

The Human Rights Obligations of Business: Reimagining the Treaty Business

Surya Deva*

I. BACKDROP

The relevance and the exact role of international law in regulating human rights abuses by multinational corporations (MNCs) has been on the discussion table at various fora since the early 1970s. The debate on this issue, which remains far from settled, could be compared to tides, with the momentum of negotiating an international instrument going up and down. At least three high tides are discernable during this period.

The first high tide was represented by the 1990 draft of the United Nations Code of Conduct on Transnational Corporations (Code).¹ Due to significant differences between developed and developing countries, the Code could not be adopted and thus this high tide receded. The second high tide was reflected in the approval of the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (Norms)² by the Sub-Commission on the Promotion and Protection of Human Rights in 2003.³ This tide too retracted quickly because the Human Rights Commission did not approve the Norms and then the Special Representative of the Secretary General on human rights and transnational corporations and other business enterprises (SRSG) decided to discard the Norms altogether.

The third ongoing high tide began in September 2013 when the Republic of Ecuador made a statement at the 24th Session of the Human Rights Council stressing the importance of a legally binding international framework.⁴ Apart from the support of at least 85 states, this Ecuadorian initiative is supported by hundreds of civil society organisations (CSOs).⁵

While it is anyone's guess how long this tide will last and what it would achieve, this paper seeks to contribute to the ongoing debate in this area and proposes a way forward to capitalise on the momentum generated by the third high tide. In particular, the paper outlines why we need an international instrument concerning the human rights obligations of business, makes a case for states to support the move to putting in place such an instrument, suggests the

* Associate Professor, School of Law, City University of Hong Kong. Surya Deva has published extensively on various aspects of business and human rights. His recent books include *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (co-edited with David Bilchitz) (Cambridge University Press, 2013) and *Regulating Corporate Human Rights Violations: Humanizing Business* (Routledge, 2012). Comments are welcome: suryad@cityu.edu.hk

¹ 'Draft Code on Transnational Corporations' in UNCTC, *Transnational Corporations, Services and the Uruguay Round*, Annex IV, p. 231 (1990).

² Sub-Commission on the Promotion and Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (13 August 2003) (UN Norms).

³ Sub-Commission on the Promotion and Protection of Human Rights, Resolution 2003/16 (13 August 2003), E/CN.4/Sub.2/2003/L.11, 52-55.

⁴ Republic of Ecuador, 'Statement on behalf of a Group of Countries at the 24th Session of the Human Rights Council' (September 2013), <http://business-humanrights.org/media/documents/statement-unhrc-legally-binding.pdf> (accessed 2 February 2014).

⁵ 'Call for an International Legally Binding Instrument on Human Rights, Transnational Corporations and Other Business Enterprises', <http://www.business-humanrights.org/media/call-for-binding-instrument.pdf> (accessed 2 February 2014). See also <http://www.escri-net.org/node/365340> and <http://www.stopcorporateimpunity.org/?p=3830> (accessed 2 February 2014).

desired nature and scope of an international instrument, and proposes ways to overcome difficulties – theoretical, practical or structural – highlighted by scholars.⁶

As the title of this paper suggests, I think that we should reorient the focus of the debate from ‘business and human rights’ to the ‘human rights *obligations of business*’. The proposed shift is not merely semantic but fundamental in at least three ways. Firstly, it signifies that human rights are non-negotiable: they should not be subject to the consent, willingness or capacity of business to assume human rights obligations. Nor should the application of human rights to companies be dependent on the presence of a business case. Rather, compliance with human rights should be a pre-condition for having the privilege to conduct business in society. Secondly, putting ‘human rights’ before ‘business’ (and not vice versa) also entails that the interests of rights holders and victims should remain central to any regulatory paradigm. Thirdly, the proposed shift implies that although we do not need to reinvent a list of human rights for companies, it would be naïve to think that the existing state-focal human rights instruments could be taken off the shelf and applied to business actors. We should therefore focus on concretising the obligations of companies flowing from existing human rights instruments.

One more terminological clarification before I proceed further: it is crucial that we understand the term ‘human rights’ in relation to corporate obligations in a wide sense so as to encompass not only human rights but also labour rights and environmental rights. A reference to human rights should also include a reference to instruments that elaborate on the human rights of specific vulnerable groups such as children, women, indigenous peoples, minorities, people with disabilities, migrant workers and refugees.

II. WHY AN INTERNATIONAL INSTRUMENT?

The project of requiring companies to comply with human rights norms faces multiple challenges: *why* should companies have human rights obligations, *what* is the nature and extent of these obligations, and *how* could victims enforce such obligations against companies effectively? There are additional challenges when dealing with the global operations of MNCs, e.g., the difference between ‘home’ and ‘host’ standards, allocation of responsibility within corporate groups, the doctrine of *forum non conveniens*, and the enforcement of court judgments. In such a scenario, the project’s success depends on the employment of multiple regulatory strategies in tandem to achieve an acceptable level of preventive and redressive efficacy.⁷

The need and relevance of an international instrument should be judged against this background. Rather than being a stand-alone magical tool, an international instrument should be seen as plugging in some of the deficiencies of existing regulatory initiatives.

⁶ See, for example, the Issue Brief issued by John Ruggie. John Ruggie, ‘A UN Business and Human Rights Treaty? An Issue Brief’ (28 January 2014), <http://business-humanrights.org/media/documents/ruggie-on-un-business-human-rights-treaty-jan-2014.pdf> (accessed 10 February 2014). See also Peter Muchlinski, ‘Beyond the Guiding Principles? Examining New Calls for a Legally Binding Instrument on Business and Human Rights’ (15 October 2013), <http://www.ihrb.org/commentary/guest/beyond-the-guiding-principles.html> (accessed 20 February 2014).

⁷ For these twin levels of efficacy as well as the idea of an ‘integrated theory’ of regulation, see Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (London: Routledge, 2012).

The Guiding Principles on Business and Human Rights (GPs)⁸ are the most recent and much acclaimed addition to the existing list of regulatory initiatives. However, it is very likely that the GPs too will fail to fill the existing regulatory gaps, especially where the gaps are the most visible, that is, in ‘weak governance zones’ or ‘conflict zones’, in cases where there is no clear business case for complying with human rights, and in cases where states are incapable or unwilling to act robustly against MNCs. The GPs will fail because they are based on a number of assumptions,⁹ which might not hold true in ‘hard cases’. By borrowing Ronald Dworkin’s term,¹⁰ I use ‘hard cases’ to refer to those instances where there is no clear business case for human rights and any action or omission on the part of states makes it more difficult for victims to hold companies accountable for violations of human rights. This difficulty – which can be framed in terms of obstacles to access to justice – would arise because not all companies are likely to ‘walk the talk’ in respecting human rights and some states will invariably be unable or unwilling to act robustly against such companies.

We, therefore, need an international instrument which is not rooted in the business case for human rights. Rather it should be underpinned by the normative hierarchy of human rights norms over business, trade and investment norms. Moreover, such an instrument should be able to provide victims with an avenue of redressal in those cases where a given state lacks the capacity or the necessary political will to deal with corporate human rights violations. In other words, the international instrument should not be exclusively ‘state-centric’, otherwise it might not fill the so-called governance gaps. If the international instrument gives states the exclusive responsibility of enforcing human rights norms against companies, it will do little to achieve the very goal for which its enactment has been advocated. In terms of norm creation at the international level, non-state actors have already started playing a crucial role. It is desirable that the international instrument harnesses the potential of non-state actors such as CSOs in enforcing international norms, especially in those cases where states falter to act against powerful companies.

Apart from performing this gap-filling role, an international instrument should also be seen as part of a ‘continuous upward-downward cycle’ of norm creation.¹¹ Instead of conceiving municipal laws and international law as two watertight compartments, we should recognise the dynamic relation that exists between norms at these two levels. Codification of norms at the international level is, at times, reflective of general consensus at the municipal level on a given issue. On other occasions, the emergence of legal norms in certain states is employed to suggest the direction that should be taken by international law. Conversely, the adoption of an international instrument might prod states to align their domestic norms as well as behaviour with the international trend.

An international instrument – especially when supplemented with Model Laws, as explained below – could play a key role in the creation of norms both by states at the municipal level and by companies at the institutional level. In cases where no such norm creation is triggered,

⁸ Human Rights Council, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’, A/HRC/17/31 (21 March 2011) (GPs).

⁹ The efficacy of the GPs is based on several assumptions such as the following: that states will be both willing and capable to exercise their ‘protect’ duty against all types of companies; that companies will carry out their ‘responsibility to respect’ diligently despite the absence of any legal bite flowing from the GPs or without CSOs having an institutionalised role as informal watchdogs; that non-judicial mechanisms could accomplish the effectiveness criteria stipulated in the GPs despite significant asymmetry between MNCs and the stakeholders affected by their activities.

¹⁰ Ronald Dworkin, *Taking Rights Seriously* (Delhi: Universal Law Publishing Co. Pvt. Ltd., 1999), 81.

¹¹ Deva, *Humanizing Business*, n 7, 202.

the international instrument could be invoked by stakeholders as a reference point to judge corporate behaviour vis-à-vis human rights or to negotiate with companies the conditions of their operations in diverse settings, e.g., running factories, detention centres, mines, educational institutions, health facilities, financial institutions and security firms.

Sensitising stakeholders to the human rights obligations of companies is another important function that an international instrument could play. This sensitivity could mean different things for different stakeholders: companies could start realising that they are more than profit maximising entities, investors could embrace the idea of ethical and sustainable investing, consumers could begin to behave in a socially responsible manner, CSOs could help in localising the global standards, and states could look beyond protecting their myopic national interests and regard humanising business as a collective global goal. Such an international instrument should also encourage international institutions with a non-human rights focus – such as the World Trade Organisation (WTO), the World Bank, International Finance Corporation (IFC) and the International Monetary Fund (IMF) – to embed human rights norms into their operations.

Here a natural question will be: why cannot the GPs perform the above three set of roles canvassed for an international instrument concerning the human rights obligations of companies? As already pointed out above, the GPs will fail to accomplish the gap-filling role. As far as the norm-creation role is concerned, the GPs could contribute, but there will be a serious problem in this domain. Since the GPs suffer from several serious deficiencies¹² – most of which arose because of the obsessive focus on achieving consensus during the SRSG's mandate – it is likely that norms created at the institutional or national level in alignment with the GPs will inherit such deficiencies.¹³ The same deficiencies will undermine the GPs' potential in performing their role of sensitising various stakeholders to the human rights obligations of business.

III. WHY SHOULD STATES SUPPORT AN INTERNATIONAL INSTRUMENT?

In negotiating international instruments, states generally tend to give priority to their national interests and try to protect them. They also regard international instruments as impinging upon their sovereignty and limiting the freedom to act flexibly in the domestic sphere. Then there are apprehensions about international instruments resulting in unequal benefits for different states. An international treaty in the area of business and human rights is also seen as providing MNCs an entry into a club exclusive to states. Considerations such as these have had a negative bearing on the continuing quest to put in place an international instrument codifying human rights obligations of companies.

It seems that most of these apprehensions are could be overcome through dialogue and a more informed understanding of issues. From a legal point of view, states should support an

¹² For a critique, see Surya Deva and David Bilchitz (eds.), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge: Cambridge University Press, 2013).

¹³ Any state which plans to implement the GPs might think that they do not need to look beyond the three pillars the GPs in discharging their human rights obligations – flowing from both international law and constitutional law – in relation to the activities of business actors. One can see evidence of this narrow focus, for example, in the National Action Plan developed by the United Kingdom (UK): while the Plan does contain some useful steps, it mirrors the three pillars and is silent as to the implications of the UK government's obligations flowing from the CRC and CEDAW (including the Optional Protocols related to these conventions). Moreover, the Plan hardly says anything concrete to improve access to judicial remedies in the UK.

international instrument because of three interrelated and largely uncontroversial facts: companies can and do violate human rights, states have a duty to protect human rights, and domestic regulatory measures are unable to hold companies accountable for human rights abuses on all occasions. Understood in this manner, an international instrument becomes a necessary corollary to the realisation of the state duty to protect human rights against the conduct of third parties. If states (and other stakeholders) are explicitly aware of the contours of corporate human rights obligations under international law, they would be better placed to ensure that companies do not infringe human rights.

Moreover, there is a normative reason for why states should support an international instrument concerning the human rights obligations of companies. Human rights are not uni-relational. All individuals have these inherent rights based on the idea of human dignity. For historic reasons, duties in relation to such rights developed mostly with reference to states.¹⁴ But it does not mean that other entities are (or should be) free from such duties. As Joseph Raz rightly points out, ‘there is no closed list of duties which correspond to the right. . . . A change of circumstances may lead to the creation of new duties based on the old right This dynamic aspect of rights, *their ability to create new duties*, is fundamental to any understanding of their nature and function in practical thought.’¹⁵ While we do not need to reorient human rights, we definitely need to reorient duties and duty holders in view of the pervasive role of, and extensive power enjoyed by, companies in society at this point of time.

In fact, from a human dignity point of view, every entity that could violate human rights ought to have corresponding obligations – the focus should be on the bearers of rights and not on violators, because it matters little for victims whether their rights and their dignity are infringed by states or other non-state actors. It is arguable that the Preamble of the Universal Declaration of Human Rights (UDHR) already embodies this spirit that ‘every individual and every organ of society . . . shall strive . . . to promote respect for these rights and freedoms’ which are a ‘common standard of achievement for all people and all nations’. Therefore, adopting an international instrument will be a step towards developing and fulfilling this UDHR aspiration.

From a non-legal and non-normative perspective, some states did/do not favour an international instrument because of a perception that such a regulatory tool would harm their economic interests or the business interests of MNCs based therein. Such a perception was not totally unfounded. There was a time when the flow of foreign direct investment (FDI) was almost one directional: from developed to developing countries. During that phase, most of the MNCs were based in developed countries and the power and operations of such companies in developing countries raised legitimate concerns. This business reality contributed to the antagonistic position taken by developed countries and developing countries in relation to adopting an international treaty that codifies human rights obligations of MNCs.

However, this landscape has undergone significant changes over the years, as MNCs from developing countries are emerging on the global stage. For example, in the 2013 Fortune

¹⁴ There have been exceptions to the predominantly state-focal orientation of human rights. For example, the Indian Constitution of 1950 did conceive – much before the evolution of the horizontal effect human rights – certain fundamental rights to be binding even on private actors. See Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford: Clarendon Press, 1966), 51, and generally Mahendra P Singh, ‘Fundamental Rights, State Action and Cricket in India’ (2006) 13 *Asia Pacific Law Review* 203.

¹⁵ Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), 171 (emphasis added).

Global 500 list, there are 132 companies from the US and 62 from Japan, as compared to 89 from China and 8 each from India and Brazil.¹⁶ This scenario is very different from what the world had experienced during most of the 20th century when 90 per cent of the MNCs were based in the US, Europe and Japan. Moreover, the outflow of FDI from developed economies has been declining, while the outflow from developing and transition economies is on the rise. The World Investment Report 2013 indicates that the FDI outflow from developed countries fell from 88 per cent in 2000 to 65 per cent in 2012 – during the same period, there has been an almost three times increase in the FDI outflow from developing and transition economies.¹⁷

Another aspect that states cannot ignore today is that we are now living in a multi-polar world in which reaching a consensus on issues of common interests is vital, even if it is difficult or time consuming. Mutual dependence of states – representing a shift from ‘one way dependence’ to ‘interdependence’ – is a reality in the area of business and human rights too: MNCs from the developed world need access to the vast markets, cheap labour and young populations in developing countries as much as developing countries need investment from MNCs based in developed countries. An international instrument can help by setting up the rules of the game at the global level and thus creating a level playing field for all companies and all states.¹⁸ Such an instrument would not completely tie down the hands of states: rather it would provide them some flexibility in localising global rules as per the doctrine of margin of appreciation. Similar considerations should apply to MNCs in judging their conduct in vastly different settings.

In short, states in the 21st century should not operate with a mindset underpinned by the economic assumptions of the 20th century. An international instrument concerning the human rights obligations of companies should be the business of all states, both developed and developing. It should be of benefit to all states who believe in the value of human rights and the rule of law.

Although it is not the focus of this paper, it is worth noting in passing that the lack of an international instrument signifying global consensus harms companies too. The corporation, an indispensable social institution, is experiencing a serious legitimacy crisis. Companies are unlikely to regain much-needed public trust and confidence by simply paying symbolic respect to human rights. Nor is their lobbying to states to continue the status quo of weak and entirely voluntary regulatory measures likely to promote their cause in the long run. Unless a global consensus acceptable to all stakeholders is reached on human rights norms applicable to their global operations, MNCs will continue to face continued backlash and prolonged litigation in multiple jurisdictions. In fact, if companies are really serious about performing

¹⁶ ‘Fortune Global 500’, http://money.cnn.com/magazines/fortune/global500/2013/full_list/?iid=G500_sp_full (accessed 28 February 2014). In fact, one can notice a gradual decline in the number of MNCs based in developed countries and a corresponding increase in the number of companies from developing countries. For instance, in the 2005 Fortune Global 500 list, there were 176 US companies (as compared to 132 in 2013) and 81 Japanese companies (as compared to 62 in 2013). On the other hand, the number of Chinese companies went up from 16 in 2005 to 89 in 2013, while the rise was less dramatic for Indian companies during the same period (from 5 in 2005 to 8 in 2013).

¹⁷ UNCTAD, *World Investment Report 2013: Global Value Chains: Investment and Trade for Development*, p 4.

¹⁸ MNCs can, for example, bring actions under bilateral investment treaties (BITs) against all states, both developed and developing. In such a scenario, an instrument codifying the human rights obligations of companies could be employed by all states to justify their domestic measures aimed at protecting and promoting human rights.

their human rights responsibilities, they should have nothing to fear from an international instrument.

IV. NATURE AND SCOPE OF THE INTERNATIONAL INSTRUMENT

What should be the nature and scope of an international instrument concerning corporate human rights obligations? I suggest below what such an instrument should cover, to whom it should apply, what objectives it should achieve, how it should be implemented, and how we should approach the task of putting such an instrument in place. Since these proposals are aimed at furthering the debate in this area, they should be treated as evolving rather than final.

To begin with, any international instrument in this area should have a wide ambit as to whom it applies and what types of rights it covers. The proposed instrument should apply to all types of business entities and not just MNCs, despite the fact that the operations of MNCs do pose more significant regulatory challenges. This non-differentiation is quite critical because the form of the business should not matter when it comes to protecting victims against human rights abuses.

Furthermore, such an instrument should cover all human rights, because calls for negotiating a narrow treaty that deals with only egregious abuses is reflective of the prioritisation of civil and political rights over social, economic and cultural rights. Such an idea runs counter to the foundational principle that human rights are indivisible, interdependent and interrelated. All rights are equally important and companies can violate all of them. Why should the displacement of indigenous people for mining, emission of (and/or exposure to) hazardous chemicals, compulsory pre-employment pregnancy test of women and illegitimate land grab by companies be taken less seriously than slavery or genocide? In fact, a narrow treaty is likely to be applicable only to a handful of cases – thus merely serving a symbolic purpose.¹⁹

Let me provide an illustration to show why a narrow human rights instrument will be inadequate. The GPs define ‘internationally recognized human rights’ as the rights ‘expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.’²⁰ Consequently, several other *core* international conventions – such as the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC) and the Convention of the Rights of Persons with Disabilities (CRPD)²¹ – do not form part of this ‘minimum’ list; rather they may become relevant as ‘additional standards’ depending on circumstances.²² Similarly, the GPs do not expressly refer to any international instruments related to environmental rights. If the proposed international instrument tries to capture an even much narrower set of rights than the GPs, it will have very limited value in humanising business for obvious reasons.

¹⁹ A narrow treaty might also invite another criticism that has been levelled against the Rome Statue, that the International Criminal Court (ICC) has mostly engaged with situations in Africa (i.e., the Global South) and ignored situations unfolding in, or involving, the Global North.

²⁰ GPs, n 8, Principle 12.

²¹ It is pertinent to note that CERD (175), CEDAW (187) and CRC (193) have been ratified by more states than the ICCPR (167) and the ICESCR (160).

²² GPs, n 8, Commentary on Principle 12.

Negotiating a legally-binding international treaty, which either deals only with selected gross human rights violations akin to the Rome Statute or covers all human rights in a wide sense as canvassed above, will require building a broad consensus amongst states. This process is likely to take time, which might mean that the current high tide triggered by the Ecuadorian government may recede in the meantime. Therefore, I suggest that instead of trying to negotiate a narrow treaty, we should start with drafting a Declaration on the Human Rights Obligations of Business (Declaration) along the lines of the UDHR.²³ This sequential order is crucial because a proposal to negotiate a narrow treaty for egregious violations not only puts the cart before the horse for pragmatic reasons, but it might also indicate that no binding treaty is perhaps required to deal with other human rights violations.

The proposed Declaration should (i) provide a sound normative basis for why companies have human rights obligations, (ii) proclaim that human rights applicable to companies are not limited only to those mentioned in the International Bill of Rights but rather extend to those elaborated in all human rights treaties adopted by the UN, (iii) outline the principles governing the extent of corporate obligations in relation to these rights, (iv) envisage a number of state-focal and non-state-centric mechanisms to implement and enforce human rights obligations against companies, and (v) suggest ways to remove substantive, conceptual procedural and financial obstacles experienced by victims in holding companies accountable for human rights violations.

Once such a Declaration is in place, simultaneous and/or sequential efforts should be made to concretise the human rights obligations of companies in different areas and also clarify the obligations (including extraterritorial ones) of states in regulating corporate behaviour. This will entail negotiating and adopting a number of international instruments in due course. Such a process will of course take time, but that itself should not be a ground to delay initiating the process.

Making companies comply with human rights norms and holding them accountable for their failure to do so will require introducing some ‘fundamental’ changes to the relevant laws and policies that concern the origin and the business operations of companies.²⁴ These changes should be rooted in the normative assumption that even if companies are specialised social organs, they ought to be subjected to non-negotiable human rights norms. In this context, it may be worthwhile to draft several Model Laws on specific areas to provide states with *concrete* guidance as to what legislative reforms and policy adjustments they should make to deal with the privatisation of human rights when acting at domestic, bilateral, regional and international levels.

Such reforms will be critical to overcome current barriers faced by victims in access to effective remedies.²⁵ To illustrate, allocation of liability within a corporate group is an area which requires reform because companies use the principles of separate corporate personality and limited liability to delay and/or deny their liability. The same could be said about the

²³ It is also possible to conceive this Declaration as applying to all non-state actors, not merely companies.

²⁴ This proposal goes beyond what the GPs contemplate, for instance, in Principles 3 and 8-10. GPs, n 8.

²⁵ Jerk notes that ‘the present system of domestic law remedies is patchy, unpredictable, often ineffective and fragile. It is failing victims who are unable in many cases to access effective remedies for the abuses they have suffered.’ Jennifer Jerk, *Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies, A Report Prepared for the Office of the UN High Commissioner for Human Rights* (2014), 7.

application of the doctrine of *forum non conveniens* outside the European Union and the principles that govern the attribution of criminal liability to corporate officials and companies.

Keeping in mind the fractured nature of international law, it will be crucial for the Declaration to assert the normative hierarchy of human rights and human rights instruments in relation to other areas and their relevant instruments. The Declaration should inform the mandate of not only the UN but also other international agencies such as the ILO, IMF, WTO, and World Bank. The bodies/tribunals operating under the bilateral investment treaties (BITs) and international financial agreements should also take on board the Declaration's implications for their work.

The Declaration (and subsequent treaties) should conceive the possibility of employing a number of enforcement mechanisms – both state-based and non-state-based – at municipal and international levels to ensure the companies that do not comply with the agreed obligations could be held accountable in an efficient and speedy manner. The current institutional practice of the UN to deal with business and human rights issues in an ad hoc way should give way to the establishment of a permanent body within the Office of the Commissioner for Human Rights. While it might not be feasible for such a body to monitor or investigate all allegations of corporate human rights abuses, it should use selected cases to issue authoritative interpretation of human rights norms applicable to business.

More critically, the Declaration should contemplate the institutionalisation of the role of CSOs in enforcing and implementing human rights norms against companies. For example, a committee of CSOs in each state could be allowed to receive and deal with complaints of human rights abuses by business. Although such committees might not have formal enforcement and compliance powers, their determinations could be posted on a designated website to be used in dynamic ways by diverse stakeholders.

In addition to acknowledging the role of traditional civil and criminal sanctions in ensuring corporate compliance, the Declaration should accept the importance of informal means and social (dis)incentives in enforcing human rights norms. These tools will be especially crucial for victims in those situations where there is no clear business case for human rights and states are unwilling or unable to act robustly against companies for diverse reasons.

V. OVERCOMING DIFFICULTIES

I have already responded implicitly to some of the difficulties highlighted by commentators in taking the treaty route. I offer below additional brief comments as to how some other difficulties could be overcome.

One common concern is raised about the treaty timeline: that it might take many years to negotiate a treaty. As explained above, we would need a number of treaties, rather than one treaty. But before we start negotiating these treaties, it might be appropriate to begin with adopting a Declaration on the Human Rights Obligations of Business. Like other areas of human rights, this would be a work in progress. The process of negotiating the Declaration and other treaties will definitely take time. But that should be a reason to start the walk on the treaty road sooner and also walk faster, rather than an excuse to postpone indefinitely the idea of a walk on that road.

Irrespective of whether corporations are ‘subjects’ of international law or not, the arms of international law can reach them directly. In fact, there are international instruments which already impose direct obligations on companies. The Convention on Civil Liability for Oil Pollution Damage, for example, stipulates that the owner of a ship – which could even be a company – ‘shall be liable for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident’.²⁶ Similarly, the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment provides that the operator of a dangerous activity – which could again be a company – ‘shall be liable for the damage caused by the activity as a result of incidents at the time or during the period when he was exercising the control of that activity.’²⁷ So, there are precedents to fall back on.

Some stakeholders are worried about the impact of exploring and/or taking the treaty route on the GPs. These worries are underpinned, among others, by the ‘either or’ mind-set, a debate which in the past used to be framed as ‘voluntary vs. obligatory’ regulation. The reality is that we need both sets of regulatory tools, not either one of them. So, rather than undermining the GPs, the international instrument(s) will complement them by providing a sounder normative basis for corporate human rights obligations, clarifying ambiguities inherent therein, and strengthening the enforcement of such obligations.

Another practical concern is raised as to why states would support an international treaty when some of the same states have not shown a strong political will in holding MNCs accountable for human rights abuses in their domestic spheres. I have already alluded to some considerations that should encourage states to shed away their apprehensions against an international instrument. Nevertheless, if a substantial number of states do not support the idea of negotiating an international instrument, at least two broad possibilities exist to overcome such a deficit of political will in the *interim period*. Firstly, we can consider an alternative vision of developing international norms ‘bottom up’.²⁸ One can, for example, rely on voluntary codes of conduct adopted by companies and business associations to forge consensus on what companies admit they ought to do in relation to human rights, or focus on the gradual consolidation and upgrading of soft law instruments into hard law.²⁹

Secondly, states sharing such a vision could adopt an international declaration jointly with other interested stakeholders such as scholars, lawyers, retired judges, CSOs, labour organisations, companies, business representatives, and bodies representing consumers and investors.³⁰ The unique nature of international law in which norms could evolve in diverse

²⁶ International Convention on Civil Liability for Oil Pollution Damage, U.N. Doc. 973 U.N.T.S. 4 (adopted on 29 November 1969, entered into force on 19 June 1975), art. III(1) read with art. I(2)/(3).

²⁷ Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, CSTS No. 150 (adopted 21 June 1993), art. 6(1) read with art. 2(5)/(6).

²⁸ For the ‘bottom up’ making of international law, see Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003); Janet Koven, ‘A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments’ (2005) 30 *Yale Journal of International Law* 125; Janet Koven Levit, ‘Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law’ (2007) 32 *Yale Journal of International Law* 393.

²⁹ Surya Deva, ‘Multinationals, Human Rights and International Law: Time to Move beyond the ‘State-Centric’ Conception?’ Jernej Letnar Čeranič and Tara Van Ho (eds.), *Direct Human Rights Obligations of Corporations* (The Hague: Wolf Legal Publishers, 2014) (forthcoming).

³⁰ The Global Compact and the ILO Tripartite Declaration of Principle concerning Multinational Enterprises are examples of norm creation by states acting in partnership with non-state actors. See Surya Deva, ‘Global Compact: A Critique of UN’s “Public-Private” Partnership for Promoting Corporate Citizenship’ (2006) 34 *Syracuse Journal of International Law & Commerce* 107.

ways and from diverse sources should be utilised as an advantage rather than taken as a limitation. The 2010 International Code of Conduct for Private Security Providers, the 2011 Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, and the 2012 Children's Rights and Business Principles are examples of how diverse actors can join hands to contribute to the concretisation and/or evolution of international norms, at least soft ones to begin with.

Last but not least, there are significant concerns expressed about the extraterritoriality dimension of the proposed international treaty. While extraterritoriality may not be an ideal form of regulation, it is a necessary evil that already exists in many areas and can be justified both on legal and policy grounds.³¹ If the well-known apprehensions linked to extraterritoriality have not stopped states from enacting extraterritorial laws to deal with piracy, slavery, environmental pollution, human trafficking, terrorism, drug trafficking, tax evasion, corruption and anti-competitive behaviour, why should states plead these apprehensions to enforce human rights documented in widely ratified international conventions? In any case, it is unlikely that all states would start adopting aggressive extraterritorial measures. But even if only a few home states of MNCs enact extraterritorial laws and exercise such power on a sound legal basis, this should have a ripple effect on the current situation of corporate impunity for human rights abuses.

VI. CONCLUSION

In view of the four decades of experimentation with voluntary initiatives, there is a legitimate scepticism about the efficacy of any *new avatars* of voluntary initiatives, including the GPs. The limitations of municipal measures in regulating transnational activities of MNCs are also well known. The business and human rights discourse, therefore, need something more in addition to entirely voluntary and entirely municipal initiatives. Against this backdrop, a legally binding international instrument, as part of a coherent combination of regulatory strategies, has an important role to play in defining and enforcing the human rights obligations of business.

The paper reimagines the role of international law in global human rights governance beyond the *present*: the present that treats human rights as negotiable social expectations in terms of their application to non-state actors, the present in which specialised social organs like companies have no legally binding obligations under international human rights law, the present in which calls are made to negotiate an international treaty applicable only to certain egregious corporate human rights abuses, the present that confers on states an almost exclusive right to create and enforce international norms, and the present that does not fully utilise the potential of CSOs in creating as well as enforcing norms in informal, horizontal and non-state-centric ways. The reimagination is needed to keep international law relevant in modern times and harness its potential in regulating the conduct not only of a few hundred states but also of a large number of powerful non-state actors.

³¹ See Fons Coomans and Rolf Künemann (eds.), *Cases and Concepts on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights* (Antwerp: Intersentia, 2012); Robert McCorquodale and P Simons, 'Responsibility beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 *Modern Law Review* 598; Surya Deva, 'Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should Bell the Cat?' (2004) 5 *Melbourne Journal of International Law* 37.