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Mariana Olaizola Rosenblat

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Mariana Olaizola Rosenblat[*]

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[*] Policy Advisor, NYU Stern Center for Business and Human Rights. This article was written while I was Lecturer in Law and a Global Human Rights Clinic Fellow at the University of Chicago Law School.

ABSTRACT

This article highlights the implications of relying on a state-centric international system for the protection of human rights, particularly where influential non-state actors stand to impact the realization of those rights. It advances the view that transnational corporations should bear self-standing obligations with respect to human rights, independent of the demands placed upon them by states. Making such obligations effective requires looking beyond the state-centric international system for models that offer more direct enforcement and greater insulation from interested state actors. This shift—from a state-centric to a "polycentric" framework of human rights protection—is already underway, as evidenced by the proliferation of multi-stakeholder regimes built to address gaps in transnational regulation. Using the example of internet platforms' impact on the right to free expression, this article sheds light on the role that multi-stakeholder solutions can play in filling gaps and yielding meaningful benefits for human rights.

I. INTRODUCTION: "BAD-ACTOR" STATES AND THE PROBLEM OF STATE CAPTURE[1]

The Socialist Republic of Vietnam has been a one-party state for over four decades. Led by the Communist Party of Vietnam, the state maintains its grip on power through tight controls on political expression and activism. Nonetheless, Vietnam has ratified major international human rights treaties, including the International Covenant on Civil and Political Rights, which enshrines the rights to freedom of expression and political participation.[2]

Vietnam's violation of civil and political rights is not new and has been well documented.[3] A more recent phenomenon is the Vietnamese government's co-optation of the private sector—the *Western* private sector—to intensify its persecution of civil society activists, journalists, and political leaders. Through the imposition of national legal mandates on Internet companies operating in the

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[1] This case study draws upon a project I worked on for the Global Human Rights Clinic at the University of Chicago Law School. The project concerned the Vietnamese state's suppression of freedom of expression and political participation using the tools and cooperation of online social media platforms, notably Facebook.

[2] *UN Treaty Body Database: Ratification Status for Viet Nam*, OFF. OF THE U.N. HIGH COMM'R FOR HUM. RTS., https://tinyurl.com/59xutebv (last visited Nov. 25, 2022).

[3] *See, e.g.*, *Viet Nam 2021*, AMNESTY INT'L, https://www.amnesty.org/en/location/asia-and-the-pacific/south-east-asia-and-the-pacific/viet-nam/report-viet-nam/ (last visited Nov. 25, 2022); *Vietnam: Events of 2019*, HUM. RTS. WATCH, https://www.hrw.org/world-report/2020/country-chapters/vietnam# (last visited Nov. 25, 2020).

country, Vietnam has secured these companies' cooperation in enacting online speech censorship with enhanced effectiveness and sophistication.[4] Disarmed and exposed, activists, civil society representatives, and ordinary citizens have ended up in prison, where they are routinely subjected to inhuman and degrading treatment and denied a fair trial.[5]

Vietnam has been particularly successful at enjoining one company—Meta—to carry out its censorship campaigns and crackdowns on social media. Meta, for its part, pledges innocence. It continues to hold itself out as a platform "where people feel empowered to communicate" and "share diverse views, experiences, ideas and information."[6] However, when national laws require it, Meta admits that it yields to government requests for information about its users as well as to demands for content censorship.[7] Meta claims that it has no choice, as its legal obligation is to comply with "applicable law," which in this case includes the Vietnamese Criminal Code and the Law on Cybersecurity.[8]

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[4] Sam Biddle, *Facebook Lets Vietnam's Cyberarmy Target Dissidents, Rejecting a Celebrity's Plea*, THE INTERCEPT (Dec. 21, 2020, 11:20 AM), https://theintercept.com/2020/12/21/facebook-vietnam-censorship/.

[5] *Joint Submission of The 88 Project and the Global Human Rights Clinic of the University of Chicago Law School to the Universal Periodic Review of the Socialist Republic of Vietnam*, THE 88 PROJECT & THE GLOB. HUM. RTS. CLINIC AT THE UNIV. OF CHI. L. SCH. 18 (Nov. 1, 2021), https://the88project.org/wp-content/uploads/2021/10/Final-ENG-version_UPR-Submission-GHRC-88-Project-10-28-21.pdf.

[6] *Facebook Community Standards*, META TRANSPARENCY CTR., https://www.facebook.com/communitystandards/ (last visited Nov. 25, 2022).

[7] Mark Zuckerberg, *A Blueprint for Content Governance and Enforcement*, FACEBOOK, https://m.facebook.com/nt/screen/?params=%7B%22note_id%22%3A751449002072082%7D&path=%2Fnotes%2Fnote%2F&_rdr (last visited Nov. 25, 2022) (stating that Facebook is forced to "respect local content laws"); *see also Vietnam*, FACEBOOK TRANSPARENCY CTR., https://transparency.fb.com/data/content-restrictions/country/VN (last visited Nov. 25, 2022).

[8] *See generally* CRIM. CODE, No. 100/2015/QH13 (Viet.); Vietnam's 2018 Law on Cybersecurity requires technology companies specializing in internet-based communications, such as social media and online search engines (e.g., Facebook and Google) to remove content that is inconsistent with state interests, to store user data in Vietnam, and to set up offices within the country. Law on Cybersecurity, No. 24/2018/QH14, art. 26 (2018) (Viet.).

While condemnations of Meta are entirely appropriate from a moral standpoint, international human rights law does not actually bind Meta to do otherwise. Under current international law, the obligation falls squarely on Vietnam to ensure that Meta complies with human rights standards. However, that is precisely the problem—Vietnam is intent on doing just the opposite.

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Much of the scholarly discussion around business and human rights (BHR) focuses on situations where corporations are the unregulated bad actors. As a result, proposals to improve human rights protection in the context of corporate activity tend to revolve around the need to tame corporations through stringent and airtight regulation by governments. In this vein, if states around the world were to cooperate in closing regulatory gaps and ensuring effective enforcement of those regulations within and across borders, the human rights of individuals affected by private sector activities would be secured.

The current push within the United Nations for the adoption of a "legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises" evinces this focus and its underlying assumptions.[9] A good deal of attention and resources have been channeled toward the negotiation process, which began in 2014 and remains ongoing.[10] The aim of this article is not to question the potential added value of an inter-governmental treaty on business and

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[9] *Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, U.N. HUM. RTS. COUNCIL, https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc (last visited Nov. 25, 2022).

[10] *See* Surya Deva, *Alternative Paths to a Business and Human Rights Treaty*, *in* THE FUTURE OF BUSINESS AND HUMAN RIGHTS: THEORETICAL AND PRACTICAL CONSIDERATIONS FOR A UN TREATY 13-32 (Jernej Letnar Černič & Nicolás Carrillo-Santarelli, eds., 2018). Former SGSR Ruggie has criticized the project since its inception. *See* John G. Ruggie, *A UN Business and Human Rights Treaty?*, HARV. KENNEDY SCH. (Jan. 28, 2014), https://media.business-humanrights.org/media/documents/files/media/documents/ruggie-on-un-business-human-rights-treaty-jan-2014.pdf.

human rights, nor to discuss the likelihood that the treaty process will actually bear fruits.[11] Rather, the goal is to step back from the fixation in some quarters on traditional inter-governmental processes such as this one, which can only yield modest results in terms of human rights fulfillment, and to shed light on the development of a more decentralized and potentially more effective system for the protection of human rights.[12]

The approach advanced here does not fall squarely into either of the two camps that have dominated debates in BHR literature and treaty negotiations alike. On one side, there are those who insist on maintaining a system of human rights protection centered on state responsibility (I call this the "classical approach"). On the other side, there are those who advocate for the creation of legally binding obligation on corporations and other non-state actors under traditional international law (the "utopian approach").[13] This article explains why neither of these approaches offers a viable answer to situations where state actors are hostile to the protection of human rights. Instead, it makes a renewed case for multi-stakeholder regimes—an increasingly diverse category of non-state initiatives created to fill gaps in regulation, oversight, and accountability unaddressed by the state-centric system. While some of these initiatives have come under

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[11] Despite laudable efforts by civil society over the last seven years to promote a new legal instrument on business and human rights, support for the draft treaty remains weak—especially among the largest industrialized countries. As such, the chances that the current treaty process results in a widely adopted instrument that can actually be effective in reining in business activity worldwide are extremely thin. For a hopeful account of what this new treaty could accomplish, *see* DAVID BILCHITZ, BUILDING A TREATY ON BUSINESS AND HUMAN RIGHTS: CONTEXT AND CONTOURS 5 (Surya Deva & David Bilchitz eds., 2017). However, as this article later explains, a treaty that relies on states to fulfill their human rights duties will fail to curb business abuses in parts of the world where human rights protection and rule of law are weak.

[12] *See Report on the First Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, With the Mandate of Elaborating an International Legally Binding Instrument,* OFF. OF THE U.N. HIGH COMM'R FOR HUM. RTS. (Feb. 5, 2016), https://tinyurl.com/fnh9j3yb.

[13] *See, e.g.*, Nicolás Carrillo-Santarelli, *A Defense of Direct International Human Rights Obligations of (All) Corporations, in* THE FUTURE OF BUSINESS AND HUMAN RIGHTS: THEORETICAL AND PRACTICAL CONSIDERATIONS FOR A UN TREATY 33-62 (Jernej Letnar Černič & Nicolás Carrillo-Santarelli eds., 2018).

criticism in recent years, multi-stakeholder regimes as a general category remain a promising approach for extending human rights accountability and relief to pockets of the world that currently lie beyond the reach of existing state-centric international instruments and institutions.

This article proceeds as follows. Part II explains why a system of international law centered on state responsibility is bound to fail in ensuring human rights fulfillment in many parts of the world. Part III begins by recounting and endorsing the normative argument for imposing direct obligations on corporations and other business entities under international law, but concludes that such obligations must be enforceable independently of state-centric mechanisms. Part IV argues that the shortcomings of existing, largely state-centric international institutions in protecting human rights in many parts of the world is a key reason to support the development of parallel multi-stakeholder regimes. This article uses a broad definition of "multi-stakeholder regime" to encompass any governance structure spearheaded by non-state actors—that is, civil society and the private sector. This category thus includes, but is not limited to, non-binding multi-stakeholder initiatives (MSIs). With their adaptable frameworks and ability to leverage the influence of non-state actors, multi-stakeholder approaches have the potential to enhance human rights protection in contexts and pockets of the world unresponsive to state-centric international human rights instruments and mechanisms. Part V explains how the proliferation of such multi-stakeholder regimes need not weaken the existing inter-governmental architecture and international legal framework centered on state responsibility. Instead, a global system of human rights regulation that makes room for robust and inclusive multi-stakeholder institutions would strengthen the human rights system as a whole.

II. STATE RESPONSIBILITY AND THE FAILURE OF INDIRECT DUTIES

Since the inception of the modern international system and its recognition of global human rights, there has been a tension between two ideas. On the one hand, the international system emerged against

the backdrop of the primacy of nation-states and was conceived as a way to organize relations among them. States came together in the wake of World War II to build and sustain a global institution—the United Nations—intended to ensure peace and security under a new world order. On the other hand, the atrocities of WWII revealed the vulnerability of human beings, not only to the actions of despotic governments but also to those of private actors serving as accessories to heinous crimes when left unchecked by a higher moral and legal order.[14] In recognition of these threats, the Universal Declaration of Human Rights (UDHR), adopted by the United Nations in 1948 as the founding document and bedrock of the human rights system, proclaimed universal human rights as standards applicable to "every individual and every organ of society,"[15] not just states.

Despite this early recognition of various types of actors as subjects of human rights standards, the ensuing treaties that codified the UDHR's standards into binding treaties singled out "State Parties" as the primary bearers of human rights obligations. Any mention of duties or responsibilities borne by individuals and other "organs of society" was relegated to the treaties' preambles, rendering those duties merely declaratory and legally ineffective.[16] This iterative process, whereby human rights instruments were codified by states and addressed primarily to them, led to the consolidation of an international human rights machinery that is set up around state responsibility.[17] Under this doctrine, states are responsible for breaches

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[14] *See* INT'L MIL. TRIBUNAL, TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10: NUERNBERG, OCTOBER-APRIL 1949 1080-1152 (1952) (describing the IG Farben, Flick, and Krupp trials of war criminals before the Nuremberg Military Tribunals).

[15] Universal Declaration of Hum. Rts., G.A. Res. 217 (III) A, U.N. Doc. A/RES/217 (III), Preamble (1948).

[16] The International Covenant on Civil and Political Rights (ICCPR), for example, states in the preamble that "the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant." Int'l Covenant on Civ. and Pol. Rts., G.A. Res. 2200 (XXI) A, U.N. Docs. A/RES/2200 (XXI), Preamble (1966). However, the binding provisions impose legal obligations explicitly only on states. Other treaties replicate this pattern.

[17] *See* Surya Deva, *Multinationals, Human Rights and International Law: Time to Move Beyond the "State-Centric" Conception, in* HUMAN RIGHTS AND BUSINESS: DIRECT

of their obligations under international law, which include not only the obligation to refrain from actively committing human rights violations but also the obligation to prevent and punish violations committed by private actors under their jurisdiction.[18] Through a combination of treaty law and judicial interpretation, a consensus emerged that international human rights norms were binding only directly on states, with any obligations for private parties arising only from downstream state regulation.[19]

CORPORATE ACCOUNTABILITY FOR HUMAN RIGHTS 27-49 (Jernej Letnar Cernic & T. Van Ho, eds., 2015).

[18] Oppenheim referred to these obligations as "original" and "vicarious" responsibilities of states. *Oppenheim's International Law (9th Edition): Volume 1 Peace* 501-02 (Robert Jennings & Arthur Watts, eds., 2008). In human rights jurisprudence, the latter concept is often referred to as the obligation of due diligence. This doctrine has been widely adopted by both regional human rights courts and UN treaty bodies. The Inter-American Court of Human Rights notes the following the Case of Velásquez Rodríguez v. Honduras:

> An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.

Velásquez Rodríguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 172 (July 29, 1988).

See also Soc. and Econ. Rts. Action Ctr. v. Nigeria 155/96, Afr. Comm'n on H.P.R., 2001, ¶ 57 (May 27, 2002), https://www.escr-net.org/sites/default/files/serac.pdf ("Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement, but also by protecting them from damaging acts that may be perpetrated by private parties."); X and Y v. Netherlands, 91 Eur. Ct. H.R. (1985); *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, OFF. OF THE U.N. HIGH COMM'R FOR HUM. RTS. (Jan. 20, 2003), https://www.refworld.org/pdfid/4538838d11.pdf.

[19] Carlos M. Vázquez, *Direct vs. Indirect Obligations of Corporations Under International Law*, 43 COLUM. J. TRANSNAT'L L. 927, 934 (2005) ("Even when a treaty's language seems to establish obligations of private parties, often what it really does as

Given this assignation of dual responsibility to states—encompassing both state and private action—influential international legal scholars subscribing to what this article calls the "classical approach" have cautioned against expanding the scope of international human rights obligations to include non-state actors as parties *directly* bound by those obligations. Instead, they have advocated for keeping international human rights law focused on state responsibility, warning that "the imposition of direct obligations on private corporations, backed by an effective international mechanism to enforce those obligations, would represent a significant disempowering of states."[20] The implication seems to be that by assigning responsibility directly to non-state actors, states would no longer have complete authority over them. Carlos Manuel Vázquez, one of the main exponents of this view, does not explain why such a shift would be undesirable, but maintains that this "proposal should be approached with caution."[21]

A related concern voiced by defenders of the classical approach relates to the issue of capacity. John H. Knox argues that "international law could not possibly replicate the vast domestic resources devoted to regulating private invasions of interests denominated as human rights by international law."[22] Given this practical challenge, which they seem to consider insurmountable, both Knox and Vazquez warn that creating new obligations without providing an adequate mechanism to enforce them would end up diluting the notion of "responsibility" under international law.[23] While this is a valid concern, the challenge posed is not actually insuperable and is worth addressing constructively. In fact, the recognition that private actors should have self-standing obligations in relation to

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a matter of international law is require the states-parties to recognize the obligations set forth in the treaty.").

[20] *Id.* at 950.

[21] *Id.* at 950, 954.

[22] John H. Knox, *Horizontal Human Rights Law*, 102 AM. J. INT'L L. 1, 19 (2008).

[23] *Id.* at 30; Vázquez, *supra* note 19, at 954.

human rights can provide the needed impetus to develop adequate instruments and institutions for the enforcement of such obligations.[24]

Continuing with the classical approach, some authors have recently argued that the answer to existing gaps in enforcement against non-state actors lies in bolstering states' power and responsibility. One proposal, advanced by Tara Van Ho, consists of expanding states' civil jurisdiction over transnational corporations. According to this view, incorporating an expansive jurisdictional provision in the (draft) treaty on business and human rights—akin to the provisions in the UN Convention against Torture and UN Convention against Corruption—would effectively "close the accountability gap that currently exists in business and human rights."[25] One of the model provisions she puts forth would obligate state parties to the treaty to establish "civil jurisdiction over the corporations accused of human rights impacts" where the impacts occur in the state's territory, or where either the alleged offenders, parent company, or victims of the impacts are its nationals.[26]

Solidifying states' responsibility to address violations with which they have a jurisdictional nexus may indeed yield benefits in *some* situations. However, enshrining such a provision in an international agreement would not do enough to solve persistent gaps of accountability in parts of the world where it is needed the most. This is so for a number of reasons. First, the mere existence of a treaty provision does not guarantee its reliable implementation. International human rights treaties are subject to notoriously weak enforcement,[27]

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[24] One of the skeptics, Knox, recognizes as such when he states that "[v]ery few international institutions have the power to enforce prohibitions directly against private actors, even though once an obligation is placed by international law, a much stronger argument can be made for using international institutions to ensure that it is met." Knox, *supra* note 22, at 30.

[25] Tara L. Van Ho, *"Band-Aids Don't Fix Bullet Holes": In Defence Of A Traditional State-Centric Approach*, *in* THE FUTURE OF BUSINESS AND HUMAN RIGHTS: THEORETICAL AND PRACTICAL CONSIDERATIONS FOR A UN TREATY 133-35 (Jernej Letnar Černič & Nicolás Carrillo-Santarelli, eds., 2018).

[26] *Id.* at 134.

[27] Eric Posner and Beth Simmons, who are taken to be on opposite sides of the debate on the usefulness of international human rights law, converge in the recognition that international institutions for the enforcement of human rights are

especially vis-à-vis states that are willfully defiant toward human rights. Autocratic states like Vietnam, Syria, and Venezuela are parties to numerous human rights treaties enshrining civil and political freedoms which they routinely flout without suffering meaningful consequences.[28] Even countries that are considered human-rights abiding frequently fall short of meeting their treaty obligations.[29] Thus, the mere existence of a treaty provision enshrining states'

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weak. *See* ERIC POSNER, THE TWILIGHT OF HUMAN RIGHTS LAW (2014); *see also*, Beth A. Simmons, *What's Right with Human Rights,* DEMOCRACY J., https://democracyjournal.org/magazine/35/whats-right-with-human-rights/ (last visited Nov. 25, 2022). Overall, these sections of the book feel intuitive in that they convey the idea that the international human rights machinery has long been widely understood as intentionally weak. But it is unjustified to conclude from Posner's account that once we have castigated the UN, the European Union, the ICC, and the major powers, nothing remains to be said about how international human rights law works.

[28] *See generally* Vietnam, Syria and Venezuela have all ratified the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and the Convention on the Rights of the Child (CRC). *Status of Ratifications Interactive Dashboard, Ratification of 18 International Human Rights Treaties*, OFF. OF THE U.N. HIGH COMM'R FOR HUM. RTS., https://indicators.ohchr.org (last visited Nov. 25, 2022); *see generally*, Emilie Hafner-Burton & Kiyoteru Tsutsui, *Justice Lost! The Failure of International Human Rights Law to Matter Where Needed Most*, 44 J. PEACE RSCH. 407 (2007). The international human rights system has been built with the (arguably naïve) presumption that states are well-behaved. However, according to Freedom House, at least one third of the world's states today are engaged in systematic repression. Its latest Global Freedom scores classifies 64 states as "not free." An additional 63 countries are only "partly free." *Global Freedom Scores*, FREEDOM HOUSE, https://freedomhouse.org/countries/freedom-world/scores (last visited Nov. 25, 2022); *see also*, Eric Posner, *The Case Against Human Rights*, THE GUARDIAN (Dec. 4, 2014), https://www.theguardian.com/news/2014/dec/04/-sp-case-against-human-rights ("Each of the six major human rights treaties has been ratified by more than 150 countries, yet many of them remain hostile to human rights.").

[29] *See, e.g.*, *United States of America 2020*, AMNESTY INT'L, https://tinyurl.com/4xascnmn (last visited Nov. 25, 2022); *France 2020*, AMNESTY INT'L, https://tinyurl.com/uy49smuj (last visited Nov. 25, 2022); *United Kingdom 2020*, AMNESTY INT'L, https://tinyurl.com/4audwdkw (last visited Nov. 25, 2022); POSNER, *supra* note 28.

extraterritorial jurisdiction would not guarantee that such jurisdiction is reliably exercised, leaving many gaps in accountability unaddressed.

Secondly, there are valid reasons why states may be loath to abide by such a provision, or to agree to it in the first place. States have traditionally been reluctant to encroach on the principle of non-interference in the internal affairs of other states, except in rare circumstances involving egregious international crimes or *jus cogens* violations.[30] Many human rights violations around the world fall short of this threshold and would require national courts to interpret other countries' human rights obligations in ways that may go well beyond their established judicial competence and lead to jurisdictional conflicts.[31] Accordingly, courts around the world have tended to approach cases involving their governments' extraterritorial obligations cautiously, particularly where the actions of non-state

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[30] *See* U.N. GAOR, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises Addendum: Corporate Responsibility Under International Law and Issues in Extraterritorial Regulation: Summary of Legal Workshops*, A/HRC/4/35/Add.2, ¶ 24 (2007) ("The option of home State courts exercising extraterritorial jurisdiction in relation to weak governance zones but applying host State laws was considered; however, some participants felt that this was too close to modern-day imperialism."). In some cases, the fear of judicial overreach by some jurisdictions may be a legitimate one as "bad actor" states weaponize their legal systems against foreign actors for self-serving ends. On the jurisdictional conflicts that arise from the exercise of extraterritorial jurisdiction in the context of multinational corporations and their thorny geopolitical implications, see PETER MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW 116-17 (2nd ed., 2007); *see also* Halina Ward, *Securing Transnational Corporate Accountability Through National Courts: Implications and Policy Options*, 24 HASTINGS INT'L & COMP. L. REV. 451, 459-60 (2001).

[31] U.N. GAOR, *supra* note 30, at ¶¶ 51-52:

> Participants highlighted that not all States are equipped to exercise extraterritorial jurisdiction. They gave examples from developing countries where the State lacks both the ability and inclination to exercise jurisdiction, particularly where it seeks to encourage companies registered on its territory to expand their overseas operations. There were also examples of developed countries choosing not to prioritize evidence-gathering for extraterritorial cases, especially where such practices are seen as too costly, time-consuming or politically hazardous.

actors are concerned.[32] Rulings in the United States over the last few decades, for example, reveal a diminishing appetite by national courts for engaging in disputes involving extraterritorial jurisdiction, lest they be seen to be interfering inappropriately in matters of foreign policy.[33] The mere existence of a treaty provision is unlikely to allay such concerns, especially in the absence of international consensus on which standards ought to be enforced extraterritorially, how and by which states so as to avoid jurisdictional conflicts.

Thirdly, even if such consensus and cooperation were to develop over time,[34] the exercise of extraterritorial civil jurisdiction would likely offer relief to a small fraction of victims of violations given the legal complexity, legal challenges and practical barriers (including costs of litigation and financial risks) inherent in transnational litigation.[35] An expansion in extraterritorial civil jurisdiction under international law may lessen some of these hurdles but is unlikely to address gaps in accountability where the states concerned lack an incentive to act. It is the "hard cases" that are most likely to continue falling through the cracks of international law.[36]

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[32] *Id.* at ¶ 65 ("[T]he problem is generally that there are no States willing to prosecute or accept a civil case, rather than States competing for the same cases.").

[33] *See* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 116 (2013) ("The presumption against extraterritorial application helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches."); *see also*, EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991) (this presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord").

[34] Iman Prihandono, *Barriers to Transnational Human Rights Litigation Against Transnational Corporations (TNCs): The Need for Cooperation Between Home and Host Countries*, 3 J.L. & CONFLICT RESOL. 89, 99-100 (2011).

[35] *See* Richard Meeran, *Multinational Human Rights Litigation in the UK: A Retrospective*, 6 BUS. AND HUM. RTS. J., 255, 265-69 (2021). On the practical and legal barriers of transnational litigation, *see also*, Leisbeth Enneking, *The Future of Foreign Direct Liability? Exploring the International Relevance of the* Dutch Shell Nigeria *Case*, 10 UTRECHT L.R. 44, 53 (2014).

[36] I borrow the term "hard cases" (meaning situations where state interests are threatened, where the violations occur in remote places, and where the victims are most vulnerable) from Surya Deva, who points out the failure of existing international law to address cases where states are unwilling or unable to hold

In conclusion, the classical approach may represent an orderly framework for human rights protection but only in theory. In practice, leaving human rights protection exclusively in states' hands—and trusting that they will ensure other actors' compliance with those rights—leaves individuals in a fragile position.[37] Indeed, the logic of indirect duties works only when states happen to have both the motivation and capacity to enforce human rights against non-state entities under their jurisdiction.[38] However, as demonstrated on a daily basis and evidenced by the case study presented earlier, states are often not just unwilling or unable to protect human rights from abuse by others; in many cases, states are themselves the primary instigators of violations.[39] The international human rights enforcement machinery, which largely relies on verbal pressure and persuasion, is largely ineffective against such states. Meanwhile, the potential of extraterritorial jurisdiction to address gaps left by "bad actor" states is limited given the challenges inherent in transnational litigation. In sum, the international framework's reliance on states to enforce human rights leaves large and chronic gaps in protection and accountability

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corporations accountable for breaches of human rights. Deva, *supra* note 17, at 31-34. Deva rightly asks: "[h]ow realistic is it to expect those very states which are at the centre of conflict or weak governance zones to effectively exercise their duty to protect people against violations perpetuated by companies?" *Id.* at 35.

[37] David Bilchitz, *Corporations and the Limits of State-Based Models for Protecting Fundamental Rights in International Law*, 23 IND. J. GLOBAL LEGAL STUD. 143, 154-55 (2016).

[38] *See* SURYA P. SUBEDI, THE EFFECTIVENESS OF THE UN HUMAN RIGHTS SYSTEM REFORM AND THE JUDICIALISATION OF HUMAN RIGHTS 232 (1st ed., 2019) ("The effectiveness of the whole UN human rights system depends upon cooperation in a constructive manner among States, but when that spirit of cooperation is absent there is very little that the present UN system can do.").

[39] Despite efforts by the international human rights system to bring all states in compliance with human rights law, this article takes as given that some bad-actor states—i.e., states that actively and persistently commit human rights violations against their own populations—will continue to exist. International law has yet to find effective means of enforcing compliance with human rights, especially by states who are the worst abusers of these rights. *See generally*, Emilie Hafner-Burton & Kiyoteru Tsutsui, *supra* note 28. As such, the question of how to directly change the behavior of bad-actor states is beyond the scope of this article. Instead, the article focuses on an *indirect* way to undercut the ability of bad-actor states to accomplish their malign goals—namely, by depriving these states of the ability to weaponize corporations in the pursuit of their aims.

for victims, especially in "hard cases" where state actors are least motivated to act in defense of those rights.

III. THE CASE FOR SELF-STANDING CORPORATE OBLIGATIONS

Granting that state responsibility, by itself, provides an insufficient means through which to guarantee human rights, it becomes necessary to consider activating obligations on other types of actors whose activities bear significantly on the fulfillment of those rights.[40] A failure to activate such obligations leaves corporations and other non-state actors free to accommodate demands by bad-actor states. As Vazquez himself acknowledges, "[i]f international law imposes obligations on corporations only indirectly, then managers and directors need only concern themselves, as a legal matter, with the domestic laws of the states in which they operate."[41] Against this backdrop, Meta's claim that its legal obligation to abide by local law supersedes its own internal policies around human rights is rather credible. If non-state actors currently lack the duties and incentives to resist weaponization by bad-actor states, the following question arises: how might such duties and incentives be created?

A first step must be the recognition that corporations *should* have obligations with respect to human rights, regardless of where they happen to conduct their business. An obligation is a standard of conduct that is mandatory, rather than optional.[42] Proponents of the utopian approach have made a strong normative case for imposing legally-binding obligations on corporations. David Bilchitz explains that human rights are entitlements meant to protect human beings against encroachment on their dignity and most basic human

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[40] For an implicit acknowledgment in Knox that there needs to be a non-state option for when the state is absent or compromised/corrupt, see Knox, *supra* note 22, at 20.

[41] Vázquez, *supra* note 19, at 936.

[42] David Bilchitz, *A Chasm Between "Is" and "Ought"? A Critique of the Normative Foundations of the SRSG's Framework and the Guiding Principles*, *in* HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT? 120 (Surya Deva & David Bilchitz, eds., 2013).

interests.[43] He echoes Joel Feinberg, who stated that "[r]ights are not mere gifts or favors, motivated by love or pity, for which gratitude is the sole fitting response. A right is something a man can stand on, something that can be demanded or insisted upon without embarrassment or shame."[44] If human rights are rights at all, they must imply that others have duties to uphold or, at least, respect them.[45] Both state and non-state actors have the capacity to violate fundamental rights on a large scale.[46] Indeed, many corporations wield power and exercise functions on par with governments.[47] In keeping with the logic and purpose of human rights, then, any actor with the potential to infringe on the enjoyment of those rights should be obligated to observe them.[48]

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[43] *Id.* at 112-13 ("[T]he recognition of human rights in international law means that individuals are entitled to basic protections for their human interests simply by virtue of the fact that they are human beings."); *see also* Carrillo-Santarelli, *supra* note 13, at 40 ("[t]he centrality of victims is the starting point that ought to guide every analysis of business and human rights.").

[44] Bilchitz, *supra* note 42 (citing Joel FEINBERG, SOCIAL PHILOSOPHY 58-59 (120)).

[45] MATTHEW KRAMER, N.E. SIMMONDS, & HILLEL STEINER, A DEBATE OVER RIGHTS 9 (1998).

[46] Carrillo-Santarelli, *supra* note 13, at 35; *see also*, U.N. GAOR, *Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, A/HRC/8/5, ¶ 52 (2008); David Bilchitz, *Corporate Law and the Constitution: Towards Binding Human Rights Responsibilities for Corporations*, 125 S. AFR. L.J. 754, 760–71 (2008).

[47] *See, e.g.*, Geoff Budlender, 20 Years of Democracy: The State of Human Rights in South Africa', speech presented at the Stellenbosch Faculty of Law and HF Oppenheimer Chair's 9th Annual Human Rights Lecture (Oct. 2, 2014); *see generally* Meghan Finn, *Organs of State: An Anatomy*, 31 S. AFR. J. HUM. RTS. 631 (2015) (discussing when private entities constitute an organ of state).

[48] As Rebecca Bratspies writes, the Universal Declaration for Human Rights of 1948, which serves as the bedrock of the human rights system, declared a responsibility on "all organs of society" to promote and protect human rights. Rebecca M. Bratspies, "Organs of Society": *A Plea for Human Rights Accountability for Transnational Enterprises and Other Business Entities*, 13 MICH. ST. J. INT'L L. 9, 33 (2005); ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 80 (2006) ("[I]f international law is to be effective in protecting human rights, everyone should be prohibited from assisting governments in violating those principles, or indeed prohibited from violating such principles themselves."); *see also*, Carrillo-

Thus, proponents of the utopian approach make a powerful case that, as a normative matter, corporations should have direct obligations under international law. Yet the mere recognition that non-state actors have obligations under international law does not make those obligations effective. The assumption seems to be that the existence of international legal obligations would translate into greater compliance by corporations on the ground. However, this assumption may not bear out in practice (hence my label of this approach as "utopian"). As noted above, the existence of human rights obligations binding on states often falls flat.[49] Why would international legal obligations work on businesses but not on states? Relatedly, under international law, a norm's formal status as being "legally binding" does not indicate the existence of mechanisms to enforce it—let alone the existence of *effective* mechanisms.[50] Again, the same could be the case for legally binding obligations imposed on non-state actors. Therefore, the creation of direct corporate obligations under international law requires a second and important step—an explanation of how or why the creation (or recognition) of such obligations would produce the desired outcome in terms of human rights protection.

What matters for the purposes of human rights protection, more than its formal status as being legally binding or not, is whether a norm can be enforced so as to lead to a change in behavior. As Daniel Bodansky has helpfully pointed out, "the concept of 'legally binding'

Santarelli, *supra* note 13, at 59 (arguing that the extent of a corporation's duties with respect to certain rights should be informed by the nature and scope of its impact on the enjoyment of those rights).

[49] Hafner-Burton & Tsutsui, *supra* note 28.

[50] For instance, the two main international conventions on statelessness – the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness – are legally binding yet seldom enforced, largely because of "the (lack of) clarity about how the various guarantees against statelessness should be implemented and the (in)adequacy of supervisory apparatus." LAURA VAN WAAS, NATIONALITY MATTERS: STATELESSNESS UNDER INTERNATIONAL LAW 205 (2008); *see also* Daniel Bodansky, *Legally Binding versus Non-Legally Binding Instruments*, *in* TOWARDS A WORKABLE AND EFFECTIVE CLIMATE REGIME 155, 160 (Scott Barrett, Carlo Carraro, & Jaime de Melo, eds., 2015) ("Many, if not most, international legal agreements provide no mechanisms for judicial application and little enforcement.").

is distinct from that of enforcement. Enforcement typically involves the application of sanctions to induce compliance."[51] In fact, in the realm of international climate agreements, the legally binding character of an agreement has not always correlated with effectiveness of the agreement.[52] Other elements influence the regime's overall effectiveness including the level of participation, the ambitiousness of the requirements, and the degree of compliance.[53] Compliance, in turn, may be induced by a sense of legal obligation,[54] but other considerations may prove equally or more important. These include the precision or clarity of the requirements and the existence of robust

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[51] Bodansky, *supra* note 50, at 159.

[52] *Id.* at 162 ("[T]he 1975 Helsinki Declaration has been one of the most successful human rights instruments, despite its explicitly non-legal nature."); *see also*, Hannah Chang, *A "Legally Binding" Climate Agreement: What Does it Mean? Why Does it Matter?*, COLUM. CLIMATE SCH. (Feb. 23, 2010), https://news.climate.columbia.edu/2010/02/23/a-"legally-binding"-climate-agreement-what-does-it-mean-why-does-it-matter/ ("Popular notions of a binding international agreement mistakenly assume that the binding nature of the obligation translates into actual implementation by states and therefore equates with effectiveness of the agreement. But in fact, there is no necessary connection between the legally binding nature of an agreement and its effectiveness.").

[53] Bodansky, *supra* note 50, at 159-60.

[54] There are different theories attempting to explain why states follow international law qua law. Thomas M. Franck, for instance, advances a theory of compliance with international law grounded in legitimacy. *See generally* Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705 (1988) (noting people comply with laws if those affected perceive the law as legitimate). Harold Koh argues that international law induces compliance through what he terms the "transnational legal process" whereby international norms get internalized into domestic systems through repeated interactions by actors at the transnational level. *See* Harold H. Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 183-184 (1996). Andrew Guzman, writing within the framework of a rational actor model, argues that international law increases compliance because it affects states' rational self-interest by raising the costs of non-compliance through direct sanctions (trade, military, diplomatic) as well as loss of reputational capital. *See* Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L.R. 1823, 1846 (2002). Whatever the mechanism, it is clear that compliance does not follow automatically from the mere existence of law but rather depends on an intermediary force, whether it be the pull of legitimacy, internalization processes or aversion to sanctions; *see also*, Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 422 (2000) ("Legalization has effect through normative standards and processes as well as self-interested calculation, and both interests and values are constraints on the success of law.").

transparency and accountability mechanisms to enforce them.[55] As such, while the normative appeal of creating human rights obligations for corporations under international law may be strong, their impact may prove disappointing on the ground unless effective mechanisms can be devised to enforce those obligations.

When confronted with the question of enforcement, some proponents of direct obligations fall back on the need for domestic mechanisms to play a prominent role. David Bilchitz has posited that the "fact that human rights standards are binding at international law does not automatically mean that international adjudicative bodies would be able to hold corporations liable."[56] He adds that "[t]he enforcement agents of such international obligations would often be states at the domestic level who could nevertheless use international human rights law as the basis for holding corporations accountable."[57] In the same vein, Nicolás Carrillo-Santarelli suggests that "a substantive international legal basis for going after corporate abusers" would invigorate states to go after corporations "on the basis of universal jurisdiction or norms permitting transnational litigation."[58] In effect, these suggestions harken back to the promotion of extraterritorial jurisdiction as a tool for addressing accountability gaps in business and human rights.

While the consolidation of a norm requiring states to exercise such jurisdiction would be beneficial in some cases, it should not be relied upon as the sole avenue of enforcement. For, as discussed

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55 Bodansky, *supra* note 50, at 161-62.

56 Bilchitz*, supra* note 42, at 114, n. 23.

57 *Id.*; *see also* DAVID BILCHITZ, HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT? 114 (Surya Deva ed, 2013) (the "fact that human rights standards are binding at international law does not automatically mean that international adjudicative bodies would be able to hold corporations liable. The enforcement agents of such international obligations would often be states at the domestic level who could nevertheless use international human rights law as the basis for holding corporations accountable"). However, it is not clear how this differs from the current setup, whereby states are required to enforce human rights internally as a matter of due diligence. As such, Bilchitz fails to explain how the recognition that corporations have binding obligations under international law would lead to greater observance of those norms.

58 Carrillo-Santarelli, *supra* note 13, at 38-39.

previously, the expansive exercise of extraterritorial jurisdiction poses legal and logistical challenges, which are difficult to overcome in many contexts. Moreover, given that extraterritorial jurisdiction is unpalatable for many states, counting on state institutions to exercise this enforcement tool whenever called for would be unsound given how unreliable states can be in fulfilling their human rights obligations—especially in the "hard cases" where they have the least incentive to do so. Thus, making direct obligations relevant and useful requires enforcement tools that are self-standing—that is, independent of states' willingness or ability to fulfill their responsibility.

Carrillo-Santarelli himself recognizes the limitations of relying on state mechanisms and offers another way in which direct obligations could become useful for holding corporations accountable under international law. [59] He suggests that the creation of such obligations would spur existing international and regional human rights bodies to speak more forcefully against corporate violations of their obligations.[60] In addition, he hints at the possibility that new mechanisms could be created to "supervise non-state compliance with duties of their own."[61] Without elaborating further, he appeals to creativity in the design of such mechanisms "to make up for the shortcomings of domestic guarantees and State obligations."[62] In theory, he states, such mechanisms would operate at multiple levels of governance, thereby providing complementary protection of human rights grounded in corporate obligations enshrined under international law.[63]

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[59] *Id.* at 37 ("the very existence of State human rights obligations is based on the acknowledgement that protection from State abuses by means of domestic legal systems may not always be expected or relied upon.").

[60] *Id.* at 38-39. Indeed, international tribunals and quasi-judicial bodies already have, in several instances, addressed violations by non-state actors such as non-state armed groups, international organizations and private firms. *See*, *e.g.*, Jordan J. Paust, *The Other Side of Right: Private Duties Under Human Rights Law*, 5 HARV. HUM. RTS. 51, 52, 54-55, 59, 62 (1992); Jordan J. Paust, *The Reality of Private Rights, Duties, and Participation in the International Legal Process,* 25 MICH. J. INT'L L.1229, 1242-43 (2004).

[61] Carrillo-Santarelli, *supra* note 13, at 39.

[62] *Id.* at 41, 44.

[63] *Id.* at 37-41.

Carrillo-Santarelli's appeal is worth taking up, and two aspects, in particular, are worth heeding. First, multiple mechanisms operating in a complementary fashion are needed for the effective enforcement of corporate obligations; and second, at least some of these mechanisms ought to be non-state-centric. This second prong is crucial and means that traditional inter-governmental mechanisms, which are also largely controlled (and often ignored or sabotaged) by states, cannot be relied upon to provide effective enforcement in many cases.[64] Accordingly, the following section makes a renewed case for multi-stakeholderism, which is defined broadly as an institutional configuration largely made up of civil society and some private sector representatives coming together to solve accountability gaps left by the lack of state regulation or enforcement. Despite the shortcomings of some multi-stakeholder instruments established to date, this institutional model should be considered a valuable component of the larger enforcement machinery serving to bring corporate actors within the human rights fold. For this reason, these instruments are worth developing, promoting, and concertedly improving.

IV. THE POTENTIAL FOR MULTI-STAKEHOLDER SOLUTIONS TO ENHANCE ENFORCEMENT AGAINST CORPORATIONS

The UN Guiding Principles on Business and Human Rights (GPs), which remain the reigning international standards on this matter since their adoption in 2011, set forth a tripartite framework for the realization of human rights in the context of business activities: (1) the *state's duty* to protect individuals' human rights from harmful

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[64] Some scholars have recommended the creation of a treaty body mechanism, with a mandate to supervise both states and businesses, as part of the draft treaty on business and human rights. While such a mechanism would not be unwelcome, and may prove marginally beneficial, it is likely to suffer from some of the same enforcement deficiencies as similar bodies attached to other international human rights instruments. Among the (soft) enforcement mechanisms available to UN treaty bodies is the requirement that state parties report on the status of their compliance with the respective treaty provisions. However, the majority of states fail to meet even this baseline requirement with little to no consequence. *See* U.N. Secretary-General, *Status of the Human Rights Treaty Body System*, ¶ 5, U.N. Doc. A/71/118 (July 18, 2016) (noting only 13% of States parties "were fully compliant with their reporting obligations").

corporate activity; (2) the *business responsibility* to respect and avoid undermining human rights; and (3) the importance of ensuring effective remedies for victims of human rights violations.[65] In addition to being a non-binding set of principles, the GPs reinforce the notion that businesses lack obligations with respect to human rights. The first and second pillars are distinguishable in the use of the word "duty" for states and "responsibility" for businesses, with the latter term recognized as a non-legally binding expectation that private actors will act in accordance with human rights standards relevant to their operations.[66] Therefore, the GPs have been the subject of intense criticism from the part of advocates of greater corporate accountability for human rights violations.[67]

While criticism of the GPs' weak language with regard to corporations is warranted, the GPs' main value lies in advancing a model of polycentric governance in the field of business and human rights.[68] Indeed, the GPs' call for the development of "multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards" has spurred the development of a plethora of non-state regulatory approaches to tackling issues in business and human rights.[69] Such creative regulatory mechanisms,[70] developed at the initiative of civil society and private sector "norm entrepreneurs,"[71] provide a promising foundation upon which to build.

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[65] *See* John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, Human Rights Council (2011).

[66] *Id.* at 13-14 ("The responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions.").

[67] *See* David Bilchitz, *Corporations and the Limits of State-Based Models*, 23 IND. J. GLOBAL LEGAL STUD. 143, 156 (2016).

[68] Surya Deva, *Business and Human Rights: Alternative Approaches to Transnational Regulation*, 17 ANN. REV L. & SOC. SCI. 139, 141 (2021).

[69] *Id.*

[70] JERNEJ LETNAR CERNIC & NICOLÁS CARRILLO-SANTARELLI, THE FUTURE OF BUSINESS AND HUMAN RIGHTS 28-31 (1st ed. 2018) (calling for multi-stakeholder instruments for the progressive development and implementation of human rights norms binding on business).

[71] Martha Finnemore et al, *International Norm Dynamics and Political Change*, 52 INT'L ORG. AT FIFTY: EXPLORATION & CONTESTATION IN THE STUDY OF WORLD POLITICS 887, 893 (1998). I borrow this term, which refers to norm entrepreneurs as

This section touches upon some of the observed shortcomings of existing multi-stakeholder initiatives. The existence of such shortcomings should not be cause to dispel multi-stakeholderism altogether; rather, these flaws should motivate innovation and creative problem-solving in the design of better mechanisms. The example of Internet governance and its impact on freedom of expression in countries like Vietnam illustrates the urgent need for multi-stakeholder regimes to provide potentially more reliable and robust enforcement mechanisms where state-centric mechanisms are consistently failing to do so.

Before proceeding, it is worth clarifying that the term "multi-stakeholder regime" can be used generally to describe any governance structure managed by non-state actors—civil society, the private sector, or a combination thereof.[72] In this definition, multi-stakeholder initiatives (MSIs) are just one model (or generation) of multi-stakeholder regime. MSIs, which are generally *voluntary and non-binding* public-private partnerships, have become relatively mainstream in a number of industries—from forestry to finance, mineral extraction, garments, and digital services.[73] These initiatives employ a range of

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actors who pioneer the adoption of new norms or transformation of old ones. On the potential of shareholders to serve as norm entrepreneurs; *see generally* Emma Sjöström, *Shareholders as Norm Entrepreneurs for Corporate Social Responsibility*, 94 J BUS. ETHICS 177 (2010).

[72] *See* Fabrizio Caffaggi, *New Foundations of Transnational Private Regulation*, 38 J. L. & SOC'Y 20, 31 (2011). Different scholars use different terminologies and propose various taxonomies to capture regimes of this category. Caffaggi uses the term "transnational private regulation" to encompass numerous types of regimes led by industry, NGOs or a combination thereof; David Vogel uses the term "transnational non-state governance" and "civil regulation" to refer to roughly the same category. *See generally*, David Vogel, *The Private Regulation of Global Corporate Conduct*, *in* THE POLITICS OF GLOBAL REGULATION 151 (Walter Mattli ed., 2009). And Dara O'Rourke uses another term, "non-governmental systems of regulation," that is synonymous. *See generally* Dara O'Rourke, *Multi-stakeholder Regulation: Privatizing or Socializing Global Labor Standards?* 34 WORLD DEVELOPMENT 899 (2006).

[73] *Not Fit-for-Purpose*, MSI Integrity 34-40 (July 2020), https://www.msi-integrity.org/wp-content/uploads/2020/07/MSI_Not_Fit_For_Purpose_FOR WEBSITE.FINAL_.pdf. (MSIs became "a staple approach to governing human rights issues over leaving them completely unregulated or putting binding governmental legislation in place."); *see also* O'Rourke, *supra* note 72, at 899; Harris Gleckman, *Rethinking MSIs: Where Is the Debate About Democracy and Multi-Stakeholder*

strategies, such as third-party monitoring, reporting, certification and labelling, and rely on public awareness, social pressure and boycotts (market sanctions) as their ultimate enforcement tool.[74] They have been hailed by some as showing "great potential"[75] and as "cornerstones of the new global architecture to protect human rights."[76] However, recent assessments have been more critical, exposing these institutions' vulnerability to corporate capture and weak representation of civil society,[77] deploring their lack of effective mechanisms for victims to seek remedies for violations,[78] and deeming them unfit overall for the protection of human rights.[79]

The shortcomings exhibited by many MSIs, rather than indicating an inherent flaw in multi-stakeholder approaches, demonstrate the need for greater innovation and boldness in the creation of non-governmental accountability regimes. Specifically, the flaws of MSIs, on a number of fronts, have shown that certain institutional aspects are necessary for the adequate functioning and legitimacy of multi-stakeholder mechanisms. Such institutions, through their composition and governance structures, must guarantee the participation and dominant decision-making role of independent civil society with strong connections to impacted individuals.[80] Further,

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Governance?, MSI INTEGRITY BLOG (Aug. 20, 2020), https://www.msi-integrity.org/rethinking-msis-where-is-the-debate-about-democracy-and-multi-stakeholder-governance/ (laying out a typology of contemporary MSIs).

74 O'Rourke, *supra* note 72, at 901.

75 Rob van Tulder, *Foreword* to Mariëtte van Huijstee, MULTI-STAKEHOLDER INTIATIVES: A STRATEGIC GUIDE FOR CIVIL SOCIETY ORGANIZATIONS 6, 8-9 (Rob van Tulder eds. SOMO 2012).

76 Bennett Freeman, *Rethinking MSIs: Time to Bury MSIs?—Not So Fast*, MSI INTEGRITY BLOG (Oct. 2020), https://www.msi-integrity.org/rethinking-msis-time-to-bury-msis-not-so-fast/.

77 *Not Fit-for-Purpose, supra* note 73, at 44-45, 66-81.

78 *Id.* at 161-179.

79 *See id.* at 4; *see also*, Rebecca Tweedie et al, *Be Wary of the Fox(es): A Power Analysis of MSIs*, MSI INTEGRITY BLOG (Sept. 3, 2020), https://www.msi-integrity.org/rethinking-msis-beware-of-the-foxes-a-power-analysis-of-msis/; Tyler Giannini et al., *Rethinking Multi-Stakeholder Initiatives Blog Series*, MSI INTEGRITY BLOG (July 16, 2020), https://www.msi-integrity.org/introducing-the-blog-series-rethinking-multi-stakeholder-initiatives/; *see also*, O'Rourke, *supra* note 72; *see* Caffaggi, *supra* note 72, at 35-38.

80 Gleckman, *supra* note 73.

these instruments should ensure robust and reliable enforcement of standards, including through (1) a system for the reliable deployment of sanctions against non-complying corporations, and (2) a mechanism through which victims of corporate violations can submit complaints and access meaningful remedies.[81]

These reforms can be actualized with a sufficient amount of bottom-up pressure from consumers and top-down encouragement from influential "norm entrepreneurs." For example, the Fair Labor Association (FLA), which includes major brands in the garment and agriculture sectors,[82] has proven effective in compelling its member companies to observe workplace and human rights standards in accordance with the FLA Fair Labor Code.[83] Led by a Board of Directors that skews in favor of civil society representation,[84] this MSI has a sound record of subjecting member companies to rigorous evaluation and accreditation processes, the results of which are made publicly available. In addition, the FLA has a third-party complaint mechanism allowing those harmed by member companies' practices to report violations and request appropriate redress.[85] Another promising paradigm is the so-called Worker-Driven Social Responsibility (WSR) model, which is "worker-driven, enforcement-focused, and based on legally binding commitments that assign responsibility for improving

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81 The right to effective remedies when rights are violated is a foundational principle of international human rights law, enshrined in article 8 of the UDHR. *See*, G.A. Res. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Dec. 15, 2005); *see also Guiding Principles on Business and Human Rights*, OFF. OF THE U.N. HIGH COMM'R FOR HUM. RTS 32-33, https://tinyurl.com/mx5e438h (last visited Nov. 25, 2022).

82 *See Fair Labor Accredited Companies*, FAIR LAB. ASS'N, https://tinyurl.com/bdcv3cbr (last visited Nov. 25, 2022).

83 *See Fair Labor Code*, FAIR LAB. ASS'N, https://tinyurl.com/3xtntbwx (last visited Nov. 25, 2022).

84 *See Board of Directors*, FAIR LAB. ASS'N, https://www.fairlabor.org/about-us/board-of-directors/ (last visited Nov. 25, 2022).

85 *Third Party Complaints*, FAIR LAB. ASS'N, https://www.fairlabor.org/accountability/fair-labor-investigations/tpc/ (last visited Nov. 26, 2022).

working conditions to the global corporations at the top of those supply chains."[86]

As envisioned by the GPs, multi-stakeholder regimes have the potential to help close regulatory and accountability gaps, especially in contexts and industries that tend to elude traditional forms of regulation under domestic or public international law. One example of such a gap in governance occurs on social media platforms, such as Facebook and Twitter, which increasingly structure and impact human expression, communication, and information-gathering with tremendous implications for human rights.[87] As Rikke Frank Jørgensen explains, "[i]ndividuals may be subjected to discrimination through or by the platforms, or have their personal data and privacy restricted. However, as private companies [the platforms] are not bound by human rights law, unless human rights standards are translated into national regulation."[88] Yet national regulation cannot be relied upon to effectively address the human rights harms posed by online platforms. First, national regulations themselves are not necessarily consistent with human rights.[89] Vietnam's Cybersecurity Law, which allows the government to compel censorship of online content under the guise of protecting "social order and security, social morality, and community well-being," is a case in point.[90] In fact, the weaponization of online platforms to control the domestic populace has become a familiar tool of authoritarian regimes.[91] Even in mostly democratic

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[86] *See What is WSR?,* WORKER-DRIVEN SOC. RESP. NETWORK, https://wsr-network.org/what-is-wsr/ (last visited Nov. 25, 2022); *see also* Caffaggi, *supra* note 72, at 47.

[87] *See generally* RIKKE FRANK JØRGENSEN, HUMAN RIGHTS IN THE AGE OF PLATFORMS (MIT Press 2019).

[88] Rikke Frank Jørgensen, *A Human Rights-Based Approach to Social Media Platforms*, BERKELEY FORUM (Feb. 26, 2021), https://berkleycenter.georgetown.edu/responses/a-human-rights-based-approach-to-social-media-platforms.

[89] These standards, concerning limitations on the freedom of expression imposed by governments, are set out in Article 19(3) of the ICCPR. They include: legality, necessity, proportionality and legitimacy. *See* U.N.G.A., *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, ¶¶ 7-8, U.N. Doc. A/72/350 (Aug. 18, 2017).

[90] *Joint Submission of The 88 Project*, *supra* note 5, at 3.

[91] *See*, *e.g.*, Isabelle Khurshudyan, *Central Asian Leaders Want to Tighten Grip on Social Media. Russia's Playbook Blazes the Trail*, WASH. POST (Nov. 7, 2021, 7:00 AM),

regions like Europe, regulatory overreach by national governments has been a recent tendency.[92] Thus, the protection of human rights requires non-state-centric mechanisms.

There lies a second reason why national laws and regulations, in the absence of international consensus around permissible online content, may be counterproductive. As with most aspects of the Internet, online platforms are deeply transnational in their nature and effects. The same is the case for laws pertaining to those platforms. One government's decision to impose restrictions on online content has spillover effects on other jurisdictions.[93] Without global agreement

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https://tinyurl.com/4fs5thaz; Miriam Berger, *YouTube Removes Videos Posted by Brazilian President Jair Bolsonaro That Spread Coronavirus Misinformation*, WASH. POST (July 22, 2021, 9:30 AM), https://www.washingtonpost.com/world/2021/07/22/youtube-bolsonaro-brazil-removal-covid-19/; Danielle Paquette, *Nigeria Suspends Twitter After the Social Media Platform Freezes President's Account*, WASH. POST (June 4, 2021, 2:42 PM), https://www.washingtonpost.com/world/2021/06/04/nigeria-suspends-twitter-buhari/.

[92] *See* Douwe Korff & Ian Brown, *Social Media and Human Rights*, COUNCIL OF EUR. COMM'R FOR HUM. RTS. (Feb. 2012), https://rm.coe.int/16806da579 ("A recent study of 37 countries by Freedom House cites increasing website blocking and filtering, content manipulation, attacks on and imprisonment of bloggers, punishment of ordinary users, cyber attacks and coercion of website owners to remove content, in attempts by authoritarian states to reduce political opposition."); *see also UK: Draft Online Safety Bill Poses Serious Risk to Free Expression*, ARTICLE 19 (July 26, 2021), https://www.article19.org/resources/uk-draft-online-safety-bill-poses-serious-risk-to-free-expression/ ("[T]he Draft Bill also gives incredibly broad powers to the Secretary of State to control its implementation in ways previously unseen in modern Western democracies."); *At a Glance: Does the EU Digital Services Act Protect Freedom of Expression?*, ARTICLE 19 (Feb. 11, 2021), https://www.article19.org/resources/does-the-digital-services-act-protect-freedom-of-expression/ ("[T]he fact remains that the European Commission is not an independent regulator. It is the EU's executive arm. In other words, oversight of very large online platforms is ultimately not independent.").

[93] *See* Yutian Ling, *Upholding Free Speech and Privacy Online: A Legal-Based and Market-Based Approach for Internet Companies in China*, 27 SANTA CLARA HIGH TECH L. J. 198 (2010); *see also The Internet and Extra-Territorial Effects of Laws*, INTERNET SOC'Y (Oct. 18, 2018), https://www.internetsociety.org/resources/doc/2018/the-internet-and-extra-territorial-effects-of-laws/. In Brazil, the government has attempted to pass a decree that would allow prosecution of foreign social medial companies in domestic courts for exercising content moderation powers. *Concerning Draft Decree in Brazil Threatens the Civil Rights Framework for the Internet*, GLOB. NETWORK INITIATIVE (Aug. 2, 2021), https://globalnetworkinitiative.org/concerns

on what constitutes legal and illegal online content—consensus which does not yet exist and is unlikely to in the foreseeable future—a patchwork of national regulations will prevail, creating uncertainty for corporations, insecurity for individual users, and jurisdictional conflicts among states.[94] The opposite of spillovers—siloes in regulation—is *also* undesirable from the point of view of human rights protection, especially in pockets of the world where rights are prone to being trampled on. Without a global regulatory regime that can enforce human rights standards against corporate actors wherever in the world they happen to operate, the rights of some populations will not be secured.

Against this backdrop, multi-stakeholder regimes have the potential to offer some solutions.[95] One promising proposal, advanced by Stanford University's Global Digital Policy Incubator (GDPi), concerns the creation of a "Global Multistakeholder Cross-Platform Social Media Council" to address human rights harms posed by online content moderation. This proposal properly responds to the

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-presidential-decree-brazil/ ("lack of clarity around the territorial scope of the Decree could have spillover effects on content moderation outside of Brazil, which would negatively impact freedom of expression extraterritorially and potentially create conflicts-of-law in other jurisdictions.").

94 In the United States, for instance, the legal system's militant defense of freedom of expression under the First Amendment often leads to an abuse of this freedom, leading to societal ills such as hate speech and disinformation. European governments, by comparison, tend to impose tighter restrictions on speech for the sake of safeguarding minority rights and democratic values. Other countries, such as Vietnam and China, impose even tighter restrictions with the justification that they are necessary to preserve public order and a harmonious society. Under Article 14 of the Vietnamese Constitution, the Vietnamese Government reserves the ability to suspend citizens' rights where "imperative circumstances," such as "national defense, national security, social order and security, social morality, and community well-being," call for such restrictions. *See* Paul M. Barrett, *Regulating Social Media: The Fight Over Section 230 – and Beyond*, NYU STERN CTR. FOR BUS. AND HUM. RTS. (Sept. 8, 2020), https://tinyurl.com/5n8mk97d.

95 David Kaye, *Social Media Councils: From Concept to Reality*, STANFORD GDPI & ARTICLE 19 7, https://tinyurl.com/65xfr9bm (last visited Nov. 25, 2022) ("Multistakeholder models of content moderation can help to avoid the pitfalls of existing private sector approaches to content regulation as well as the regulation of content by governments. They have substantial advantages for platforms, governments, and users.").

transnational nature of digital platforms with a model that is global in scope. Compared to national-level approaches, a global multi-stakeholder regime is generally less vulnerable to capture by state agents and therefore more likely to function as a truly independent body guided by human rights standards rather than state-specific laws and priorities.[96] Furthermore, a global body that has the support of stakeholders from around the world is better positioned to garner the authority and resources needed to close loopholes and bring powerful transnational corporations within the international human rights fold. Whether through a global social media council or through another multi-stakeholder institution such as the Global Network Initiative (GNI), the guarantee of freedom of speech in online platforms will require intervention *and* innovation by a broad spectrum of stakeholders, rather than just state and business actors. The effectiveness of a multi-stakeholder regime in actually protecting human rights, however, will ultimately depend on the robustness of its enforcement and accountability mechanisms.

The example of online platform governance shows that multi-stakeholder approaches have a unique and productive role to play in advancing human rights in certain contexts—particularly where traditional approaches, such as national or inter-governmental regulation, fail to produce the desired results. Yet, multi-stakeholder approaches certainly cannot replace all need for regulation and accountability. They should be seen as part of the solution, as an integral component of an increasingly multi-polar system of human rights protection. Such a system would require complementarity and integration of regulatory mechanisms.

V. COMPLEMENTARITY AND INTEGRATION

If, as suggested, a critical number of robust multi-stakeholder regimes emerge to enforce human rights standards directly against

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[96] *Social Media Councils: One Piece in the Puzzle of Content Moderation*, ARTICLE 19 18-19 (Oct. 12, 2021), https://www.article19.org/wp-content/uploads/2021/10/A19-SMC.pdf ("Constituting an SMC at the international rather than the national level avoids the largest risks of direct government interference in SMCs and also makes it easier to firmly ground the council in human rights principles.").

non-state actors, what picture of the world emerges? One possibility is a world where human rights norms and mechanisms become disjointed due to conflicting and competing interpretations, leading to chaos, confusion, and an eventual loss of the idea of universal rights. While some might fear this outcome, it is unlikely for several reasons.

First, the human rights system has evolved as a decentralized body of law with multiple institutions already exercising overlapping jurisdiction and authority. For example, members of the Council of Europe, which include 47 states, are subject to human rights standards under the European Convention on Human Rights (ECHR), as well as their own domestic human rights legislation and international law more broadly (which includes customary international law and treaties ratified by the states individually or collectively).[97] When a human rights violation by a specific country is at issue, all of these sources of authority come to bear in the adjudication of an outcome. In arguing that the United Kingdom violated an individual's right to seek asylum, for example, advocates can appeal to judicial precedent of the European Court of Human Rights, as well as international conventions that the UK has ratified such as the Refugee Convention of 1951.[98] At the same time, principles such as "subsidiarity" and "margin of appreciation" help relevant adjudicative institutions avoid stepping on one another's toes, generally allowing processes to resolve at the domestic level before institutions at the regional and international levels are called upon to intervene.[99] Likewise, multi-stakeholder enforcement regimes could be integrated into the human rights system under similar arrangements. To the extent that they garner legitimacy, these regimes could be given deference in the development,

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[97] *See* Nico Krisch, *The Open Architecture of European Human Rights Law*, 71 THE MOD. L. REV. 183, 184 (2008).

[98] *See*, *e.g.*, Saadi v. The United Kingdom, App. No. 13229/03 (Jan. 1, 2008), https://hudoc.echr.coe.int/fre?i=002-2289.

[99] *See generally* Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AJIL 38 (2003); *see also*, Samantha Besson, *Subsidiarity in International Human Rights Law—What is Subsidiary about Human Rights?*, 61 AM J JURIS 69 (2016); ANDREW LEGG, THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW (Oxford Univ. Press 2012).

interpretation, and implementation of human rights standards relevant to specific business sectors.

Secondly, complementarity among governmental, inter-governmental, and multi-stakeholder regimes is likely to strengthen each mechanism's ability to perform the functions for which it is best suited, thereby strengthening the human rights system as a whole.[100] For instance, MSIs with the proper governance framework can add value and expertise in the application of human rights principles to specific sectors or industries. They are also more likely to make innovations in the development of grievance mechanisms that are efficient and streamlined but also consistent with essential standards of transparency, accountability, accessibility, and procedural fairness.[101] Meanwhile, international and regional adjudicative and standard-setting institutions, such as the UN treaty bodies, special procedures, and regional human rights courts, can provide normative guidance and oversight for the activities carried out by non-governmental or multi-stakeholder mechanisms. Currently, regional and international human rights institutions are overburdened by the sheer number of requests that reach them, and they are increasingly unable to address them in a timely fashion.[102] Introducing robust and legitimate grievance mechanisms managed by civil society actors would relieve some of this backlog, while reserving a role for supranational institutions to exercise higher-level normative supervision.[103]

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[100] *See generally* Surya Deva, *Vision of an Integrated Framework of Corporate Regulation*, *in* REGULATING CORPORATE HUMAN RIGHTS VIOLATIONS HUMANIZING BUSINESS (2012).

[101] *See Guiding Principles on Business and Human Rights*, *supra* note 82, at 33-35.

[102] *See*, *e.g.*, *Requests for Interim Measures (Rule 39 of the Rules of Court)*, Eur. Ct. H. R. (Feb. 11, 2011), https://tinyurl.com/3a2cyzkc; Alvaro Paúl, *The Inter-American Commission on Human Rights' Initial Review of Petitions, Its Backlog, and the Principle of Subsidiarity,* 49 GEO WASH INT'L L REV. 19 (2016).

[103] *See* Bilchitz, *supra* note 11, at 12; *see also* Erika R. George et al, *Access to Remedy: Treaty Talks and the Terms of a New Accountability Accord*, *in* BUILDING A TREATY ON BUSINESS AND HUMAN RIGHTS: CONTEXT AND CONTOURS 377, 406 (Surya Deva & David Bilchitz eds., Cambridge Univ. Press, 2017); Knox, *supra* note 22, at 45, ("Although neither treaty bodies that review parties' reports on their own compliance and complaints from individuals under petition procedures, nor UN special rapporteurs that focus on a particular country or set of issues, have the power to

There would be an essential role for the state to play as well. State-level regulatory institutions and adjudication can provide backup enforcement in cases where corporations and other non-state actors fail to observe standards and agreements concluded under multi-stakeholder regimes.[104] Domestic legal institutions, backed by coercive power, are still among the strongest enforcement tools in terms of exacting compliance with the rule of law and providing adequate remedies stemming from non-compliance.[105] Thus, states are likely to remain crucial players in the human rights system, at least in the foreseeable future, especially in providing the legal and enforcement apparatus "with teeth" that reinforces human rights norms' bindingness.[106]

Thirdly, aside from allowing better division of labor among various actors, the continued decentralization of the human rights order by way of more robust inclusion of civil society in governance would contribute to the system's resilience. Philip Alston has argued against the creation of a "world court for human rights" precisely because such an institution would undermine the "systemic pluralism,

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compel compliance, their ability to draw attention to human rights violations can often lead the responsible government to take steps toward curtailing or at least ameliorating its actions.").

104 *See* Deva, *supra* note 100, at 208-14; *see also* Deva, *supra* note 68, at 9-13; Manon Wolfkamp et al., *Rethinking MSIs: Regulating Responsible Business Conduct*, MSI INTEGRITY BLOG (July 30, 2020), https://www.msi-integrity.org/rethinking-msis-regulating-responsible-business-conduct/ ("Legislation and a renewed MSI policy could reinforce each other in a smart mix of measures to incentivise responsible business conduct. Thanks to such legislation, the RBC agreements might become an attractive instrument for many more companies and sectors who want to implement due diligence obligations.").

105 *See* Robert O. Keohane et al., *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT'L ORG 466, 472 (2000) (arguing that "even if authority to render judgments is delegated to an independent international tribunal, implementation of these judgments depends on international or domestic action by the executives, legislatures, and/or judiciaries of states").

106 Lisa Conant, *Whose Agents? The Interpretation of International Law in National Courts*, *in* INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS – THE STATE OF THE ART 394 (J.L. Dunoff & M.A. Pollack eds., Cambridge Univ. Press, 2013); *see generally* Beth Stephens, *Expanding Remedies for Human Rights Abuses: Civil Litigation in Domestic Courts*, 40 GERM YRBK INT'L L117 (1997).

diversity [, and] separation of powers" that helps protect the system against capture by elite interests.[107] Although Alston is primarily concerned about the concentration of power in a handful of international judges, one could extend his argument to assert that the human rights system would benefit from greater checks and balances by civil society on state and international actors. By integrating a measure of healthy competition, as well as cooperation, among non-state and state-centric institutions and mechanisms, the human rights system would become more agile, responsive to local communities, accountable to rights holders, and less prone to state or elite capture.

Fourthly, in line with the idea of "polycentric governance,"[108] the existence of multiple and decentralized enforcement mechanisms would provide more options for victims to access adequate remedies.[109] In addition to enhancing options for rights holders, a proliferation of enforcement mechanisms would serve as a safeguard against a single enforcement body becoming defunct, ineffective or corrupt.[110] Indeed, the human rights system needs more avenues to enforcement and accountability for violations, particularly in parts of the world where existing inter-governmental mechanisms have proven ineffective. Countries like Vietnam, China, and Syria, which engage in routine human rights violations, have been largely unscathed by international institutions' attempts to influence them. Enforcement

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[107] Philip Alston, *Against a World Court for Human Rights*, 28 ETHICS & INT'L AFFAIRS 15, 20 (2014).

[108] *See* Jamie D. Prenkert and Scott J. Shackelford, *Business, Human Rights, and the Promise of Polycentricity,* 47 VAND. J. TRANSNAT'L L. 451, 455-56 (2014) (defining a polycentric system as "a regulatory system . . . that consists of 'a collective of partially overlapping and nonhierarchical regimes" and where "neither states nor any other entities enjoy sole rulemaking powers").

[109] The right to effective remedies when rights are violated is a foundational principle of international human rights law, enshrined in article 8 of the UDHR. *See generally Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. GEN. ASSEMBLY (July 18, 2017), https://tinyurl.com/3bm99vks.

[110] Deva, *supra* note 100, at 203; Rachel Anderson, *Reimagining Human Rights Law: Toward Global Regulation of Transnational Corporations*, 88 DENV. U. L. REV. 183, 190 (2010) ("[T]he importance of human rights as core values contrasted with the inadequacy of international human rights law as the sole tool to protect them at the global level, demonstrate the need for protection and enforcement of these rights in multiple forms of human rights law.").

mechanisms can act in tandem, each one making up for deficiencies in others and closing gaps which otherwise allow actors to behave with impunity and leave victims without effective redress.[111]

Finally, continuous dialogue and mediation among the various actors and institutional players would enhance regulatory integration and coherence within this broader system. As stated by Surya Deva, "[t]he crucial aspect of this integration process is a continuous upward-downward cycle of dialogue and evolution between regulatory initiatives at three levels in that they will be informed by the experiences and outcomes of each other."[112] Regulatory components of the overall human rights system can remain in constant discourse—which they already are by citing to each other's precedents and authoritative documents—contributing to the cross-pollination of norms, interpretations, and practices. Such progressive integration would enhance consensus about rights without compromising the potential for wider participation and inclusivity.

In sum, the proposal to expand the scope and modalities of human rights enforcement should in no way entail the weakening of existing institutions and processes centered on state responsibility.[113] Constructing multi-stakeholder mechanisms for human rights implementation and internalization should not detract from developments in the state-centric human rights system. On the contrary, the incorporation of new regimes, directed and controlled by civil society stakeholders, into the broader global human rights infrastructure would help strengthen the system as a whole.

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111 Deva, *supra* note 68, at 29 (citing to J. Pauwelyn, R.A. Wessel and J. Wouters, *When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking,* 25(3) EUR. J. INT'L L. 733 (2014)).

112 Deva, *supra* note 100, at 202.

113 *See* A. Reinisch, *The Changing International Legal Framework for Dealing with Non-State Actors*, *in* NON-STATE ACTORS AND HUMAN RIGHTS 37 (P. Alston ed., Oxford Univ. Press, Oxford 2005). For a helpful rejoinder to the argument that affording human rights obligations to corporations would somehow weaken pressure on states to abide by their own obligations.

VI. CONCLUSION

"All reform, all change, must be tested on the measure of how better it protects human rights than what we have at present."[114] While putting forward a vision for a multi-polar system of human rights enforcement and protection, these words by Michael O'Flaherty resonate strongly. John Knox proposes a two-part test to assess whether a change in the existing system is warranted. First, the new framework should seek to address issues that cannot be addressed with the system we currently have. Second, the new framework should improve upon the existing system by actually increasing human rights fulfillment.[115] Broadening the sphere of human rights to include non-state actors as both subjects and core participants in the global human rights order, as set forth in this article, meets both conditions.

This article was motivated by the conviction that, when non-state actors violate human rights norms in complicity with states, we in the international community should not simply throw up our hands. A persistent problem in international human rights law is that the existing framework of protection places almost exclusively relies on states to respect, and secure respect for, human rights. Yet, many governments (or those in control of governmental institutions) often succeed in using their power over non-state actors to curtail the rights of those who would question their authority. Although this situation has been observed and repeated in many parts of the world, the existing state-centric institutions have failed to produce an effective solution that protects victims of corporate abuses from further harm.

Thus, I have argued for a reconceptualization of the human rights system that can accommodate new agents and mechanisms of human rights protection and accountability. This reconceptualization begins with the recognition that all relevant actors on the global stage, including corporate and other non-state actors, should have binding human rights obligations. Namely, their observance of human rights standards should not be regarded as optional. Second, obligations that

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114 Michael O'Flaherty, *The Strengthening Process of the Human Rights Treaty Bodies*, 108 AM. SOC'Y INT'L L. 285, 288 (2014).

115 Knox *supra* note 22, at 47.

are normatively binding should be translated into legal obligations that can be enforced with or without the mediation of states. One step in this direction is the development of non-governmental enforcement mechanisms led by civil society stakeholders, which can set standards for corporations and hold them accountable pursuant to international human rights norms.

The creation of this more inclusive and expansive human rights order is possible. It requires giving a voice to rights holders in discussions about accountability, while leveraging the power of civil society to act as a proper counterpoint to state and corporate power. The progression can be gradual, and it is already underway, as evidenced by the proliferation of multi-stakeholder initiatives and other transnational regulatory regimes. This article has merely sought to defend and guide the international system's advancement along this path to better respond to the demands of individuals and their human rights, wherever they may be.