

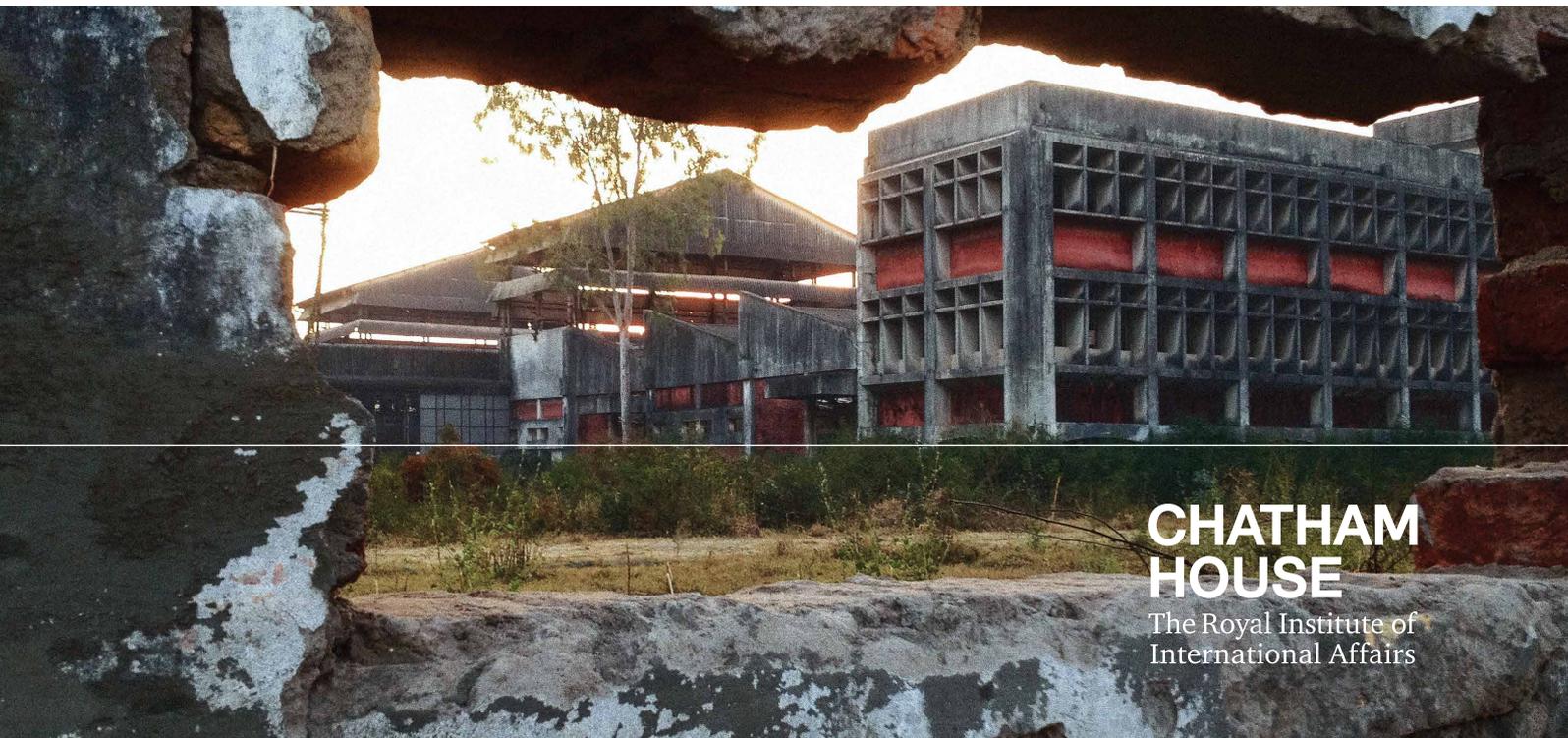
Research Paper

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# Business and Human Rights Bridging the Governance Gap



**CHATHAM  
HOUSE**

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# Contents

Summary	2
Introduction	3
Assessing Trends in an Emerging Field	5
Activity Without States: Private Governance and BHR	9
Activity Within States: Stasis and Shift in International Law	13
Activity Between States: International Regulation?	22
The Future Scope of the BHR Agenda	28
Scenarios: Possible Trajectories for 2015–25	34
Conclusion	36
Acronyms	39
About the Author	40
Acknowledgments	40

## Summary

- It is probable that the period 2015–25 will see fairly sustained pressure for the adoption of measures to narrow the ‘governance gap’ between corporate influence and accountability, including with regard to business respect for human rights.
- This regulatory gap is not a vacuum, and a range of standards do already apply. However, uncertainty about the future of the business and human rights (BHR) agenda explains the need for more guidance on wider trends for policy-makers, legal advisers and others.
- Market incentives are shifting so that there is no necessary trade-off between being competitive and being responsible; indeed, in some sectors proven social responsibility may increasingly provide a competitive edge.
- Intergovernmental processes and activists are focusing on access to remedy, but progress will be slow and piecemeal. Some legislative and business actors are focusing on prevention issues, and Europe shows an emerging trend towards more mandatory due diligence and disclosure requirements for corporations.
- Big business in major economies will not necessarily resist some legislation on due diligence, if only to reduce prevailing regulatory uncertainty. Yet any legislative moves will be patchwork in global terms, and may be less significant in prevention terms than self-regulatory initiatives by the business and financial sectors.
- The international legal framework on BHR issues is not evolving as fast or as fully as some experts maintain. In particular, there is insufficient evidence behind claims that a general international law duty now exists on states to regulate the human rights impacts of corporate nationals abroad.
- It remains easy to overstate levels of awareness and activity around BHR issues and the 2011 UN Guiding Principles (GPs) on Business and Human Rights. Most firms lack sufficient awareness, capacity or incentives in this area. Pressures on governments to narrow the governance gap will not necessarily see the GPs receive greater global priority.
- The BHR agenda is about much more than national-level uptake of the GPs, and is not simply a legal or legislative project. Yet the ideal scope of the BHR narrative remains debatable. Wide framings of the BHR debate could affect how readily it is able to gain a transformative degree of traction as a legal, policy and business strategy issue.
- With the focus on procedural due diligence requirements, one emerging risk is that the BHR narrative becomes primarily about narrow issues of technical compliance and reporting. If so, it will lose its power to drive broader, transformative strategic and commercial thinking.
- Comprehensive, just, effective and predictable future BHR frameworks at any level will require both public law grounding and widespread positive business engagement. An ideal strategy cannot be limited either to top-down state ‘command’ regulations or to voluntary business-driven initiatives alone.

## Introduction

This research paper explores some trends and debates related to efforts to identify, promote and regulate the roles, responsibilities and impacts of business enterprises in relation to human rights. The emerging field of business and human rights (BHR), encapsulating these issues, is marked by an overall paradox: clear signs of increasing interest and activity around BHR questions exist alongside considerable uncertainty, apathy or outright lack of awareness concerning many key BHR themes.

In this context, this paper attempts to assess the potential trajectory of the BHR agenda with the aim of furthering debate in policy, professional, business and academic circles. Those with a strategic stake in BHR are increasingly seeking to understand the present state of legal and other normative development, as well as where the field might be heading.

The paper's reference point is 2011, when – despite the usual divisions among its member states – the UN Human Rights Council (HRC) unanimously approved the Guiding Principles (GPs) on Business and Human Rights, addressing state and business responsibilities for the human rights impacts of business activity. How might the field evolve over the period 2015–25, including on the basis of patterns since 2011? What forces and factors might determine its trajectory? If the overall objective is to promote maximal fulfilment and enjoyment of human rights, what measures and approaches will be the most appropriate, viable and sustainable? How significant will law-based approaches be, relative to policy measures and market-driven initiatives? What is at stake in pursuing that regulatory mix?

The nexus of business and human rights potentially traverses a vast range of issues, and indeed the scope of BHR is itself an issue. This paper has a limited ambition. To stimulate debate, it reflects only on a few issues seen as particularly unclear, contested or important:

- The first section outlines trends of change and continuity in the BHR agenda, and the nature and source of forces that will probably shape its future.
- The second section revisits (for forward-looking purposes) somewhat familiar debates on the significance of non-state, market-based and voluntary regulatory initiatives, especially relative to governmental and legal ones.
- The third section considers trends in governmental (especially legislative) activity on the BHR agenda, assessing the significance of this practice for any emerging international legal consensus or convergence.
- The fourth section considers the scope for greater regulation of BHR issues at the intergovernmental level, and other international legal vectors – in particular trade and investment regimes – for influencing the human rights impact of business activity.
- The fifth section reflects on the breadth of the BHR narrative, weighing up whether this phenomenon is positive for rights protection or may jeopardize that objective.
- Given the contradictory patterns of activity and apathy noted above, the sixth section offers tentative scenarios for what this important and complex field might look like by 2025.

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Two further caveats on this paper's scope are needed. First, it is intended for a relatively informed audience: a Briefing published earlier in 2015 attempted a more accessible overview of BHR trends.<sup>1</sup> Second, the analysis in this paper reflects a particular interest in international law aspects of BHR, although its content and conclusions are of relevance to policy-makers and lawyers alike.<sup>2</sup> The paper benefits from contributions made at an expert roundtable held at Chatham House in March 2015.

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<sup>1</sup> Ford, J., *Business and Human Rights: Emerging Challenges to Consensus and Coherence?* Briefing, Chatham House, February 2015 (Ford 2015a), [https://www.chathamhouse.org/sites/files/chathamhouse/field/field\\_document/20150226BusinessHumanRightsFord.pdf](https://www.chathamhouse.org/sites/files/chathamhouse/field/field_document/20150226BusinessHumanRightsFord.pdf).

<sup>2</sup> This is of particular significance regarding the view taken on the breadth of BHR, in the section on the Future Scope of the BHR Agenda.

## Assessing Trends in an Emerging Field

This section attempts briefly to capture the prevailing situation in the field of BHR. Much more diagnostic or audit work is required in order to have a more accurate sense of current patterns and thus better assess or influence future developments.<sup>3</sup>

### 2011: watershed or landmark?

The 2011 approval of the GPs by states through the HRC further consolidated the 2008 responsibility framework on business and human rights proposed by Professor John Ruggie, under the mandate extended to him in 2005 as the Special Representative of the UN Secretary-General for Business and Human Rights.<sup>4</sup> The 2008 framework elaborated the duty of states to protect against human rights abuses by third parties, including business sector interests, through appropriate policies, regulation, and adjudication; the corporate responsibility to respect human rights, including acting with due diligence to avoid infringing rights; and provision of judicial and non-judicial access for victims to effective remedies for claims of business-related violations.

### Change: a new framework for BHR after 2011

On one hand, the 2011 resolution and accompanying state and civil society consensus constituted a watershed event in BHR. For example, the official French position now is that the GPs were ‘ground-breaking’ so that ‘all existing fundamental international standards have been integrated into a single model with global scope’.<sup>5</sup> In the view of the French government, the role and transnational nature of many large business enterprises now justify ‘the introduction of international standards of respect for human rights that target them directly and specifically’.<sup>6</sup> Looked at in this way, the GPs both manifest and help to solidify a much wider trend towards socially responsible business and investment conduct, and its regulation.

The GPs, or elements of them, have since 2011 begun to be integrated into intergovernmental, governmental and business policy and management systems, and into the agenda of organizations that lobby and monitor these constituencies. At the multilateral and regional level, for example, the GPs-related framework has been incorporated by reference into the EU policy framework and the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises.<sup>7</sup> Another example is how the World Bank’s International Finance Corporation (IFC)

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<sup>3</sup> The leading source of insight in recent years has been the Institute for Human Rights and Business (IHRB) ‘State of Play’ reports. The most comprehensive, accurate and thoughtful contribution since 2011 may be Mares, R., ‘Business and Human Rights after Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress’, in R. Mares (ed.), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Martinus Nijhoff, Leiden, 2012).

<sup>4</sup> *Guiding Principles on Business and Human Rights*, A/HRC/17/31, 21 March 2011, endorsed by UN HRC Resolution 17/4 of 16 June 2011. This was based on a 2005 mandate from the Council: E/CN.4/Res/2005/69, 20 April 2005, [1].

<sup>5</sup> Ministry of Foreign Affairs and International Development, 2015, ‘Business and human rights’ <http://www.diplomatie.gouv.fr/en/french-foreign-policy-1/human-rights/business-and-human-rights/>.

<sup>6</sup> *Ibid.*

<sup>7</sup> EU Strategy for Corporate Social Responsibility 2011–2014, 25 October 2011; Revised OECD Guidelines for Multinational Enterprises, 25 May 2011.

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has updated its performance standards by reference to the GPs, with some flow-on influence in the world of private-sector project finance.<sup>8</sup>

In big business and finance circles one can discern GPs-related activity, with some promising potential. For instance, the International Organization for Standardization (ISO) has incorporated GP elements into its influential ISO 26000 social responsibility standard, and also privately owned stock exchanges are examining their listing and reporting requirements.<sup>9</sup> Civil society and consultancies are helping firms to assess, measure and report on GPs-related issues.<sup>10</sup> Along with specialist BHR organizations, the global legal profession and bar associations are becoming more fluent in the GPs, while BHR increasingly features on the curriculum of business and law schools.

At the national governmental level, some influential states (mainly in Europe, but including the United States)<sup>11</sup> have either developed or are developing general National Action Plans (NAPs) on the GPs. Other governments are producing more targeted policy guidelines referencing the GPs, such as China's 2014 guidelines for mining and minerals-trading firms operating abroad.<sup>12</sup> Some have parliamentary bodies considering legislative actions (see section on Activity Within States, below). These issues have filtered into some governmental circles, such as central banks and export credit agencies, in ways not anticipated a decade ago.<sup>13</sup> Nevertheless, the recent pattern is not just of variation in the content and consequence of NAPs,<sup>14</sup> but also of considerable divergence in states' uptake of the GPs.<sup>15</sup> This differential experience will continue, and in numerical terms the proportion of states with NAPs or other GPs-related activities afoot is very small at present: most are inactive domestically in this respect, even where they actively engage in diplomatic activities at the HRC in Geneva.

### Continuity: trends in responsible business and its regulation

This divergence in uptake of the GPs, alone, necessitates caution in seeing 2011 as a game-changer, for two reasons. The first is that the facts do not support claims that some rapid and thorough global paradigm shift is under way in relation to regulating and remedying the business impact on human rights.<sup>16</sup> For example, experts at Chatham House roundtables in 2014–15 confirmed that awareness of the existence (let alone the detail) of the GPs is low even within top global law firms and among legal advisers in major firms.<sup>17</sup> It would be an exaggeration to claim the existence across more than a handful of states of any significant, pan-governmental focus on the GPs-related agenda, despite some greater alignment between some actors on narrower 'hot topics'. BHR has

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<sup>8</sup> IFC Performance Standards on Environmental and Social Sustainability, effective 1 January 2012.

<sup>9</sup> See 'Human Rights Reporting' (Update to Corporate Law Project) (Shift, London, Nov. 2013), section II (stock exchanges), [http://shiftproject.org/sites/default/files/Update%20to%20Corporate%20Law%20Project%20November%202013\\_1.pdf](http://shiftproject.org/sites/default/files/Update%20to%20Corporate%20Law%20Project%20November%202013_1.pdf).

<sup>10</sup> See recently, for example, 'The UN Guiding Principles Reporting Framework' (Shift/Mazars, London, February 2015, updated at [www.ungpreporting.org](http://www.ungpreporting.org)).

<sup>11</sup> Denmark, Finland, Italy, Netherland, Spain and the United Kingdom.

<sup>12</sup> 'Guidelines for Social Responsibility in Outbound Mining Investments' launched in Beijing on 23 October 2014 (Chamber of Commerce for Metals, Minerals and Chemicals, under the Ministry of Commerce). The guidelines were developed with German assistance and co-launched with the NGO Global Witness.

<sup>13</sup> For example, one Chatham House roundtable participant had briefed Brazilian central bank officials on the GPs.

<sup>14</sup> The process and content of NAPs to date differs considerably: De Felice, D., and Graf, A., 'The Potential of NAPs to Implement Human Rights Norms: an early assessment' *Journal of Human Rights Practice* (online), January 2015. This variation is unsurprising and does not detract from the sense of a wider phenomenon under way.

<sup>15</sup> 'State of Play: Human Rights in the Political Economy of States' (IHRB, London, 2014).

<sup>16</sup> A common observation at the 2015 Chatham House roundtable was the different speeds and altitudes of participants in the BHR agenda, as exemplified by patchwork uptake of the GPs. See too Aaronson, S and Higham, I. 'Re-righting Business: John Ruggie and the struggle to develop international human rights standards for transnational firms' (2013) 35(2) *Human Rights Quarterly* 333.

<sup>17</sup> There may be benefits in exploring whether the responsibility for following BHR issues in major firms lies with legal counsel, risk management officers, or with those holding 'external affairs' or 'social performance' portfolios. Ideally all of these groups would be engaged.

certainly not become *the* vector or vocabulary for a wider agenda of transforming market capitalism more generally. In this sense, 2011 was not a watershed. This is so even though many activities and debates are undoubtedly in preparation or progress – from Beijing to Brussels – on broader themes of sustainable, ethical and just business practices, and even though many ongoing key social debates and grievances can potentially be articulated in BHR terms.

The second reason for caution is that the BHR agenda – and certainly the wider corporate responsibility phenomenon – of course has roots stretching far further back than Ruggie’s mandate. Even if the international human rights and treaty systems were in good shape, the BHR field is beset with legacies of division, uncertainty and apathy. This history may not affect how business responds of its own accord to changing social and market expectations. But it will probably affect how states respond, at least at the intergovernmental level.

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The corollary of this is continued divergence in how different states, sectors, firms and other stakeholders respond to the GPs and wider BHR agenda. Even if it is true to claim that the human rights discourse is shaping global economic relations, it is doing so in a very uneven way.<sup>18</sup> Like states, businesses are responding to the agenda with very differing degrees of intensity.<sup>19</sup> Beyond reinforcing incentives on bigger, more sophisticated or higher-profile firms and funds to improve monitoring and reporting initiatives, 2011’s events alone have not been – and will not necessarily be – the decisive factor in driving such activity. Only a small proportion of businesses and funds globally are fully incorporating these issues into business strategy and risk management systems. Most will lack the awareness, capacity or incentives to respond. Some of this divergence results from differing capacities, but at issue are also structural and specific business incentives for reform. These are enduring features that will also affect how states pursue their long-standing human rights commitments and duties in all areas, not just BHR. These patterns seem unlikely to shift notably over the medium term.<sup>20</sup>

Studies of conflict-linked trade in raw commodities generated many insights into the structural reasons why united legislative efforts are so difficult to envisage or achieve: global business occurs on an uneven regulatory playing field, comprising heterogeneous actors who generally lack any incentive to lead collective action efforts.<sup>21</sup> Arguably, market incentives are changing in such a way that there is no necessary trade-off between being competitive and being responsible. (Indeed, responsibility may provide a competitive edge.)<sup>22</sup> Nevertheless, across many firms and sectors the logic for adopting a rights-based approach is not seen as obvious. Likewise, many states perceive no good reason for regulating corporate nationals’ human rights impact abroad in the absence of peer action. In constrained global growth conditions, no reason exists for believing that this trend will change rapidly.

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<sup>18</sup> Picciotto, S., ‘Humanising global economic governance’ in Drache, D., and Jacobs, L. (eds), *Linking Global Trade and Human Rights: New Policy Space in Hard Economic Times* (Cambridge University Press, 2014).

<sup>19</sup> See generally Ford 2015a.

<sup>20</sup> IHRB ‘State of Play’ 2014.

<sup>21</sup> For an overview, see Ford, J., *Regulating Business for Peace* (Cambridge University Press, 2015) (Ford 2015b), Chapter 1.4, in particular discussion of the work of the late Karen Ballentine.

<sup>22</sup> See in particular Michael Porter’s influential work in the last decade, beginning with Porter, M., and Kramer, M., ‘Strategy and Society: the link between competitive advantage and CSR’ *Harvard Business Review* (Dec. 2006).

## The ‘governance gap’ and its discontents

In forecasting trends it is useful to step back and see the BHR agenda as part of growing contemporary expectations around the role and regulation of business in society. Economic globalization over recent decades has been accompanied by a ‘governance gap’, an ‘institutional misalignment’ between business actors’ influence and their degree of accountability.<sup>23</sup> More critical voices see large transnational corporations as operating ‘beyond the law’.<sup>24</sup> The emerging human rights responsibilities of business enterprises, and calls for greater accountability, flow in particular from the perceived greater influence and impact of transnational business, especially in countries with weak institutions. The diffuse discontent surrounding expectations and concerns about this perceived influence–accountability imbalance is only likely to grow over the next decade. Within the BHR field itself, some have asked whether the 2011 resolution delivered ‘consensus without content’.<sup>25</sup> Such sentiment, and state apathy since 2011, explains why discontent within the narrower ‘bubble’ of those working on BHR will also continue to fuel calls for more action. In some ways, this is because the discontent feeding much activity on BHR issues has a far longer pedigree than the Ruggie process; the rise of BHR symptomizes continued efforts to address the perceived governance and accountability gap.

Another underappreciated source of discontent may, in unexpected ways, drive greater BHR activity, certainty and clarity. That source is the business community itself, or part of it. One cannot assume that business will be passive or resistant to GPs-related regulatory activity. A tipping point may come (nationally or even globally) where influential business constituencies push for action simply to resolve the current uncertain and unpredictable regulatory and litigation landscape.<sup>26</sup> One argument supporting the recent French bill on due diligence (see section on Activity Within States, below) is that such regulation is not threatening, but rather offers greater legal predictability compared with the present ad hoc, case-by-case treatment of claims.<sup>27</sup> More research is needed on analysing which commercial incentives and forces will most likely shape BHR trends, if only to direct advocacy and assistance efforts more strategically.

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<sup>23</sup> See E/CN.4/2006/97, 22 February 2006, [9]–[19], [20]–[30], and Ruggie, J., *Just Business: Multinational Corporations and Human Rights* (Norton, New York, 2013), xxiii; Danielsen, D., ‘Corporate Power and Global Order’ in Orford, A., (ed.) *International Law and its Others* (Cambridge University Press, 2006), 85–99; Kinley, D. *Civilising Globalisation, Human Rights and the Global Economy* (Cambridge University Press, 2009).

<sup>24</sup> See, for example, Glasbeek, H., *Wealth by Stealth: Corporate Crime, Corporate Law, and the Perversion of Democracy* (Between the Lines, Toronto, 2002).

<sup>25</sup> De Schutter, O., ‘Foreword’ in Deva, S., and Bilchitz, D. (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press, 2013), xviii.

<sup>26</sup> Zerk remarks that the present remedies system is failing many companies, which operate in an uneven legal environment of considerable uncertainty: Zerk, J., ‘Corporate Liability for gross human rights abuses’ (UN Office of the High Commissioner for Human Rights OHCHR, Geneva, 2014), 7; this is implicit in some Ruggie reports: A/HRC/11/13, 22 April 2009, [66].

<sup>27</sup> Aba, E., ‘Opportunity for France to hold companies legally responsible for human rights abuses’, Business and Human Rights, 2015, <http://business-humanrights.org/en/opportunity-for-france-to-hold-companies-legally-responsible-for-human-rights-abuses-by-subsidiaries-abroad>.

## Activity Without States: Private Governance and BHR

This paper's main interest is governmental law-based activity. Yet over the next decade much of the most significant 'regulatory' activity for preventing adverse impacts will come from within the business sector. This is both inevitable and desirable, since business is obviously key to the 'regulatory ecosystem',<sup>28</sup> and has potentially greater resources, incentives, and opportunities to avoid adverse impacts. Yet, simultaneously, this is also problematic, because a comprehensive and just human rights system must necessarily be based on mandatory provisions grounded in public law.

### The promise of market forces and incentives

Of course, the sources of governance and regulatory influence in global society are increasingly diffuse, and not limited to public authorities.<sup>29</sup> The private sector may not call for mandatory legislation but has not been wholly passive on the 'governance gap'. Thus the gap is not a vacuum: no overarching global inclusive and robust scheme exists, but the gap is criss-crossed with somewhat experimental expressions of an emerging practice of largely voluntary global administration.<sup>30</sup> Many firms and industries have sought voluntarily to explore the parameters of their responsibility through various schemes, from internal self-regulatory undertakings to multi-stakeholder hybrid approaches with more mandatory elements. Arguably, BHR issues largely align with commercial risk-management and considerations of value-creation. Whether to pre-empt or anticipate regulation, respond to market or consumer expectations, or for other enlightened reasons, the trend of firms tracking and resolving adverse human rights impacts will solidify. Similar attention by the finance and insurance sectors will reinforce corporate trends.<sup>31</sup>

Various non-binding instruments and initiatives are hardly irrelevant to the interests of justice. They may have normative force, shaping behaviours and expectations. Indeed, sometimes the legal quality of norms and mechanisms may be fairly unimportant for compliance prospects.<sup>32</sup> 'Soft' provisions can operate like 'hard' provisions, for instance when they comprise the reason why project finance is extended or refused. The official French view on non-binding instruments is that states will rely on the norms they espouse, using various regulatory and policy means, to ensure that businesses comply 'as they would with any binding obligations'.<sup>33</sup>

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<sup>28</sup> Ruggie, J., 'Closing Plenary Remarks', 3rd UN Forum on Human Rights and Business, Geneva, 3 December 2014 (2014b), 2.

<sup>29</sup> See Braithwaite, J., and Drahos, B., *Global Business Regulation* (Oxford University Press, 2000); also Hall, R., and Biersteker, T., (eds) *The Emergence of Private Authority in Global Governance* (Cambridge University Press, 2002).

<sup>30</sup> A/HRC/4/35, 19 February 2007, [53]–[56] (Ruggie process).

<sup>31</sup> See for example Sullivan, R., and Hachez, N., 'Human Rights Norms for Business: the missing piece of the Ruggie jigsaw (institutional investors)' in Mares (ed.) 2012.

<sup>32</sup> Reinisch, A., 'The changing international legal framework' in Alston, P., (ed.) *Non-State Actors and Human Rights* (Oxford University Press 2005), 69. See discussion of plural sources of human rights normative influence in McCorquodale, R., 'Pluralism, global law and human rights: strengthening corporate accountability for human rights violations' (2013) 2(2) *Global Constitutionalism* 287.

<sup>33</sup> Ministry of Foreign Affairs and International Development, 2015.

## The limits of market-driven approaches

Whatever their promise, serious questions remain over how far market-based regulatory initiatives and incentives will go, and how significant they will prove in shaping behaviour or addressing claims. Even among pro-active firms fluent in GPs issues, considerable distance remains in fully integrating the agenda. Below these firms there is (as noted earlier) far less awareness or uptake on BHR issues. Thus faith in enlightened self-regulation is not necessarily warranted among the smaller enterprises that comprise most of the world's businesses. The scope for larger firms to influence this cohort through 'regulating' their supply-chain is limited. The pervasive 'free-rider' phenomenon – a corollary of the collective regulatory action problem among states – is often overstated in relation to social impact issues, but may continue to dissuade firms whose 'free-riding' competitors remain passive on human rights performance standards.<sup>34</sup> Alongside these practical considerations are more profound limits on seeing market-based activity as the main BHR vector. For some, the international human rights legal system is now more of a 'backdrop' for mechanisms on corporate impact, not 'the prism through which corporate accountability might be filtered'.<sup>35</sup> Yet this is precisely why others worry that the broader regulatory shift – from government to governance, from 'violation' to 'adverse impact'<sup>36</sup> – may undermine the longer-term effective protection of human rights as special claims with legally relevant consequences.

Human rights are not simply the 'arcane' province of a sub-group of international lawyers.<sup>37</sup> They have significance well beyond state-based legal protections; law and liability models may not be the 'preeminent and indispensable mechanisms' for advancing the BHR agenda.<sup>38</sup> The GPs expect states to use various policy and non-law tools to foster business respect for human rights.<sup>39</sup> Ruggie clearly opted for a less state-centred, networked governance approach, an 'unavoidably multifaceted treatment' of corporate accountability, and a model of 'strategically coherent distributed action', given that states are not the only entities that can abuse, prevent or remedy human rights.<sup>40</sup> Yet as Ruggie rightly repeated during his mandate, private governance, while both vital and inevitable, is not sufficient. The BHR agenda must ultimately be grounded in and licensed by the political public authority and regulatory legitimacy that only states have.

## 'Soft law' and voluntarism: the debate continues

Debate on the role of 'hard' binding law – the 'supreme polariser'<sup>41</sup> in debates over how the Ruggie process differed from previous approaches – will persist for years. The main question is not whether non-binding regimes shape corporate conduct, but whether their proliferation will preclude the emergence of any harder, binding legal framework and undermine efforts definitively to narrow the governance gap. On this argument, strategies of self-regulation tend to shift power to private actors

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<sup>34</sup> See for example, Muchlinski, P., 'International Business Regulation' in Campbell, T., and Miller, S., (eds) *Human Rights and the Responsibilities of Corporate and Public Sector Organisations* (Kluwer 2005), especially 90–91.

<sup>35</sup> Nolan, J., 'Refining the Rules of the Game: the corporate responsibility to respect human rights' (2014) 30(78) *Utrecht Journal of International and European Law* 7, 8.

<sup>36</sup> See Nolan, J., 'The corporate responsibility to respect human rights: soft law, or not law?', in Deva and Bilchitz, 2013, 141.

<sup>37</sup> Reinisch 2005, 73.

<sup>38</sup> Mares 2012. See, for example, O'Brien, C., *Human rights and Transnational Corporations: a multi-level governance approach*, European University Institute, Florence, 2009.

<sup>39</sup> See too Lagoutte, S., 'The State duty to protect against business-related human rights abuses – unpacking pillar 1 and 3 of the UN Guiding Principles' (Danish Institute for Human Rights, 2014), 11, <http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf>.

<sup>40</sup> Mares 2012, 2, 41 (Mares' latter reference quotes John Ruggie).

<sup>41</sup> *Ibid.*

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from public regulators without also creating accountability.<sup>42</sup> Rather than preparing the way for future public regulation, it retards that process,<sup>43</sup> so that the appearance of regulation may be worse than no regulation at all.<sup>44</sup>

Excessive faith in law's transformative and emancipatory role should be avoided. The focus should be on the ends and not the means, the broader, engaging process of seeking continuous improvement in business practices, not simply narrow approaches framed around achieving or ensuring procedural 'compliance'.

This 'freezing' or 'displacement' argument must be taken seriously.<sup>45</sup> Yet business self-regulation is not new. Indeed, historically much public regulation has involved the state's codifying preceding industry self-regulation.<sup>46</sup> Private governance contributions are partial, incomplete and fallible, but so is state regulation.<sup>47</sup> Voluntary and hybrid schemes do not preclude mandatory options or further regulation. Self-regulation can create pathways and institutional habits for later binding rules with better compliance levels. Legislating is not necessarily more important or effective than persuading businesses in ways that engage their own interests. Top-down systems are not the only ones that count or work, and legislation divorced from business cultures risks irrelevance. Compliance outcomes are seldom simply the result of available sources of binding law.<sup>48</sup> Excessive faith in law's transformative and emancipatory role should be avoided.<sup>49</sup> The focus should be on the ends and not the means, the broader, engaging process of seeking continuous improvement in business practices, not simply narrow approaches framed around achieving or ensuring procedural 'compliance'.<sup>50</sup>

Across the BHR agenda (and international law), tension exists between seeking neatness and coherence, and being comfortable with open-endedness, plurality and innovation. Many elements of an overall strategy lie beyond the legal sphere, and would do even if we had some fully developed binding treaty. Some experts misconceive the GPs' nature and intent.<sup>51</sup> Ruggie's reliance on broader normative expectations and responsibilities rather than precise legal duties on corporations in international law came not only through his own professional lens of 'networked global governance'.<sup>52</sup> It also reflected a frank acknowledgment of the limited development, objectively, of international law.

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<sup>42</sup> A contradiction may exist among those who want corporations to have less influence, yet wish them to have greater status as subjects of international law. Ruggie noted this, in effect, at various points in his mandate: E/CN.4/2006/97, [68]; A/HRC/8/5, 7 April 2008, [69]; A/HRC/11/13, 2009, [65].

<sup>43</sup> Le Billon, P., 'Getting it Done: Instruments of Enforcement' in Bannon, I., and Collier, P., (eds) *Natural Resources and Violent Conflict: Options and Actions* (World Bank, Washington DC, 2003), 258.

<sup>44</sup> See for instance Chesterman, S. 'The Turn to Ethics: Disinvestment from MNCs for Human Rights Violations' IILJ Working Paper 2008/2 (Global Administrative Law Series) (NYU, New York, 2008), 20.

<sup>45</sup> Ford 2015b, Chapter 6.2.

<sup>46</sup> Braithwaite and Drahos 2000, especially 484.

<sup>47</sup> Parker, C., *The Open Corporation: effective self-regulation and democracy* (Cambridge University Press, 2002), 299.

<sup>48</sup> Haas, P. et al., *Institutions for the Earth* (MIT Press, Cambridge, 1993), 17; generally Chayes, A.J., and Chayes, A.H., *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, 1998); also Shelton, D., *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (Oxford University Press, New York, 2000). See too A/HRC/4/35, [62]. Typically the problem surrounding business and human rights is not lack of available laws, but failure to enforce existing ones: A/HRC/17/31, 21 March 2011, Annex, Part I, [3].

<sup>49</sup> Bowden, B., Charlesworth, H., and Farrall, J. (eds), *The Role of International Law in Building Democracy and Justice after Conflict: Great Expectations* (Cambridge University Press, 2009).

<sup>50</sup> Parker 2002, 245.

<sup>51</sup> For example, Nolan describes the GPs as 'the latest in a line of soft regulatory techniques', but it is guidance, based on the limited hardening of norms, and hardly just promotes voluntary measures: Nolan 2014, 9, 12.

<sup>52</sup> Cf. Nolan 2014.

At some levels, the concerns and interests of responsible, future-minded businesses and governments might align. This militates against conceiving of regulation as consisting only of control.<sup>53</sup> Distrust, the desire for rigour and the comforting reassurance of ‘harder’ regulation can be misleading. It can send the regulation of business responsibility down narrow corridors of lowest-denominator compliance. It can preclude a principled but pragmatic problem-solving approach that neither sacrifices public interests to corporate ones, nor discourages legitimate responsive ways in which businesses might adjust their practices.

Nevertheless, there remains a caveat on embracing the contributions of business sources of governance and normativity, since (as noted) such initiatives must have their grounding, orientation and parameters prescribed by public law. Writing a decade ago, Reinisch wondered whether the tendency to see the legal quality of norms as less relevant might ‘ultimately backfire’ by ‘weakening the obligatory character of human rights law’.<sup>54</sup> This paper returns to such warnings when considering what issues fall within ‘BHR’.

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<sup>53</sup> Ford 2015b, 22.

<sup>54</sup> Reinisch 2005, 69.

## Activity Within States: Stasis and Shift in International Law

More research will be needed in future to survey state activities of a legislative or proto-legislative nature in this area. Developments at state level are relevant for their own sake, especially in the larger or more influential economies, as well as for what they might tell us about any emergence or convergence of state practice theoretically capable of informing the evolving content of applicable international law duties.

### The nature and extent of state duties

#### Recapping the nature of state duties

Given the claims being advanced in this field, it is worth taking stock of the prevailing situation in international law.<sup>55</sup> States generally have ‘negative’ obligations (a duty to refrain from acting) that extend to liability for acts by businesses that are entities or agents owned or controlled by the state, or the actions of which are otherwise attributable to the state.<sup>56</sup> States also have a ‘positive’ duty (a duty to act) to take reasonable steps to protect rights-holders from violations from private third parties, including businesses. In both situations the state also has a duty to provide access to effective forums to address claims of rights abuse.<sup>57</sup>

The 2008 framework approved by UN member states in the HRC is based on the ‘differentiated but complementary’ human rights responsibilities:<sup>58</sup> the state legal duty to protect against abuses by businesses; the corporate responsibility to respect human rights by acting with due diligence to avoid infringements; and greater remedial access by victims of business infringements.<sup>59</sup> It does not limit the range of rights involved. The extent or precise content of states’ legal duties in relation to human rights violations by business is unresolved and subject to debate, but there is less scope for claims that business entities can be directly liable by holding international legal duties.<sup>60</sup> States indisputably have a duty to protect those within their jurisdiction against rights abuses by third parties including business actors.<sup>61</sup> They may sometimes exercise extraterritorial jurisdiction over human rights violations by business.<sup>62</sup> However, as a general proposition they are not currently required to do so.<sup>63</sup>

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<sup>55</sup> For a good recent overview see Lagoutte 2014.

<sup>56</sup> ‘Articles on the Responsibility of States for Internationally Wrongful Acts’ (International Law Commission, A/Res/56/83, 12 December 2001 (28 January 2002), Chapter II, especially Art. 8.

<sup>57</sup> Crawford, J., *Brownlie’s Principles of Public International Law* 8th ed. (Oxford University Press, 2014), Part II.

<sup>58</sup> A/HRC/11/13, [3]–[5].

<sup>59</sup> A/HRC/17/31, Annex, Part III (remedial aspects).

<sup>60</sup> A/HRC/4/35, [33]. Scholars generally overreach: see in particular Deva and Bilchitz 2013.

<sup>61</sup> A/HRC/17/31, Annex, Part I, [1].

<sup>62</sup> A/HRC/17/31, Annex, Part I, [2]. Such regulation is not clearly prohibited where states regulate reasonably from a recognized jurisdictional basis; see too A/HRC/8/5, 7 April 2008, [19]; A/HRC/14/27, [46]–[50].

<sup>63</sup> A/HRC/4/35, [15]; A/HRC/8/5, [19]. There is some divergence of academic opinion on this issue; see too Section 3.3.

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## Corporations as subjects of international law

The previous section noted that, in many respects, in promoting ‘compliant’ conduct, it may be immaterial whether any binding norm applies to a firm’s conduct. However, the ‘governance gap’ will continue to prompt calls for businesses to be considered directly liable in international law. There is some flux concerning the precise status of corporations as capable of bearing human rights duties under international law, reflecting shifts in international law and the society it serves. In principle, states remain both the ‘authors’ and principal ‘subjects’ of international law, which has yet to adapt to the noticeable power shift towards non-state bodies.<sup>64</sup> It is not obvious that the status of corporations in international law will change over the next decade – and perhaps only states can decide whether and in what ways it might.

Non-state actors (such as indigenous peoples) can be ‘general’ rights-bearers, and, along with concepts of corporate complicity in international crimes,<sup>65</sup> the Ruggie process noted some ‘fluidity’ on the idea that corporations can bear some duties as subjects of international law.<sup>66</sup> Underlying Ruggie’s identification of a business responsibility to respect human rights is a ‘transnational normative regime’ that has acquired ‘near universal’ recognition.<sup>67</sup> It is not entirely unfair to characterize Ruggie’s ‘corporate responsibility to respect human rights’ – short of an international legal duty – as an expedient ‘legal fudge’.<sup>68</sup> However, this regime can have normative consequences without constituting an international legal duty. International law has not yet recognized general duties on non-state actors except in some specialized fields of international humanitarian and criminal law, and sometimes in international economic and environmental law.<sup>69</sup> The subject/object distinction in international law may at times seem overblown, but there is no significant support for claims that international human rights law involves direct legal duties for businesses.<sup>70</sup> Academics have offered little evidence that this position has changed in the decade since Ruggie was mandated.<sup>71</sup>

**It is not obvious that the status of corporations in international law will change over the next decade – and perhaps only states can decide whether and in what ways it might.**

State practice may even be against recognizing corporations as subjects: notably, states specifically rejected extending the Rome Statute of the International Criminal Court to corporations.<sup>72</sup> Those observers who assert direct binding international law duties on corporations in this area seldom advance forensic legal arguments, examining what states consider the position, to support that case. This approach seems driven mainly by academic frustration with states’ inability or unwillingness to

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<sup>64</sup> Danielsen 2006; Zerk, J., *Multinationals and Corporate Social Responsibility* (Cambridge University Press, 2006), 76–83. It is easy to exaggerate the novelty of this shift: Ford 2015b, 22.

<sup>65</sup> See A/HRC/4/35, [21]–[32]. Discussion of the growing literature on this is beyond the scope of this paper.

<sup>66</sup> A/HRC/4/35, [20].

<sup>67</sup> A/HRC/11/13, [46]–[47]; A/HRC/14/27, 9 April 2010, [55]; A/HRC/17/31, Annex, Part II, [17]–[21]. Business may need to consider additional standards in conflict-affected areas or special standards for vulnerable groups such as indigenous people: A/HRC/14/27, [61].

<sup>68</sup> See recently, for example, O’Brien, C., and Dhanarajan, S., ‘The Corporate Responsibility to Respect Human Rights: a Status Review’ Working Paper 2015/05 (School of Law, National University of Singapore, May 2015).

<sup>69</sup> Crawford 2014.

<sup>70</sup> E/CN.4/2006/97, [64]; later A/HRC/17/31, Annex, Part II, [11]–[15], [16]–[24].

<sup>71</sup> Lagoutte notes (2014, 43–4), that in one sense only the state can commit a human rights violation: actions from businesses only become violations by reference to the state’s duty. Some instruments reflect a growing focus on juristic persons, such as the Optional Protocol on Child Pornography of the UN Convention on the Rights of the Child.

<sup>72</sup> Negotiations for the *Rome Statute of the International Criminal Court* limited its jurisdiction to natural persons (Art. 21(1)), rejecting a proposal that legal persons be included. This was partly because of technical legal obstacles in some states to ascribing criminal duties to corporations. In principle states can legislate to prosecute their corporate nationals for extraterritorial conflict-related criminal activity.

regulate corporate conduct impacting human rights.<sup>73</sup> For instance, some academic critiques of the GPs' normative foundations attempt to erect an international law duty directly binding corporations on human rights abuses.<sup>74</sup> These advance an argument that because states are obliged to ensure that third parties within their jurisdiction do not violate human rights, it must follow that those third parties are also themselves bound by an international law duty not to violate those rights (otherwise there would be no reason for the state to enforce its own duty). Such strained reasoning is very unlikely to be helpful in grounding any credible concept of direct duties.<sup>75</sup> Nothing in international law would prevent non-state actors being liable for human rights violations to other non-state actors, but only if states generally said so.<sup>76</sup> Thus while states can give their corporations human rights duties directly, there is enormous diversity in national laws on the liability of corporations, little activity in making corporations directly liable for state-like duties, and certainly no trend to speak of.<sup>77</sup>

### Developments in state regulation: due diligence trends

A far more significant trend over the next decade is evolving state practice on human rights due diligence by (or in respect of) business actors in relation to human rights impacts. There is no doubt that many firms and funds, not just publicly listed Western corporations, are giving greater attention to their human rights profile, risks or impact, and to tracking and sometimes reporting on such issues.<sup>78</sup> In some places, notably within the EU, these procedural, preventive activities are increasingly becoming mandatory.<sup>79</sup> For instance, jurisdictions such as Denmark and Norway have (since 2011) enacted laws in effect requiring reporting on human rights impacts by certain businesses.<sup>80</sup> Institutional investors in the United Kingdom are required to declare how social, environmental and ethical considerations are factored into investment screening and management.<sup>81</sup> In 2010 the State of California adopted a law requiring certain levels of retailers and manufacturers doing business in California to disclose what efforts they have taken to eradicate slavery and human trafficking from their direct supply chains.<sup>82</sup> Since March 2015 UK law has obliged firms over a certain size doing business there to publish an annual statement of steps they may have taken to ensure that slavery or human trafficking are not occurring in any aspect of their business.<sup>83</sup>

Some argue that human rights due diligence (HRDD) may be shifting from a voluntary practice into a potential normative standard.<sup>84</sup> A more productive line of enquiry is whether the content of the state's general duty to protect is developing to include a duty to require business actors, domiciled within the jurisdiction, to exercise due diligence on human rights impacts, potentially including those

<sup>73</sup> A clear example is Deva and Bilchitz 2013.

<sup>74</sup> Bilchitz, D., 'A chasm between 'is' and 'ought': a critique of the normative foundations of the Ruggie Framework and GPs' in Deva and Bilchitz 2013, especially 111–12.

<sup>75</sup> Some authors propose a concept of corporations 'sharing' the state's international law duties when investing firms operate in weak states with reasonable risks of the investment resulting in (some threshold of?) human rights impacts: Keenan, P., and Ochoa, C., 'The Human Rights Potential of Sovereign Wealth Funds', (2009) 40 *Georgetown Journal of International Law* 1151. This has received no traction.

<sup>76</sup> See generally Reinisch 2005.

<sup>77</sup> See for example (the Ruggie process) A/HRC/4/35, [34], [41], and A/HRC/4/35/Add.3.

<sup>78</sup> For a sense of the extent of this shift, it is useful to go back even five years (see, for example, 'Trends in corporate human rights reporting' GRI, 2009) and compare this with the situation today: 'From Stockholder to Stakeholder' (The Smith School, Oxford, March 2015).

<sup>79</sup> Directive A7-0006/52 (4 August 2014) 2014 of the European Council, amending Directive 2013/34/EU on disclosure of non-financial information by certain large enterprises.

<sup>80</sup> See generally O'Brien and Dhanarajan 2015, 15–16.

<sup>81</sup> *Occupational Pension Schemes (Investment, and Assignment, Forfeiture, Bankruptcy etc.) Amendment Regulations* 1999, [11A], cited in Mares 2012.

<sup>82</sup> *Transparency in Supply Chains Act* 2010 (CA). For one overview see Shift's Corporate Law project (2013 update) cited earlier.

<sup>83</sup> *Modern Slavery Act of 26 March 2015*, s. 54, relating to slavery, servitude, forced labour or human trafficking.

<sup>84</sup> Martin-Ortega, O., (2014) 'Human rights due diligence for corporations: from voluntary standards to hard law at last?', *Netherlands Quarterly of Human Rights*, (2014), 32 (1).

occurring in another state.<sup>85</sup> Even if states are legislating for due diligence requirements, do they consider themselves obliged to do so? For example, French official language seems to suggest a clear trend, given its view that international practice ‘now requires businesses to evaluate and manage their impacts on society’.<sup>86</sup> Yet there is a need for closer forensic work on what states consider their obligations to be, in particular what use is or must be made of the information generated by due diligence exercises.

### Emerging trend? French example

Recent developments in France illustrate what may become a wider trend, at least in EU countries and especially if eventually taken up at the European Commission. In March 2015 France’s lower chamber approved a revised 2013 bill on the liability of French firms for human rights violations committed abroad.<sup>87</sup> The Senate has yet to vote (as of September 2015). The bill would require large French-headquartered firms (with more than 5,000 employees in France and 10,000 globally) to publish a *plan de vigilance* (due diligence framework) on how their activities and suppliers abroad will respect human rights, environmental and anti-corruption norms. Non-compliance would result in a civil fine of up to €10 million. The revised bill dropped the ideas of criminal liability and a reverse onus on defendant firms. Civil society largely welcomed the vote of the lower chamber as an initial step, while business sectors have argued either that the bill will undermine French competitiveness or that it is unnecessary since France’s largest firms already undertake such plans.<sup>88</sup>

### Emerging trend? Swiss developments

In late 2014 the Swiss Council of States endorsed a move requiring the Federal Council to produce a report considering what measures would be suitable for Switzerland to enable effective access to remedy for claims against home-state companies of human rights violations committed abroad.<sup>89</sup> Matters have proceeded further since then. In March 2015 the lower chamber of the Swiss parliament voted fairly narrowly (95–86) against a motion to introduce mandatory human rights (and environmental) due diligence for Swiss corporations.<sup>90</sup> There will likely be further attempts to enact such legislation, which might well pass with amendments acceptable to Swiss business lobbies.

### United Kingdom: trend neutral?

By contrast, the United Kingdom exemplifies an EU member state with a strong NAP<sup>91</sup> that nevertheless does not appear likely to see any parliamentary move in the foreseeable future in respect of general HRDD. The HRDD obligations on firms in the new *Slavery Act* are not necessarily portents of or precedents for more general obligations beyond analogous niche issues on serious violations

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<sup>85</sup> The considerable variation in how firms approach HRDD is important since discussion of the content of the state’s duty tends to assume consensus exists on what ‘due diligence’ entails and what counts as ‘compliance’: ‘The state of play of human rights due diligence 2010: anticipating the next five years’ (IHRB, London, 2011).

<sup>86</sup> Ministry of Foreign Affairs and International Development, 2015.

<sup>87</sup> Bill 1524, 6 November 2013.

<sup>88</sup> The author is grateful to Elodie Aba for her comment.

<sup>89</sup> Postulate 14.3663, Bern, 26 November 2014.

<sup>90</sup> Swiss Coalition for Corporate Justice, <http://www.corporatejustice.ch/en/>.

<sup>91</sup> *Good Business: implementing the Guiding Principles on Business and Human Rights* (London, 2013).

capable of attracting sustained support.<sup>92</sup> UK government advisers appear to maintain a ‘watching brief’ on due diligence, liability and remedial avenues, without proposing legislation as such. This is not necessarily based on inertia; it may reflect a considered view that UK domestic law is sufficiently developed, and that its courts already provide a forum for remedies (tort actions).<sup>93</sup> The UK may exemplify a jurisdiction that is unlikely to move further without, for example, European consensus and directives. Any such activity would not necessarily reflect a sense of obligation in international law beyond the EU.

### Japan: a contrary example

The inactivity apparent in many important jurisdictions beyond Europe underlies the difficulty in describing a more general trend in state regulation of corporate HRDD. For example, in Japan the foreign ministry (not the commerce ministry) leads on BHR issues and the GPs, which have very little traction elsewhere in government or in business. No civil society groups are engaged in this field, and the idea of legislating on BHR issues faces strong resistance from the commerce ministry. The agenda lacks any champion within government, and the GPs’ thrust is seen as contrary to current policies of reducing the regulatory burden on business.<sup>94</sup> This non-practice by one of the world’s leading economies is not insignificant to trend analysis.

### Other legal developments

There are of course other ways in which non-legislative HRDD requirements might arise, such as greater incorporation of human rights provisions in private procurement, contracting, credit extension and insurance practices. In many OECD countries and international organizations, HRDD requirements are also likely to be further integrated in public tenders and contracts for goods and services. These patterns are already fairly well established in some jurisdictions, for example in US federal government procurement regulations requiring human rights undertakings of various sorts (although practice does vary). Alongside trends in the private commercial and institutional finance sectors, HRDD and other concepts will also assume greater significance in the more important state export credits and risk guarantee agencies.

Again, these legal developments might prove significant for preventing adverse human rights impacts without necessarily adding to any emergence or crystallization of duties in international law. The same goes for the potential use that litigants might begin to make of legal avenues such as consumer protection laws against firms making ‘misleading and deceptive’ statements about their goods or services. In France some unsuccessful claims have been made to show that firms’ public statements on human rights were inconsistent with their conduct or impact in fact.<sup>95</sup> Overall, such legal developments would reinforce the incentive for businesses to seek regulatory certainty in order avoid ad hoc, unpredictable legal activity.

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<sup>92</sup> See above on the Act. In a July 2015 note, the BHR consultancy Shift argues that the Act does not demand more than what is already expected of firms in terms of their GPs due diligence responsibilities: see [http://shiftproject.org/sites/default/files/Shift\\_Mapping%20Modern%20Slavery%20Act%20Against%20UNGPs%20Note\\_July2015.pdf](http://shiftproject.org/sites/default/files/Shift_Mapping%20Modern%20Slavery%20Act%20Against%20UNGPs%20Note_July2015.pdf).

<sup>93</sup> For one critical overview, see Meeran, R., ‘Access to remedy: the UK experience of tort litigation for human rights violations’ in Deva and Bilchitz 2013.

<sup>94</sup> Expert input, Chatham House roundtable 17 March 2015.

<sup>95</sup> For example, in February 2013 a complaint was brought against Samsung (France) alleging that the company’s practice towards workers did not correspond to its stated code of conduct. In July 2013 a prosecutor agreed to open an investigation, which was later dismissed: see ABA 2015.

## Looking ahead

As far as mandatory public law is concerned, legislative measures at national level will almost certainly remain far more significant than any developments at the HRC in Geneva. As noted, over time it may be business that pushes for legislative action, for example on HRDD, if only to resolve uncertainty. The evolution of corporate governance, along with growing market and consumer requirements on non-financial due diligence, disclosure and reporting, will continue to give HRDD issues relevance in many OECD countries at least.<sup>96</sup> The field will not advance uniformly. Uneven legislative interventions may affect particular sectors, issues or countries that happen to attract sufficient political attention (such as US human rights reporting requirements for firms operating in Myanmar). One is likely to see more attempts of the Swiss and French variety, especially in relation to high-risk sectors, activity or locations. These will focus on *preventive* approaches that do not necessarily result in opening up greater remedial avenues for claimants. Indeed it is difficult to gauge the significance of greater HRDD attention for the trajectory of the wider BHR project. A focus on process-oriented regulations runs the risk of symbolic or ceremonial conformity,<sup>97</sup> what has been identified as hollow and unproductive ‘ritualism’ in human rights compliance.<sup>98</sup>

## The extra-territoriality debate

It is likely that support will slowly continue to grow, at least in Europe, towards the existence of a clearer state duty, in international law, to protect against corporations within their jurisdiction committing human rights violations abroad. The most likely initial content of that state duty is one to exercise and/or require due diligence in respect of a corporate national’s human rights impacts abroad. However, it would seem premature to assert that this duty already exists. Moreover, it is difficult to identify with any precision the content of such a duty, especially where the duty is asserted in relation to economic, social and cultural (ESC) rights.

Those who find evidence of an international legal state duty to regulate firms’ human rights impacts extraterritorially rely (in the main) on General Comments from treaty bodies, including the Committee for ESC Rights’ ‘Statement on the Obligations’ regarding the corporate sector and ESC rights.<sup>99</sup> These observers tend to depend heavily on, and generalize from, one comment in particular: this maintains that states should, where capable of such influence, protect the right to health from harm by third parties in other countries.<sup>100</sup> Some leading observers at first refrain from overstating the position, noting that states *may* require the exercise of due diligence measures to influence human rights conduct outside their territory.<sup>101</sup> However, they go further, also drawing on the treaty body pronouncements.<sup>102</sup> They argue that well-established international case-law

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<sup>96</sup> A/HRC/17/31/Add.2; see also Mares 2012.

<sup>97</sup> See the editorial essay in Mares 2012.

<sup>98</sup> Charlesworth, H., and Larking, E., (eds) *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (Cambridge University Press, 2015).

<sup>99</sup> 20 May 2011 (12 July 2011), E/C.12/2011/1, [6]. This provides that states party to the International Covenant on ESC Rights ‘should’ take steps to ‘prevent human rights contraventions abroad by corporations that have their main seat under their jurisdiction, without infringing the sovereignty or diminishing the obligations of host States’.

<sup>100</sup> The Committee on ESC Rights in General Comment 14 (11 August 2000), E/C.12/2000/4, [39] provided that states ‘have to’ respect the right to health in other countries, as well as protect the right by preventing third parties from violating the right in other countries if the state is able to influence those third parties by legal or political means. See too General Comment 15 (26 November 2002), E/C.12/2002/11, [31]–[32] (on the right to water); General Comment 19 (2007) on the Right to Social Security, [53]–[54], although these refrain from the ‘have to’ or ‘must’ formulae and use ‘should’ to describe the relevant state action. These comments reference only the views of other treaty bodies rather than any actual state practice with relevant normative qualities.

<sup>101</sup> De Schutter, O., et al., *Human Rights Due Diligence: the role of states* (ICAR, 2012), 51. See too Hakimi, M., ‘State Bystander Responsibility’, (2010) 21(2) *European Journal of International Law* 341.

<sup>102</sup> De Schutter 2013, 85.

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on the duties that states owe each other to exercise due diligence to prevent international legal harms also supports the existence of a duty to regulate human rights harms in other states by non-state actors (businesses) present within their state.<sup>103</sup>

Perhaps outside of gross abuses amounting to international crimes, no clearer obligation has yet crystallized for states to control or remedy the human rights violations of private actors abroad.

It is far from clear that these attempted case-law analogies work – from duties owed to other states to avoid transboundary environmental harm, to duties to individual rights-holders to avoid business-related human rights violations. Moreover, proponents of this duty offer little or no evidence that states generally today perceive themselves as being under any such obligation.<sup>104</sup> It is not enough to show that many states happen to regulate various corporate activities extraterritorially using a ‘due diligence’ device. Those asserting the existence of the duty in question have generally not attempted forensically to track states’ formal explanations of any such assertions of jurisdiction in relation to corporations’ human rights impacts abroad. Beyond treaty body comments they have generally offered no evidence from the statements and practice of states that states consider themselves *obliged* to do so.<sup>105</sup>

Thus whatever the *Maastricht Principles* provide,<sup>106</sup> and at least in relation to ESC rights, there is insufficient support for the idea that the traditional international law duty of due diligence (that states should take steps to ensure that their territory is not used in a manner that harms the rights of other states) extends to a general duty to regulate human rights-impairing corporate activity abroad by firms within a state’s jurisdiction. The pronouncements of treaty bodies carry significant weight. The trend in most advanced economies is certainly towards encouraging if not yet requiring human rights due diligence by firms abroad.<sup>107</sup> Nevertheless, the highest level at which it can be stated is that there is an ‘emerging argument’ that a state obligation to prevent and punish corporate human rights violations committed abroad may exist where the state is capable of preventing such violations by controlling the corporate actors. Perhaps outside of gross abuses amounting to international crimes, no clearer obligation has yet crystallized for states to control or remedy the human rights violations of private actors abroad.<sup>108</sup>

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<sup>103</sup> Ibid, n. 222 and 223, citing *United States v Canada* (the ‘Trail Smelter’ case) 3 RIAA 1905 (1941) and *United Kingdom v Albania* (the ‘Corfu Channel’ case), 1949 ICJ 4. In support of their claim for such a duty, others simply reproduce (at 16, n. 24) footnote 224 from De Schutter et al. 2012: Skinner, G. et al., ‘The Third Pillar: access to judicial remedies for human rights violations by transnational business’ (British Institute of International and Comparative Law, London, 2013). No evidence is offered that any home state sees a duty of this kind in relation to businesses abroad and their impact in host states on bearers of human rights. Likewise, Nolan 2014 overreaches.

<sup>104</sup> Bartels also sees the position as ‘at best inconclusive’ and doubts that any such duty exists: Bartels, L., ‘A model human rights clause for the EU’s international trade agreements’ (Deutsches Institut für Menschenrechte, Berlin, 2014, 17. For one contribution on the potential extraterritorial application of ESC rights, see Langford, M., et al. *Global Justice, State Duties: the extra-territorial scope of ESC duties in international law* (Cambridge University Press, 2013). The authors acknowledge, somewhat reluctantly, that there is no ‘visible global jurisprudential practice’ in this area and the volume speculates on whether, when and how the law might ‘catch up’.

<sup>105</sup> For one recent survey of practice, see ‘Roles and Responsibilities of Interested States’, OHCHR Working Paper 2 (Geneva, April 2015), <http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StateamicusATS-cases.pdf>; A/HRC/29/39 (7 May 2015), Part III.

<sup>106</sup> The Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (<http://www.etoconsortium.org/en/library/maastricht-principles/>) are not evidence of state practice and were agreed by certain independent experts on 29 February 2012. They declare that all states must take necessary measures to ensure that non-state actors that they are in a position to regulate do not nullify or impair the enjoyment of ESC rights. This does not constitute or reflect general international law.

<sup>107</sup> Some may argue that the ‘responsible supply chains’ section of the recent G7 Leaders’ Declaration (Schloss Elmau, 8 June 2015, <https://www.whitehouse.gov/the-press-office/2015/06/08/g-7-leaders-declaration>) has relevance to the emerging international legal position. The Declaration ‘urges private sector implementation’ of HRDD ‘in line with’ the GPs.

<sup>108</sup> De Schutter, O., *International Human Rights Law* (Cambridge University Press, 2010), 162. This view seems contrary to De Schutter’s views expressed elsewhere (see above), but nothing in the book’s 2014 second edition suggests that this assessment should differ.

As has been widely noted,<sup>109</sup> the wording of GP 2 is qualified. It does not require that states ensure that businesses are bound, only advising states that they should set out clearly the expectation that all business enterprises over which they have jurisdiction should respect human rights. Criticism of the GPs as rather undemanding is in a sense misconceived:<sup>110</sup> the GPs could not state the international legal consensus any higher than it actually is.<sup>111</sup> The commentaries of various treaty bodies reflect a clear trend towards a more onerous content of the state's duty, but given state practice and the unanimous state adoption of the GPs formula, these commentaries alone cannot support the significance placed on them by many scholars.

### Assessing trends on access to remedy

A recent UN-sponsored study assessing domestic law remedies for business-related human rights violations notes that these are unevenly distributed, 'patchy, unpredictable, often ineffective and fragile'; even in relation to gross human rights abuses, many claimants lack 'realistic prospects for legal redress' at local level, while there is considerable technical uncertainty on the scope and content of key liability concepts such as complicity; this unevenness of remedial options and conceptual uncertainty is replicated at the transnational and international levels, for example in terms of the respective roles of home and host states.<sup>112</sup>

Another recent report has grouped 10 of the major legal and practical barriers to transnational remedy for claims of corporate human rights violations: legal problems with bringing claims in a home state, the *forum non conveniens* doctrine (outside of the EU), applicable law problems, legal issues around corporate liability and corporate structure, evidential problems typically experienced by claimants, time limitations, immunities and other constraints, the reach and enforcement of remedies, and the cost of litigation.<sup>113</sup> These make sobering reading in terms of trends in opening access to legal remedy in this field.

Trends are diverging on transnational tort claims for human rights allegations. It is harder for EU member state courts to decline jurisdiction over EU-domiciled firms.<sup>114</sup> By contrast, in US federal courts (which were for years a focus for attempted transnational torts-based human rights claims) the jurisdictional scope for hearing claims is narrower and requirements are stricter for identifying a class for class actions. On jurisdiction this is since a 2013 Supreme Court ruling on a 2002 claim by Nigerian plaintiffs alleging that Shell's non-US corporate elements aided Nigerian government

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<sup>109</sup> See recently for example Lagoutte 2014, 22.

<sup>110</sup> Knox, J., 'The Ruggie Rules: applying human rights law to corporations' in Mares 2012, which is a more accurate overview than those in Deva and Bilchitz 2013, Part III. The effect of the GPs' special treatment of conflict-affected areas may be that states may in future be held to a more onerous duty to regulate activity, within their jurisdiction, in conflict areas abroad, and in relation to business involvement in gross human rights abuses.

<sup>111</sup> It is important to acknowledge that the analysis of state practice underling Ruggie's 2008 Framework, to which the GPs relate, is now over eight years old: A/HRC/4/35/Add.1, 2007.

<sup>112</sup> Zerk, J., 'Corporate Liability for gross human rights abuses' (OHCHR, Geneva, 2014), 7, 9, and 109. The most recent 'Progress Report on Legal Options and Practical Measures to Improve Access to Remedy for Victims of Business-related Human Rights Abuse' was presented to the HRC on 7 May 2015 (A/HRC/29/39) ahead of the HRC's 29th Session.

<sup>113</sup> Skinner et al. 2013. There may be more scope for non-judicial and arbitral avenues of remedy.

<sup>114</sup> As described in both de Schutter et al. (2012) and Skinner et al. (2013), the 'Brussels I' Regulation (European Council Regulation 44/2001) requires EU member state courts to receive civil cases filed against domiciled defendants, as does Swiss law. There is no requirement in relation to non-domiciled firms.

human rights violations.<sup>115</sup> The most likely scenario is that some avenues to accessing remedy will open up, but some will become more constrained, with an uncertain net effect for remedies globally.<sup>116</sup>

The range and depth of barriers to access to justice make it seem unlikely that there will be as much progress on resolving remedial problems as there might be, for instance, on ‘Pillar 1’ preventive measures such as HRDD. There does not seem to be the same sense of momentum on ‘Pillar 3’ remedial duties. While GP 25 reflects the existing international law duty to provide adequate remedy, GP 26 is framed in the negative: states must ensure only that they do not erect barriers to legitimate cases being brought before their courts. Yet as one of the 2014 HRC resolutions in Geneva showed, the momentum in the HRC and related bodies is towards improving access to remedy at a domestic level.<sup>117</sup> Nevertheless, the UN-sponsored report referred to above concluded that even for gross business-related human rights abuses, progress in increasing remedial opportunities for claimants will almost certainly involve only incremental steps, and not any giant leaps.<sup>118</sup>

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<sup>115</sup> *Kiobel vs Royal Dutch Shell* 569 US 2013, 13 April 2013. The majority held that a presumption against the extraterritorial applicability of statutes can only be displaced where the conduct does ‘touch and concern’ US territory with ‘sufficient force’. Supporting judgments held that such jurisdictional claims will be limited by applying standard checks (such as *forum non conveniens*) not by operation of a presumption.

<sup>116</sup> There is little utility in discussing, as some have, the remote prospects for some sort of specialist international court for businesses and human rights.

<sup>117</sup> See for instance OHCHR’s 2015–16 project on access to remedy: <http://business-humanrights.org/en/ohchr-launches-accountability-and-remedy-project>

<sup>118</sup> Zerk, J., ‘Corporate Liability for gross human rights abuses’ (OHCHR, Geneva, 2014), 114.

## Activity Between States: International Regulation?

Developments at intergovernmental levels are significant in their own right, in terms of how the international human rights system evolves to deal with the challenge of the ‘governance gap’. They are also significant for their possible effect in motivating and informing the steps that states, businesses and others take at many levels to address rights impacts. This is the case even though a major theme in watching future BHR trends is the extent to which activities to promote the GPs (or other parts of the agenda) might become decoupled from – and not dependent upon – developments at a formal intergovernmental level.

### Geneva bodies and the ‘treaty path’

A recent Chatham House paper considered the challenges that arose, by 2014, to the consensus achieved in 2011 in the HRC.<sup>119</sup> Rather than narrate those events, the following sub-sections reflect briefly on some aspects of Geneva-level activity going forward.

### Merits, prospects and drivers of the ‘treaty path’

The GPs process had resulted in consensus among states (and, for the most part, transnational civil society) in mid-2011 that the search for a multilateral binding treaty in relation to corporations and human rights (the ‘treaty path’) would be put aside. This was to ensure a focus on promoting national-level awareness and uptake of the 2008 ‘respect, protect, remedy’ framework, to which the GPs related. The merits of eschewing the treaty path and the erosion of consensus on this have been explored elsewhere.<sup>120</sup> The result was parallel resolutions at the June 2014 HRC meeting. One mandated an ambitious time frame to begin intergovernmental negotiations to elaborate a legally binding international instrument regulating the activities of transnational corporations. It passed narrowly, mainly with developing states as supportive and developed states opposed.<sup>121</sup> The other resolution was adopted by consensus. Among other things, it requested the UN High Commissioner for Human Rights to facilitate consultations to explore the ‘full range of legal options’ to improve access to remedy for victims of business-related human rights abuses.<sup>122</sup>

What might the ‘treaty path’ look like? The two main states that sponsored the resolution for new treaty process – South Africa and Ecuador – arguably have particular subjective concerns (relating *inter alia* to perceived legacy grievances and domestic political audiences) that are not necessarily

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<sup>119</sup> Ford 2015a. The Danish Institute for Human Rights is leading a 2015–16 research project on ‘the treaty question’, building on the research in O’Brien 2009; see <http://www.humanrights.dk/projects/human-rights-business-treaty-question>.

<sup>120</sup> See in particular Ruggie, J., ‘Business and Human Rights – treaty road not travelled’, *Ethical Corporation*, May 2008, and Ruggie, J., *Just Business: Multinational Corporations and Human Rights* (Norton, New York, 2013). See Ford 2015a; and IHRB’s series ‘A Business and Human Rights Treaty?’ (London, June 2014–, <http://www.ihrb.org/tags.html?tag=business+and+human+rights+treaty>).

<sup>121</sup> A/HRC/26/L.22/Rev.1, 24/26 June 2014. While two key non-BRICS emerging market states (Brazil and Mexico) abstained, others (such as South Africa and Indonesia) voted in favour. The first meeting of the open-ended working group was held on 6–10 July 2015 in Geneva, around the 29th Session of the HRC; see <http://business-humanrights.org/en/binding-treaty/first-session-of-the-intergovernmental-working-group>.

<sup>122</sup> A/HRC/26/L.1, Rev.1, Geneva, 27 June 2014, [7], orally amended and adopted without a vote, version as held by the Norwegian mission in Geneva (cf. draft version of A/HRC/26/L.1 of 23 June, para [8], still represented on the HRC website by September 2015).

shared by other developing states that voted with them. Some may have voted not on the merits but rather due to political ‘vote-trading’ on current issues in UN forums, or for reasons of ‘Global South’ solidarity. There is a clear need for more careful and informed empirical analysis of how such states may vote in future, and why. Nevertheless, it is not obvious that pro-treaty states necessarily want, or expect to see, any treaty in the foreseeable future. The landscape of transnational firms cannot easily be reduced to simplistic ‘north–south’ narratives. Some of the states that voted for the 2014 resolution (notably China) are global economic players and may lack the incentives to maintain any strong momentum on the treaty path. Brazil’s abstention in June 2014 may reflect how its state-owned and private mining, energy, agribusiness and other firms have an increasingly global exposure.<sup>123</sup>

The BHR field is so broad that it seems unsuited to attempted governance through one overarching treaty framework.<sup>124</sup> The many obstacles to agreeing a treaty of any workable scope make resurrection of the ‘treaty path’ a potential distraction from pursuing national-level measures envisaged in the GPs. The intergovernmental process could wither or stall, perhaps depending on how much pride South African diplomats in particular feel is at stake. Yet the process is now formally afoot, and many states (and big business groupings) might prefer to engage with and influence it. This suggests that there will be some sustained conversation about the ‘overarching treaty’ debate even if a treaty of any significance is very unlikely. Many states are fairly heavily invested in the discussions and reluctant to see the pre-2011 work wasted.

The main question is whether states will be able to rebuild consensus and repair current distrust and polarization around international regulation efforts, and avoid unproductive and (in today’s corporate world) artificial north–south division. A way must be found for states such as South Africa to retreat from postures that contrast the GPs and a treaty process, or that downplay references to the GPs altogether. The treaty-related alignments from June 2014 will probably shift, coalitions will not necessarily last, and attempts will continue to obtain progress on meaningful areas. The rhetoric evident at the first meeting in July 2015 of the new intergovernmental working group on an international instrument pursuant to the Ecuador–South Africa resolution in 2014 suggests the risk of a return to the polarized, ideological debates that characterized BHR discussions in the decades before the Ruggie mandate.<sup>125</sup>

The Ruggie mandate was never intended to preclude a search for international remedial mechanisms. A consistent treaty path opponent, Ruggie concedes that some form of further international regulation, focused on specific governance gaps, is both inevitable and necessary.<sup>126</sup> Moreover, he rightly observes that there is no necessary contradiction between implementing the GPs and NAPs, and further international regulation efforts – the debate should not be about a ‘GPs path’ versus a ‘treaty path’.<sup>127</sup> There is also more to Geneva-level BHR issues than what happens in the HRC, especially the related working group and annual forum, while treaty bodies, subject-matter committees and others will consider business-related dimensions to their mandated human rights roles, for example in relation to privacy or freedom of communication issues in newer media and communications technologies. Arguably, the wider BHR agenda (especially business initiatives)

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<sup>123</sup> Ruggie 2014b, 5.

<sup>124</sup> Ruggie 2014b, 6; generally Ford 2015a.

<sup>125</sup> See the (draft) report of the Inter-Governmental Working Group, UN HRC 31st Session, Geneva, 10 July 2015 (unpublished). This calls for a ‘complementary’ international instrument to the GPs (at para [20]). However, its sponsors’ ambitious agenda is revealed by calls ([21]) for the draft convention to include ‘environmental principles, inherent dignity, freedom, justice, peace ... the polluter-pays principle’ and other very broad issues. This suggests consensus is years away even among proponents.

<sup>126</sup> Ruggie 2014 (July).

<sup>127</sup> Ruggie 2014b, 2.

has its own momentum, but HRC debates will help shape the field. Conversations about a treaty may energize the issues even if no treaty is imminent, prompting states and influential corporations to influence or outflank this process by taking steps that reduce the sense of inaction on the ‘governance gap’ that is driving some of the demand for a binding treaty.

### ‘Hot topics’ and ‘precision instruments’

One scenario is that energies might become directed towards action in a more niche area, for example current issues around ‘modern slavery’. However, those calling for ‘precision instruments’ are seldom precise about what they envisage, and specialized conventions already exist on some issues, for instance within the International Labour Organization (ILO) system. Moreover, in relation to a narrower class of instruments dealing only with remedying ‘gross’ human rights abuses, a recent UN report found that a workable and viable treaty-based solution seems a long way off.<sup>128</sup> With all the well-known problems of compliance and implementation affecting core human rights conventions, no evidence or arguments have been advanced to displace the sense that treaty-level initiatives – ‘precision’ or general – would be poor substitutes for state-level legislative and other activities based on existing state duties in international law.

### The limits of the anti-corruption analogy

The OECD Anti-Bribery Convention attracted state adherents by affording them discretion in how they implement their obligations.<sup>129</sup> Anti-bribery laws were erected despite significant variation in domestic legal systems and fears about rendering firms from regulated states relatively uncompetitive. Some argue that this history shows a possible path for equivalent human rights conventions and legislation.<sup>130</sup> Moreover, some legal advisers find that helping clients through anti-corruption diligence is not vastly different from what emerging human rights processes require, suggesting business resistance to legislation may be softer.<sup>131</sup>

Anti-corruption precedents might inform (and reassure business on) national regulation on specific human rights harms. However, at least in relation to any general BHR-related convention, the anti-corruption experience and analogy is of limited utility, for reasons best articulated in a recent report exploring the scope of prospects for ‘convergence’ with other legal concepts for regulating corporate social impact.<sup>132</sup> Anti-corruption legislation addresses a relatively definable activity, whereas even limiting a BHR regime to ‘gross’ abuses would require covering large range of behaviours and circumstances, and varying degrees of involvement. Even if feasible, greater legal convergence may be undesirable if it results in a shared but undemanding standard lower than existing ones. That is, convergence may precipitate a ‘race-to-the-bottom’, narrow the scope for redress, or generally risk stifling national legal development. Major remedial obstacles would still remain. The commercial rationale for collective standards on bribery does not necessarily apply for human rights. Finally, rights regimes – unlike anti-bribery ones – must focus on victims and remediation.<sup>133</sup>

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<sup>128</sup> Zerk, J., ‘Corporate Liability for gross human rights abuses’ (OHCHR, Geneva, 2014).

<sup>129</sup> 1997 OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions.

<sup>130</sup> See, for example, Ramasastry, A., ‘Putting the BHR agenda in context: lessons from the anti-corruption sphere’ in Deva and Bilchitz 2013, especially 184–85.

<sup>131</sup> Participant remarks, Chatham House roundtable on BHR, March 2015 (author’s notes).

<sup>132</sup> Zerk 2014, Section 5.1.

<sup>133</sup> *Ibid*, especially 110–12.

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## Beyond Geneva: trade and investment frameworks

The Ruggie process found a lack of integration between regular government agencies with economic, commercial and trade mandates, and those with human rights mandates.<sup>134</sup> Yet it rightly saw considerable scope for trade and investment frameworks to become vectors for manifesting state duties to respect and protect human rights from adverse impacts by business actors. This section assesses the basis for the optimism that sometimes accompanies the potential of these regimes.

Most links drawn between trade or investment treaties and human rights are critical ones highlighting the imbalance between the rights, privileges or protections that businesses receive under such regimes, and their obligations or exposure to claims by affected groups. In particular, investor protection clauses in bilateral investment treaties (BITs) and stabilization clauses in investor–host-state agreements are seen to constrain host governments’ abilities to regulate investors’ social and environmental impact.<sup>135</sup> Most of the human rights literature on BITs, in particular, is highly critical (rather than seeing these instruments as potential ways to pursue human rights protection).<sup>136</sup> Indeed for some, the international investment agreement and dispute resolution systems are experiencing a ‘legitimacy crisis’ that cannot be resolved by tweaking agreements or procedural reforms.<sup>137</sup>

### The promise of trade and investment regimes

Considerable precedent exists for using trade policy to promote governance improvements in partner states (or at least to prevent reduction of labour rights protections for presumed competitiveness gains).<sup>138</sup> There is also growing practice on human rights impact assessments relating to trade agreements.<sup>139</sup> At issue here is a different question: whether greater space will be carved out for BHR considerations in negotiating trade and investment agreements and for how human rights factors apply in the interpretation of these agreements by dispute settlement and arbitration bodies. In this respect – and notwithstanding critical voices – most observers echo the Ruggie observation (above) that trade and investment frameworks and forums hold considerable regulatory power that has not yet been fully harnessed to promote human rights objectives.<sup>140</sup> For some there is an opportunity cost in how these regimes insufficiently integrate human rights considerations, and trade or investment law has not followed general international law in integrating human rights principles.

Whereas investment agreements are often criticized as reducing policy space, some suggest that economic crises present opportunities for innovative ‘vibrant linkages’ between trade and human rights issues.<sup>141</sup> In 2014 the head of the World Trade Organization (WTO) argued in favour of integrating the decades-old ILO labour rights conventions into the WTO agreements.<sup>142</sup> Bartels argues that

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<sup>134</sup> Before the Ruggie process, the Committee on ESC Rights had encouraged states to consider more systematically the impact upon human rights of particular trade and investment policies: ‘Statement on globalization and its impact’, 1 May 1998 ((1999) 6(4) *International Human Rights Reports* 1176).

<sup>135</sup> GP 9 recommends that states should retain adequate domestic policy space to meet their human rights obligations when negotiating business-related objectives with other states or businesses, including through investment treaties or contracts. In particular, host (investment-receiving) states are encouraged to ensure that stabilization clauses do not constrain their ability to meet their human rights obligations.

<sup>136</sup> For a recent example, focused on China–US trade, see Hang, S., ‘Investing in human rights: using BITs to hold multinational corporations (MNCs) liable for labour rights violations’ (2014) 37(4) *Fordham International Law Journal* 1216.

<sup>137</sup> See the LSE work of Saldarriaga, A., and Shemberg, A., at <http://blogs.lse.ac.uk/investment-and-human-rights/>.

<sup>138</sup> For example, EU trade agreements have long held human rights clauses enabling Brussels, in effect, to use trade-related actions to shape the political governance of emerging market and developing country partners.

<sup>139</sup> HRC guidelines: [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-59-Add5\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-59-Add5_en.pdf).

<sup>140</sup> For a sober overview, see Bartels, L., ‘Trade and human rights’ in Bethlehem, D., et al. *Oxford Handbook of International Trade Law* (Oxford University Press, 2009). See too Petersmann, E., ‘The promise of linking trade and human rights’ in Drache and Jacobs 2014.

<sup>141</sup> ‘Introduction’ (the editors) in Drache and Jacobs 2014, 21.

<sup>142</sup> Lamy, P., ‘Remarks at the UN Forum on Business and Human Rights’, Geneva, 3 December 2014.

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EU ‘constitutional’ law obliges it to ensure that its trade policies comply with its own obligations to extend human rights protections to persons in third countries.<sup>143</sup> More generally, the post-2015 global development agenda will highlight the merits of governments more fully leveraging the private sector’s role in development. This may mean more positive approaches that see business as a partner in realizing socio-economic rights, although most firms will resist any implication that they have a role in helping states fulfil state obligations to populations.

BITs could potentially address human rights impacts by solidifying obligations on investors or by explicitly incorporating related state duties. In theory, rights issues and remedial options concerning investor conduct could be covered in new BITs, by amending existing BITs, by agreeing binding interpretations alongside BITs, or indirectly through interpretation of instruments during arbitral proceedings.<sup>144</sup> The former (revision) options would take time: BITs are not made or amended often, and new model BITs providing for corporate human rights impact will only gain influence slowly. A 2010 report was too optimistic in speculating that by 2015 human rights safeguards and remedy mechanisms may be included in many agreements as a matter of course.<sup>145</sup> To date, very few investment agreements mention human rights, and while some new models and agreements refer to these issues, none creates investor obligations as such.<sup>146</sup> BITs are between states but help corporations by affording them a dispute forum other than the host state’s courts. In this sense, investors have international-level rights without corresponding liabilities. Nothing in international law prevents a corporation taking on human rights obligations (and remedial arrangements) when making a direct agreement with a host government.

**To date, very few investment agreements mention human rights, and while some new models and agreements refer to these issues, none creates investor obligations as such.**

The latter (interpretative) route faces questions about arbitrators’ mandates and the normative effect of rulings beyond the particular parties. Debate continues (as does inconsistent practice) on the legitimacy of arbitrators taking public interest issues or external public law into account when considering state defences to regulatory actions involving investors. Only in very few cases have human rights issues arisen squarely in BITs arbitrations.<sup>147</sup> Still, international investment law is part of the wider corpus of international law, and some scope may exist for interpreting agreements (from the WTO to bilateral agreements) in ways that uphold human rights principles to the greatest extent possible. At very least, human rights arguments feature more regularly in disputes, though with mixed success at best.<sup>148</sup>

### The limits of the trade and investment vector

Trade and investment regimes and instruments have an inherently limited potential to advance BHR issues, given their core trade-promotion and investor-protection functions. Their regulatory

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<sup>143</sup> Bartels 2014.

<sup>144</sup> See generally Dupuy, D., Francioni, F., Petersmann, E. (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009).

<sup>145</sup> IHRB ‘The state of play of human rights due diligence 2010: the next five years’ (London, 2011), 37.

<sup>146</sup> Jacob, M., ‘International Investment Agreements and Human Rights’ INEF Research Paper Series, Duisberg, 2010, 9–11, 27.

<sup>147</sup> Jacob 2010, 31. See more recently Meshel, T., ‘Human Rights in Investor-State Arbitration’ (2015) 6(2) *Journal of International Dispute Settlement*.

<sup>148</sup> Jacob 2010, 31.

promise is no substitute for strengthening conventional human rights capacities. BHR concepts are not necessarily the most promising narrative for addressing structural issues about the role for international investment in promoting sustainable development.<sup>149</sup>

We will likely see experimentation and ad hoc or piecemeal efforts without any pattern or consistency, with some breakthroughs in areas where negotiators have both the ‘political imagination’ and aligned interests to carve out policy space for rights issues.<sup>150</sup> So far, at least on publicly available materials, provisions of the significant Transatlantic Trade and Investment Partnership being negotiated between the EU and the United States do not appear to reflect any particular effort to reflect the GPs and BHR principles. Investors may seek explicit human rights obligations in future in an effort to reduce interpretative uncertainty. Much might depend on broader economic sentiment and conditions. Yet many contributions on this topic are somewhat misguided. For instance, observers often use ‘BITs’ (bilateral treaties between sending and receiving states) to describe what are in fact host-state contracts agreed directly between investors and governments; others speak of ‘forcing’ corporations to adhere to human rights provisions in such agreements and ‘imposing’ these obligations on investors.<sup>151</sup> This misconceives how these legal relationships must be negotiated: in many smaller states the idea of imposing terms on larger investors is unrealistic.

The investment law and arbitration field is not sealed off from general international law and is undergoing significant evolution.<sup>152</sup> However, it is not evolving out of all recognition, and it is easy to overstate its potential as a vehicle for manifesting the BHR agenda. The objective of BITs remains treaty-level protection for sending state investors in relation to regulatory or other actions by host governments. Their purpose is not to address public interest issues or the promotion of investment that supports sustainable development or human rights.<sup>153</sup> Looking to such instruments to provide comprehensive protections and remedies can obscure the real challenge, which remains strengthening generic human rights protection mechanisms.

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<sup>149</sup> Bartels 2009.

<sup>150</sup> Drache and Jacobs 2014, 17.

<sup>151</sup> See for example Dumberry, P and Aubin, G, ‘How to incorporate corporate human rights obligations into BITs’ (2011–12), *Yearbook on International Investment Law and Policy*, 569–600. In a piece for the Institute for Sustainable Development (March 2013) these authors list the instruments that corporations ‘must comply with’ as ones such as the Rio Declaration 1992 on sustainable development. Yet this creates no obligations on corporations: the work exemplifies scholars overreaching in stating the current international law position. See too Peterson, L., ‘Human Rights and BITs’ International Centre for Human Rights and Development (2009).

<sup>152</sup> See for example Brown, C., and Miles, K, (eds) *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011).

<sup>153</sup> Jacob 2010, 33–37.

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## The Future Scope of the BHR Agenda

It is fairly unarguable that there is some widening, at least among advocates, of the conceptualization of what falls within ‘BHR’.<sup>154</sup> As Ruggie noted recently, the BHR label covers a ‘vast, diverse and conflicted’ issue area and set of activities.<sup>155</sup> This breadth is both the strength and the weakness of the BHR narrative.<sup>156</sup> The issue divided experts at the 2015 Chatham House roundtable, and is unavoidable in assessing the future of this field. It is interesting to reflect on a leading 2010 report. This argued that ‘greater terminological clarity’ will be key to advancing the BHR agenda within corporate cultures. It was optimistic:

By 2015, there will be clarity about when businesses should talk explicitly about human rights ... business will understand the full legitimizing potential of human rights better, and that the terms of engagement will be more specific ... strategic and policy commitments ... and concrete performance ... will be explicitly and transparently stated in human rights terms.<sup>157</sup>

This has not transpired, raising a question: might a broad, more amorphous BHR narrative continue to inhibit the prospects of such clarity (assuming that clarity is a virtue in a transformative project)? Some roundtable participants maintained that issues such as trends in ‘casualization’ of employment contracts, ‘tax justice’ (corporate tax avoidance) and climate change are unarguably BHR issues. Others saw this broader framing as likely to render the agenda unpalatable and unmanageable to both regulators and regulatees. Taking tax justice as an example, this section considers the debate, accepting that much may turn on the extent to which one views BHR as being inextricably a project of or about international law.

### Pro: the breadth of BHR as a strength

There are perhaps four main conceivable arguments for a broad framing of BHR. First is that the framing question does not matter, because BHR is an open social programme to transform business cultures in pursuit of the fullest possible enjoyment of human rights; it is not reducible to technical questions about whether claims using BHR concepts are ‘valid’ in the sense that they engage recognized international liabilities. The second approach implicitly accepts that issues such as corporate tax avoidance do not raise any technically justiciable claims in international human rights law, but argues that this situation could, will and should evolve, in ways that will not dilute the wider human rights project. This argument sees an analogy with ESC rights, which over time came within the corpus of recognized rights despite many ‘purists’ claiming that these were not capable of doing so.

The third defence of a broad framing relies on the force of the proposition that many areas of activity involving business enterprises potentially raise ‘human rights issues’ because they impact (in varying ways and degrees) on the enjoyment of rights recognized in international law.<sup>158</sup> For example, a lengthy 2014 International Bar Association (IBA) report has analysed justice for those groups specially

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<sup>154</sup> These issues are raised more briefly in Ford 2015a.

<sup>155</sup> Ruggie 2014b, 6.

<sup>156</sup> Expert’s remarks, Chatham House roundtable on BHR, March 2015 (author’s notes).

<sup>157</sup> ‘The state of play of human rights due diligence 2010: anticipating the next five years’ (IHRB, London, 2011), 36, 38; thus ‘establishing clarity about the explicit use of human rights terminology, standards and language’ was one of five overarching themes identified for the 2010–15 period.

<sup>158</sup> Business or investor conduct may of course enhance, not just impair, enjoyment of rights.

impacted by climate change by reference to human rights principles, including the GPs.<sup>159</sup> Another large IBA report in 2013 meanwhile considered tax abuses – not conventionally a human rights issue – through the lens of internationally recognized human rights.<sup>160</sup> Central to such analysis are the existing obligations of states (at least where party to the main ESC rights convention) progressively to realize ESC rights.<sup>161</sup> The IBA also argues that corporations pursuing tax avoidance strategies may breach their responsibility to respect human rights. The box below summarizes the IBA's position which, coming from an influential professional body, deserves attention. BHR trends are fairly clearly simply one manifestation of wider debates about the societal roles and responsibilities of the private sector. Even if widely-framed BHR debates seem unsatisfactory and conceptually messy, this may be no different to the early days of establishing a clear foothold for the environmental or anti-corruption agendas.

A fourth conceivable response to criticisms of overly broad framing of the BHR agenda is that, by approving the GPs, states chose to proceed with broad language around 'adverse human rights impacts'. This has, on one view, widened the scope of what constitutes a relevant impairment. Many behaviours can 'adversely impact' or affect someone's rights without strictly speaking constituting a 'violation' or 'breach' that triggers a legally recognizable and consequential cause-of-action. Has states' desire to avoid the language of violation instead broadened the scope of internationally-relevant BHR questions?<sup>162</sup>

### Tax abuses and human rights: a bridge too far?

The IBA's 2013 report notes that corporate tax avoidance directly impairs governments' abilities to provide services, in particular health and education, which relate to two fundamental ESC rights. It states that corporate tax abuses deprive governments of the resources required to respect, promote and fulfil these rights. Since tax abuses affect poverty reduction, and poverty impairs human rights fulfilment, it argues that it is possible to 'make a connection' between tax abuses and human rights.

In addition to the states' recognized international legal duty to realise ESC rights (this duty includes, according to the IBA, levying and spending tax revenue), the IBA suggests that there exists a more direct human rights responsibility of businesses on tax payment.<sup>163</sup> It does so because the GPs provide that business enterprises have a responsibility to avoid causing or contributing to adverse human rights impacts through their own activities, and to seek to prevent or mitigate adverse human rights impacts directly linked to their operations (etc.).<sup>164</sup>

The IBA suggests that it follows that firms should 'exercise caution' in negotiating special tax regimes, tax holidays or exemptions so as not to impact negatively the state's ability to meet the state's human rights obligations. It further argues that pressing for concessions when these 'foreseeably will result in negative human rights impacts' would contravene the corporate responsibility to respect human rights. The IBA declares that due diligence obligations on firms extend to 'multinational enterprises, as well as their advisers and financiers' to be careful about the potential negative impacts of their tax planning strategies.

<sup>159</sup> *Achieving Justice and Human Rights in an Era of Climate Disruption* (IBA, London, July 2014), especially Chapter 3.

<sup>160</sup> *Tax Abuses, Poverty and Human Rights* (IBA, London, October 2013), especially 103–17. In 2014 the UN Special Rapporteur on Extreme Poverty and Human Rights issued a comprehensive report: A/HRC/26/28, 22 May 2014, although its recommendations are addressed only to states. See also Lazala, M., 'Tax avoidance: the missing link in BHR', *Business and Human Rights*, London, 2014, <http://business-humanrights.org/en/tax-avoidance-the-missing-link-in-business-human-rights>; and Lusiani, N, 'Lets get fiscal: human rights advocates are tackling tax injustice' *Open Democracy*, 8 April 2015, <https://www.opendemocracy.net/openglobalrights/niko-lusiani/let%E2%80%99s-get-fiscal-%E2%80%93-human-rights-advocates-are-tackling-tax-injustice>; and see discussion, in Ford 2015a, of 'Top 10 issues for human rights and business in 2015' (IHRB, London, December 2014).

<sup>161</sup> IBA 2013, 105–10.

<sup>162</sup> This is not necessarily of use to claimants for legal redress – who must still articulate their claims of harm in legally recognizable ways.

<sup>163</sup> IBA 2013, 117–33.

<sup>164</sup> GPs 2011, para [11].

The IBA recognizes (as it must) that states have the relevant privileges, powers or duties to gather taxes and to control how they are used. It also does not state that corporations owe some direct human rights-style duty to governments or society at large. It acknowledges, as it must, that governments may not enforce tax laws for various reasons or may not use tax revenues from corporations in rights-enhancing ways. Yet this profound intermediation role of governments is surely highly significant to whether corporations may be seen to have any tax-related human rights responsibilities with any sufficient directness or content to be at all legally meaningful. The IBA does not develop its reasoning, including on any relevance of distinctions between a responsibility to respect rather than protect rights.

Whether or not broad framings of BHR are viable, they are perhaps inevitable since most conduct in society can be understood by reference to human rights impacts, and since efforts to further various social agendas will continue to draw on rights vocabularies and concepts, given the power and profundity that this lends them. Yet the special resonance of claiming issues as human rights issues also informs arguments *against* overly broad framings.

### Con: problems and risks in framing BHR widely

The main objection may only arise if BHR is conceived of as being inseparable, ultimately, from claims about harm based on recognized rights with international legal force. This is open to dispute. Yet the strength of arguments against overly wide propositions about BHR's scope is the recognition that to label something a 'human rights issue' is to elevate its significance from policy design preferences about economic and social development, to ones where states have clear legal duties. Is it possible that deploying emerging BHR terms and concepts in support of a wide variety of social and political campaigns (such as tax avoidance) may risk eventually diluting the agenda's efficacy and undermining its traction?

A recent Chatham House paper questioned whether attempts to draw fairly indirect 'impact' arguments (such as the IBA's) could deprive the BHR project of the vital and universalizing force it gets from being grounded in relatively stable recognized state duties under international law.<sup>165</sup> Law, including human rights law, is highly relevant to development and poverty-reduction. However, on this argument not every issue that requires law reform in order to benefit human rights is itself a 'human rights issue'. Vital areas from taxation to climate change clearly both involve business and affect the enjoyment of human rights, but may not necessarily involve notions of directness and obligation to a degree that would be sufficient to trigger the special protective status of international human rights law.

Arguably, framing such broad issues in terms of corporate human rights responsibilities may not strengthen action on those claims, but instead undermine their credibility, while simultaneously diluting the utility and impact of subsequent recourse to rights vocabularies. This might result from overreaching arguments (such as the IBA's tax points) of corporate responsibility for generalized society-wide harms, that are so heavily mediated through state discretion (how tax revenue is raised and spent), where it is hard to describe a clear obligation on business towards social-spending recipients, and where it is not possible to define a remediable wrong or a distinct class of wronged persons.<sup>166</sup>

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<sup>165</sup> Ford 2015a, discussing remarks by Jochnick (forthcoming, 2015).

<sup>166</sup> Chapter 2 of the IBA's climate change justice report (2014) sets out the significant legal challenges that exist on issues such as causation, standing and attribution.

This argument against overreaching is especially important (at least strategically) at a time when more palpable, core duties of states in this area are still gaining traction. Overly broad BHR arguments such as the IBA's might simply confuse and/or alienate policy-makers, executives, and advisers – the very entities whose engagement is required to promote the rights said to be at issue.<sup>167</sup> Thus government representatives at the 2015 roundtable worried about wide conceptions of the BHR agenda. They described obtaining traction with internal and external stakeholders only when they can tie conduct to recognized rights and duties, and impacts capable of being tracked. Such officials see the GPs framework – already broad given the nature of human rights – as at least providing a logical approach that officials can 'get a handle on' and describe to decision-makers.<sup>168</sup>

Approaches that advance an issue such as tax justice in terms of GPs-style corporate human rights responsibilities can result in proponents contorting themselves in ways that risk undermining the credibility of BHR among key audiences. For example, one BHR observer has called for 'greater access to effective remedies for those negatively impacted by corporate tax abuses'.<sup>169</sup> Arguably, such an easy elision of concepts (the indirect corporate *tax* abuse replacing corporate *rights* abuse, but using the latter subject's 'access to remedies' formula) makes it harder to explain to key regulatory and corporate stakeholders what BHR is about and not about, and harder to secure their collaboration in transformative preventive and remedial activities. Such an elision may also weaken the general force of arguments of those seeking to widen access to remedy in scenarios where a corporation more clearly has an answerable case for a sufficiently direct harm to a defined group of claimants.

Like its tax justice report, the IBA's 2014 report on climate change justice, noted above, illustrates further some of the pitfalls of current expansive claims on BHR issues. It is a significant and serious document that shows the scope for productive linkages between climate change behaviours and consequences, and human rights ones. Yet its weaknesses could serve to undermine rather than advance that project. For example, the report lists new 'conflict minerals' supply chain disclosure requirements under US law as providing 'access to domestic remedies for violations of climate change obligations, even if the violative [sic] conduct occurred in another country'.<sup>170</sup> Yet the US law does no such thing. There is no necessary link between measures to reduce conflict risk impact and those to address climate change. Moreover, such procedural disclosure measures create no legal avenue for remedy by any affected party. Such loose argumentation from a prestigious body – based as it is on broad framings of BHR – simply risks discrediting the BHR project among key informed audiences, who may well lose interest.

Of course, the promotion of human rights principles is not limited to what can be expressed in precise legal terms or litigated upon. However, arguably the further human rights claims stray from a sense of universally recognized binding-ness, the more they risk diluting the utility of the concept.<sup>171</sup> Soon, then, invoking human rights does not bring special significance to an issue; it becomes a routine and futile rhetorical reference to a concept whose content is increasingly devoid of meaning and consensus.<sup>172</sup> Such cautions would seem dire, but the human rights project is bigger than the

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<sup>167</sup> Ford 2015a.

<sup>168</sup> Remarks, Chatham House roundtable on BHR, March 2015.

<sup>169</sup> Lipsett, L., 'Corporate tax abuse as a human rights issue', Shift Project, 2014, <http://www.shiftproject.org/article/tax-abuse-business-and-human-rights-issue>. Lipsett's bland prescription ('it is important to strengthen good governance') typifies the unsatisfactory nature of such arguments. Lipsett does not say if the 'those impacted' refers to the state deprived of revenue or populations deprived of state spending. Lipsett is conscious that using human rights vocabulary helps to obtain greater public and political attention, but does not see this instrumental use as potentially harmful to the wider human rights discourse.

<sup>170</sup> IBA 2014, 153.

<sup>171</sup> See too Nolan 2014 (the source of the corporate responsibility to respect rights should ultimately be linked to international human rights law).

<sup>172</sup> See the work of Hilary Charlesworth, cited above (2015) in relation to human rights 'ritualism'.

BHR agenda, which is simultaneously narrower than campaigns for social justice, transparent governance, poverty reduction and inclusive sustainable development.

The counter-argument to broad framing is thus mainly a strategic one, against undermining more compelling parts of the BHR agenda. It is that BHR proponents should confine their ambitions to promoting state implementation of preventive, protective and remedial mechanisms on issues where businesses can clearly directly breach the rights of distinct classes of people. When pressed, roundtable participants seemed to agree that at most it can be argued that corporate tax avoidance ‘creates human rights vulnerabilities’ or may constitute an ‘indicator’ of the risk that rights fulfilment (by the state) may be impaired.

Would BHR advocates be better advised to focus, for now, on more obvious, direct and definable areas of state duty and corporate responsibility? One arguably detects in the IBA tax report a deep reluctance to accept the limited development of law in this field. This denial seems ill-suited to persuading states and businesses to act more decisively on areas where they already do have clear duties and responsibilities. The problem with the ESC rights analogy – which accepts that issues such as tax avoidance do not raise any human rights liabilities but which aim for such recognition in future – is that overreaching exposes the weakness of claims just when so much still needs to be done on ‘core’ BHR problems involving recognized legal rights issues.<sup>173</sup>

### Assessing the debate on BHR’s scope

As noted, the breadth of the BHR narrative is both its strength and its weakness. This field raises – far more directly or emotively than many regulatory projects – deeply political and indeed ideological issues at the nexus of private power and public authority.<sup>174</sup> It is not surprising that BHR proponents will touch on a very broad range of economic and developmental issues. Moreover, and as noted, advocates will invariably invoke human rights discourse due to the resonance it has especially in addressing structural-level injustices. Meanwhile, BHR is clearly not simply an international law or lawyers’ project: campaigners mostly aim to end human rights violations, whatever the legal technicalities of the conduct by reference to international norms.<sup>175</sup> In this sense BHR trends simply reflect wider issues of what the OECD calls the ‘responsible business conduct’ agenda.<sup>176</sup> Yet at the same time BHR must also be seen as fundamentally distinct from many areas of conventional corporate responsibility, since its discourse triggers non-voluntary human rights imperatives that have a special claim to priority and validity.<sup>177</sup>

Some roundtable proponents of broader framings accepted that tax justice is a ‘secondary’ BHR issue; one participant conceded that including issues such as tax justice within the BHR agenda did not amount to saying that these are human rights issues ‘in themselves’.<sup>178</sup> Instead, the use of rights terms was an attempt to promote thinking about systems and interrelationships of conduct in society. Yet those seeking to transform capitalism’s social footprint may be better advised to focus on persuasive, engaging strategies than on propositions (such as the IBA’s) that corporations have human rights responsibilities of such a diffuse nature as to avoid adverse impacts on social service

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<sup>173</sup> The analogy with campaigns for recognition of ESC rights is not sound in a further respect: at issue is not ‘what rights are worthy of protection’ but ‘what conduct has sufficient connection with protected rights’.

<sup>174</sup> Ford 2015b, 22. Of course, many of the world’s most significant business entities, notably in the energy sector, are state-owned and so not ‘private’.

<sup>175</sup> Participant’s observation, Chatham House roundtable, 17 March 2015.

<sup>176</sup> See the June 2015 OECD summit on this agenda: <https://mneguidelines.oecd.org/globalforumonresponsiblebusinessconduct/>.

<sup>177</sup> See for example Avery, C., ‘The difference between CSR and human rights’, *Corporate Citizenship*, No. 89, Aug.–Sept. 2006.

<sup>178</sup> Various remarks, Chatham House roundtable, 17 March 2015.

provision by the state. If strategies are to be pursued to leverage BHR's currency so as to steer attention to issues such as casualization of work contracts or tax avoidance, then more precision is arguably needed to sustain claims that such issues are sufficiently connected to recognized duties or responsibilities in international human rights law. Reliance on weak narratives of liability, such as the IBA's, might cause states and businesses to adopt a defensive or even dismissive approach, rather than a cooperative, problem-solving one. Some threat of liability may create the environment required to compel corporations into shifting their behaviour, but can also send a wide, transformative agenda down unproductive avenues of gaming over the technical validity of claims of liability.<sup>179</sup>

The 'breadth' debate is important for speculating on the future path of the BHR phenomenon; debate over what falls within the 'field' is also healthy, even if one strategic priority is to frame issues in ways that businesses can reasonably engage with. It may be possible to advance primary BHR issues and, in parallel, sustain debate on 'secondary' ones. This may hold transformative promise but may also carry the risks, noted above, of dilution and distraction and confusion. Still, those firms serious about mitigating their net adverse impact on human rights fulfilment can consider (for example) how their tax profile affects a host state's ability to meet its social service duties.

**Lumping BHR with climate change and poverty may simply generalize issues to the point of paralysis and further distance any sense that there are 'doable' solutions by distinct actors with distinct duties.**

On one hand, BHR is of considerable wider significance as a subset of important questions around the future of capitalism and of sustainable and just human development. In this sense, considerable promise seems to lie in productive conceptual linkages between thematic issues such as climate change and human rights. Moreover, the BHR phenomenon has served to shift the focus in human rights law from state actors alone to the wider range of sources of both protection and violation of human rights. On the other hand, human rights violations attributable at least in a reasonable legal liabilities way to business actors are not obviously the most pressing human rights problems in the world today. Lumping BHR with climate change and poverty may simply generalize issues to the point of paralysis and further distance any sense that there are 'doable' solutions by distinct actors with distinct duties. While the burden of responsibility is shifting beyond the state, it is not obvious that claims based on the human rights responsibilities of business are the most effective vector for addressing state, corporate and community inaction on these wider issues.

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<sup>179</sup> The IBA climate justice report (2014: 118) accepts that liability regimes are only one component of a 'broader system of disincentives' to conduct that impairs human rights.

## Scenarios: Possible Trajectories for 2015–25

The following scenarios are intended to stimulate reflection on what is possible, and preferable, in how the BHR agenda is carried forward over the next decade.

### Scenario A: fading momentum, niche issues?

The least likely outlook is that, despite the growing relevance and greater uptake of wider sustainability ideas, the BHR agenda as such gradually loses its momentum, coherence and resonance both on the intergovernmental level and within business and investment circles. In this scenario, transnational civil society pursues some niche BHR issues, as do national legislators, who focus on particular regulatory efforts (such as ‘modern-day slavery’ bills). Deeper activity on these niche issues fails to carry forward the whole BHR agenda, including the GPs ‘regime’. In business terms there is considerable diversity between industry sectors, some of which do and some of which do not perceive similar incentives for uptake of BHR concepts. Greater recognition or normativity on discrete issues does equate with any sense of an emerging new global legal standard on business actors (or states in relation to them) across human rights generally. Divergence and apathy in state practice, along with the breadth of the BHR agenda, makes it impossible to discern any ‘hardening’ of consensus on general norms in international legal terms. Progress on access to remedy is piecemeal, with no net gain across important jurisdictions.

Intergovernmental negotiations drag on with no particular breakthrough on a consensus instrument. While UN-sponsored expert platforms help with clearer diagnosis of the nature of doctrinal and practical obstacles, and keep the agenda ticking over, business actors (and BHR vocabularies) are subsumed within standard human rights discourse without any greater attention or urgency than other issues. A greater proportion of corporations and financial institutions do adopt human rights policies, monitoring processes and grievance mechanisms. However, this trend is not uniform across all business types, is seen as one aspect of general responsible business conduct, and neither reflects nor adds to any normative ‘hardening’.

### Scenario B: consensus and coherence?

A second, slightly more likely, scenario is a far more positive one in terms of narrowing the ‘governance gap’. As well as human rights impact issues becoming a high priority for an ever-increasing proportion of businesses and investors globally, it sees more states acting in more robust ways to enhance (in particular) prevention against business-related human rights violations. A large number of states, including the world’s most important economies, adopt NAPs, and a clear and compelling pattern of state legislative actions emerges. In particular, the EU moves a directive for member states, mainly focused on requiring due diligence for extraterritorial impacts. Capital-exporting home states act to improve the ease of making transnational civil claims. This prompts other states – with the support of big business – to regulate access to remedy in order to assert their own jurisdiction and in an attempt to control future litigation.

Human rights issues are progressively mainstreamed into the activities of state bodies such as export credit agencies, and come to feature more overtly in negotiated trade and investment agreements. The position of China and other ‘emerging market’ states on regulating responsible business has more clearly aligned with OECD ones: regulators and business discern a more level playing field or less competitive disadvantage from greater exposure to regulation or adjudication on social impact issues. Leading business and investment figures publically call for certainty and clarity on BHR, stimulating consensus and coherence. One sees greater international cooperation and coordination between states (at both judicial, legal cooperation and law enforcement levels) with respect to both civil and criminal claims and actions.

At the intergovernmental level, a consensus resolution is reached (along some ‘treaty path’) or parallel treaty-related negotiations continue but do not distract or displace national-level legalization and implementation measures. Indeed, international efforts at legalization (whatever its form or pace) serves to spur states to address business human rights impacts and remedial avenues in some more general way at national levels. Alternatively, state legislative and remedial actions centre on niche BHR issues but in ways that clearly signify a more general shift in standards. A UN General Assembly declaration on the ‘governance gap’ is agreed, of similar significance to historic resolutions that solidified international legal understandings.

### Scenario C: ‘muddling through’ along multiple paths

Arguably, the most likely path lies between the two outlined above, and/or contains elements of each. There is neither widespread legalization of BHR issues, nor fragmentation and dissipating momentum. The field continues to be characterized mainly by huge divergence in business and state practices, and widespread uncertainty, especially on the content of business obligations. BHR remains an important but contested and somewhat stalemated issue in Geneva, despite work on the nature of the state’s potential duty to require due diligence and to facilitate access to remedy. That proposed duty, as it emerges, is neither particularly onerous nor precise, if anything simply reinforcing the existing state duty to take measures to prevent violations of rights from private sources. The content of any norm on corporations being directly liable in international law, perhaps beyond complicity in gross violations and international crimes, remains impossible to delineate with any authority. In general, the ability to litigate transnationally on BHR claims is patchwork, with no significantly greater jurisdictional access to forums in most investment-sending geographies.

The global legal profession remains engaged, prodding big business and financial actors whose own attention is secured if only because of the uncertainty that prevails. Global business leaders continue to accept a GPs notion of responsibility. However, beyond major listed firms, finance houses and funds there is huge variation in business awareness, uptake or acceptance. Most of the focus is on awareness-raising, implementation, and linking BHR to core commercial considerations. Indeed, from the perspective of firms BHR issues lose some distinctiveness and become integrated with obligations, commitments or strategies on workplace relations, stakeholder management and general corporate legal and social responsibility management. This process is not necessarily retrogressive, seen from a perspective that distinguishes ‘ends’ from ‘means’. In this scenario, most firms in most places in the world progressively become better at preventing human rights impairment or at remediation, even if there is no clear universal trend of greater ‘hard’ law.

## Conclusion

The uncertainty prevailing in the BHR field at this time, among business, regulators and others is a function of the breadth of the BHR agenda, the fact that the field is still emerging, and the conceptual and practical complexity of the issues. Yet not everything lacks certainty: the BHR agenda may reflect an undeniable wider shift in the nature of business–society relations, but it also remains hostage to fairly enduring structural features of the global political economy. Moreover, while it may have special resonance and currency, the BHR agenda remains subject to long-standing issues of capacity and political will that continue to affect how and why states in particular do (or do not) promote and protect human rights generally. One question is whether there is anything about the BHR field, and its link to commercial actors and incentives, that offers any reason to believe that states with historically poor general human rights records will become galvanized over these issues.<sup>180</sup> Moreover, studies on the future of BHR must account for ideas on how the wider human rights system and discourse may be changing in nature and utility.

What trajectory for BHR is likely or possible is distinct from what path may be preferable. The argument advanced here, in effect, has two parts. First, a focus on legal measures and mechanisms can confuse the *means* of human rights protection with the *ends* to be achieved. In this respect, the Ruggie process was surely correct in positing that while international legal development and state legislative action is important, many avenues of non-state, non-law activity will be needed (and desirable) to narrow the ‘governance gap’. Ruggie’s insistence over many years that a ‘smart mix’ of measures is required may frustrate those seeking to focus attention on harder legal frameworks. Yet arguably Ruggie’s views are essentially correct, given the very complex nature of the BHR ‘problem-set’.<sup>181</sup>

In promoting rights-compliant business, what is both objectively more likely or feasible – and perhaps more desirable – is a ‘regulatory ecosystem’ comprising voluntary as well as mandatory measures, capable of generating significant change at scale, and which both reinforces and builds on existing ‘regulatory dynamics’.<sup>182</sup> These approaches do not necessarily conceive of business actors narrowly, as simply one possible source of human rights violations, yet still demand higher standards of conduct and accountability of business actors. Ruggie supporters can appear impatient with those perceived as straying from the message that the focus should only be on national-level implementation of the GPs. Yet, objectively, Ruggie was surely right that a country-level focus on these governmental, business and civic activities does hold the greatest prospects for progress on rights protection (compared with, for instance, focusing on lowest-denominator global regulation or treaty design issues).<sup>183</sup>

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<sup>180</sup> Here the linkages between the BHR agenda and trade promotion may hold some promise relative to promoting human rights in other spheres of conduct. BHR issues may be championed by certain constellations of states for purely strategic reasons, or to draw attention away from issues reflection those states’ performance of other human rights subject matters.

<sup>181</sup> See Braithwaite and Drahos 2000, cited earlier, for a pre-Ruggie mandate articulation of the same basic pluralist regulatory idea.

<sup>182</sup> Ruggie 2014b, 2. See Nolan 2014: the BHR agenda requires a multiplicity of stakeholders and a very nuanced mix of public and private regulation that may be difficult to replicate easily across different sectors, states and cultural boundaries. See importantly Parker, C., and Howe, J., ‘Ruggie’s diplomatic project and its missing regulatory architecture’ in Mares 2012.

<sup>183</sup> Of course, national-level measures can include those to regulate corporate impacts abroad in appropriate circumstances, and/or to provide remedial avenues in that regard.

One driver of moves for legal standards is a desire (revealed, among things, at Chatham House expert roundtables) for more specificity and clarity: what exactly is required of governments and firms, what will the field look like, where and how soon? The subtitle of the previous Chatham House Briefing on this issue related to challenges to ‘consensus and coherence’.<sup>184</sup> Both themes will remain significant over the next decade. The themes are also linked, of course, because the quality and quantity of consensus achievable on the agenda partly depends on how clear and coherent it is. Yet even if neatness and agreement were achievable, these are not necessarily desirable features of an evolving field – just as the partial fragmentation of international law is not necessarily regrettable (even if it were somehow avoidable).

Despite its ‘Business’ element, the BHR agenda turns heavily on what states can or will do (whatever they should or must do). In that way issues to do with the responsibilities of business on human rights are no different to other human rights issues.

Thus in addressing BHR’s ‘lack of clarity’, there is a risk that the BHR narrative might become too specific. This might happen if it becomes primarily about narrow issues of technical compliance and reporting, rather than broader, transformative strategic and commercial thinking about how addressing business human rights impact can create value or competitive advantage while mitigating various forms of risk. Hence those within the BHR field who call for an approach that promotes engaged thinking, not just more routine compliance.<sup>185</sup> In this respect, considerable transformative potential lies in overall approaches that promote the pursuit of basic values rather than gaming about particular rules and mechanisms.

The second broad line of argument is a qualifier on the promise, outlined above, of a plural-systems and broad approach to BHR issues. While we must privilege the ends of rights protection over the methods adopted to achieve them (so embracing market-driven and other approaches), those means do matter. That is, rules matter: a sustainable, legitimate and effective BHR system must ultimately be susceptible to being grounded in public law, and then in international human rights law. This is for principled reasons, so that private power is subject to representative and reasonable public control. It is also for practical reasons, whether the focus is mere compliance or continuous improvement in human rights performance. This is because sustained, self-generated virtuous business actions to address human rights impacts may require the ‘shadow of an axe’ – a sense that to avoid more intrusive regulatory intervention, business must be proactive.<sup>186</sup> The credible threat of compulsory state action is one element in ensuring this. This requires, at some point, clear links between BHR claims and accepted and binding legal concepts and mechanisms. This is one reason why there is an arguable risk in promoting broad BHR concepts without sufficient connection to recognized human rights and corresponding duties.

The experts’ roundtable discussed the notion of a BHR ‘bubble’ inside which those working on these issues can lose perspective. The public international legal system vital to underpinning BHR activity only develops slowly, reflecting its reliance on the accumulation of a critical mass of state regulatory

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<sup>184</sup> Ford 2015a.

<sup>185</sup> On one view, due diligence is more than a negative obligation but part of a wider shift in business processes, a vision that sees these practices gain ground incrementally from within business, rather than on the basis of top-down imposition: de Schutter, O., ‘Foreword’ in Deva and Bilchitz, 2013, xix.

<sup>186</sup> See Ford 2015b, Part II, applying theories of responsive regulation developed, among others, by John Braithwaite and Christine Parker.

activity. Well-meaning scholars cannot speed up normative development by declaring the law is other than what most states take it to be. Despite its 'Business' element, the BHR agenda turns heavily on what states can or will do (whatever they should or must do). In that way, issues to do with the responsibilities of business on human rights are no different to other human rights issues.

Climate change issues are clearly linked to for-profit activity and directly affect human rights protections. Yet seen through the lens of international human rights law – and in terms of where to place diplomatic and advocacy efforts on human rights generally – it is far from obvious that actionable identifiable violations directly linked to corporations' conduct are objectively the most pressing issues on the human rights table. Moreover, while the BHR narrative holds considerable promise, it is not obvious that human rights discourse is best suited to (or served by) being deployed in what is in effect a project to reform wider dysfunctions of 'the corporation', regulatory capitalism, or the globalized and carbon-based economy.

To be frank about the limits of legal development in this area is not to act as an apologist for business or to deny shifts in modern international law and the global society it serves.<sup>187</sup> Instead, it is to accept limits while seeking to understand where viable scope exists to expand preventive, protective and remedial opportunities. This tweaking exercise building on existing regulatory approaches is not unambitious 'pragmatism without principles.'<sup>188</sup> It reflects recognition that along with a broad normative vision and alignment of incentives, transformation is often comprised of the net effect of myriad relatively small interventions. It follows that the BHR agenda will require from experts more consistent accuracy and credibility in addressing particular conceptual and practical problems across diverse legal systems and business sectors, and a greater understanding of this by stakeholders such as governments, business and civil society.

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<sup>187</sup> The most recent (and unconvincing) example is Wallace, D., *Human Rights and Business: a policy-oriented perspective* (Brill/Nijhoff, Leiden, 2014).

<sup>188</sup> Cf. de Schutter 2013.

## Acronyms

BHR	business and human rights
BITs	bilateral investment treaties
CSR	corporate social responsibility
ESC	economic, social and cultural
GPs	Guiding Principles
HRC	Human Rights Council
HRDD	human rights due diligence
IBA	International Bar Association
IFC	International Finance Corporation
IHRB	Institute for Human Rights and Business
ILO	International Labour Organization
ISO	International Organization for Standardization
MNCs	multinational corporations
NAPs	National Action Plans
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the UN High Commissioner for Human Rights
WTO	World Trade Organization

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