company admits to the "unique and significant challenges in monitoring performance against our high expectations and requirements." No matter the efforts Disney makes to embed human rights into its daily operations, it is impossible to monitor effectively each of the 30,000 factories to ensure that all worker rights are being protected.

Is there a critical size to which a company can grow, beyond which it becomes outsized for the communities it serves and out of touch with the ways in which it may harm them? Will the B Corp movement be able to establish the systemic infrastructure necessary for compliance with the social mission, regardless of how large a company becomes? Apart from scaling the enterprise, the scaling of the certification and assurance processes also raises challenges. Currently, all certified B Corps must submit to a data assurance process that “includes a phone review of their Assessment with B Lab Staff and documentation reviews to validate their answers,” B Lab’s B Corporation website says. “In addition, 10 percent of B Corps are reviewed on-site for a deeper review every year.” This fairly robust system will be hard to maintain should B Lab realize its vision of thousands more candidate companies registering to be certified B Corps—let alone companies the size of Wal-Mart or Disney.

Trade unions and other labor-rights defenders have long worried about not just the size of the supply chain, but also social auditing, the current supply-chain-monitoring regime on which multinationals rely. An extensive literature demonstrates that social auditing often bypasses or actively undermines workers’ organizing rights, which empower them to claim other workplace rights. Workers are better situated than third-party auditors to monitor rights violations on the factory floor or farm. Although trade union rights are part of the B Lab assessment, a B Corp could receive certification and not do well on this measure.

Multinationals fail to respect human rights not just because of their corporate form, but also because they are too big to manage all of their human rights impacts. This should serve as a cautionary tale for benefit corporations and certified B Corps’ ambitions to scale up. It may not be possible for a large corporation to respect human rights fully, even if there is no threat of takeover and even if company owners wholeheartedly support the social mission. There is no doubt that social enterprises, such as certified B Corps, need to grow to a certain size in order to be viable. The question is, just how big?

B Lab began to tackle this issue in 2015 after several multinationals, including Unilever, expressed interest in becoming certified B Corps. B Lab created a Multinationals and Public Market Advisory Council (MPMAC) made up of representatives from multinationals, as well as experts in public capital markets. The topics under consideration in the MPMAC discussions include new and/or more in-depth standards on a range of issues (including human rights) as well as the verification process and performance requirements specific to multinationals, B Lab’s Osusky says. In a 2016 *Fast Company* article, Ben Schiller cites B Lab cofounder Coen Gilbert discussing the MPMAC and acknowledging a “high danger” that corporate engagement could “dilute the B Corp brand.”

## THE ROAD AHEAD

To achieve the goal of business with a social mission, the B Corp movement needs to recognize more explicitly that companies, particularly as they grow, can and do have negative impacts on human rights. Putting aside concerns about scale, the B Corp movement offers promise to human rights advocates if some of its limitations are corrected. With their legal obligation to balance a “general public benefit” with profit making, benefit corporations, like certified B Corps, offer a path to respecting human rights intrinsically.

The B Impact Assessment in its current form, however, leaves too much leeway for B Corps to claim the mantle of social responsibility while still falling short on human rights. As such, it raises questions about who defines “benefit.” Social enterprises should be required to adhere to certain baseline human rights criteria, such as freedom of association and the right to collective bargaining, before being granted certification or benefit corporation status.

We cannot say what other human rights should be the baseline criteria for certification; the BHR movement also struggles with determining which among the indivisible, inalienable, universal human rights are most “salient” in any given business context. Instead, it is through dialogue between the two movements that the criteria might be established. Research on the human rights impacts of similar corporate forms, such as the UK’s Community Interest Companies, might also contribute to such a discussion.

In February, in an e-mail to its members, B Lab invoked the Universal Declaration of Human Rights and called on businesses to speak out against injustice, hate speech, and violence “in this chaotic moment” in American politics. It remains to be seen whether this statement signals a shift toward embedding human rights in its approach that will be reflected in the BIA or in its advocacy regarding benefit corporation legislation.

Benefit corporations and certified B Corps must reconceptualize “benefit” so that the intrinsic valuation of human rights can be realized in these corporate forms. Any conception of benefit that does not fully recognize the fundamental place of human rights falls short. Acknowledging and addressing this problem, ideally in collaboration with the BHR movement, would constitute true progress toward the B Lab founders’ stated goal of transforming capitalism. ■

## NOTES

- 1 Andrew Kasso, Bart Houlahan, and Jay Coen Gilbert, “Impact Governance and Management: Fulfilling the Promise of Capitalism to Achieve a Shared and Durable Prosperity,” Brookings Institution Center for Effective Public Management, July 2016, p. 10.
- 2 Samuel J. Palmisano, “The Globally Integrated Enterprise,” *Foreign Affairs*, May/June 2006.
- 3 The International Bill of Human Rights consists of the 1948 Universal Declaration of Human Rights and the two international covenants of 1966 that build on it, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights.
- 4 These are conventions on forced labor (C29) and abolition of forced labor (C105), on the right to freedom of association (C87) and the right to organize and collective bargaining (C98), on equal pay (C100) and prohibiting discrimination in employment (C111), and on minimum age to work (C138) and abolition of the worst forms of child labor (C182).
- 5 John Ruggie, Statement to the 63rd Session of the UN General Assembly, Third Committee, October 27, 2008.
- 6 Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, “Guiding Principles on Business and Human Rights: Implementing the UN ‘Protect, Respect and Remedy’ Framework,” UN Doc. A/HRC/17/31, March 21, 2011.
- 7 Andrew Kasso and Nathan Gilbert, “B Corporations: Redefining Success in Business,” in Lara Blecher, Nancy Kaymar Stafford, and Gretchen C. Bellamy, eds., *Corporate Responsibility for Human Rights Impacts*, American Bar Association, 2014, p. 451. B Lab requires that certified B Corps located in states with benefit corporation legislation adopt benefit corporation legal status within four years of the effective date of the legislation or two years of initial certification.
- 8 This is based on a review of randomly selected certified B Corp and benefit corporation websites, accessed October–December 2014.
- 9 Kasso and Gilbert, p. 447.
- 10 Kasso and Gilbert, pp. 448–49.
- 11 Hiroko Tabuchi, “Etsy’s Success Gives Rise to Problems of Credibility and Scale,” *The New York Times*, March 15, 2015.



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