Business and Human Rights: Emerging Challenges to Consensus and Coherence

Summary

• Trends in the regulation of business responsibility for human rights have growing salience for diplomats, policy-makers, business strategists and social activists.

• At the intergovernmental level, new divisions have emerged over how best to pursue remedies for business-related rights claims. This fragmentation could hamper rights protection, but that there is debate is both unsurprising and healthy in an emerging field with historical legacies.

• At national level, divergence among states in degrees of implementation of the 2011 UN Guiding Principles on Business and Human Rights is evident. A significant majority of states are currently passive.

• Among businesses, similar implementation divergence is likely. Most new regulation will comprise voluntary industry schemes rather than international legal instruments.

• The topic of business and human rights covers an increasingly broad agenda. That social advocates may struggle to select priority issues strategically will have implications for how much resonance the agenda can obtain.

• Forthcoming Chatham House research will look in greater depth at the trajectory of future international regulation in the field of business and human rights, including the potential emergence of ‘soft norms’ and the integration of human rights considerations into trade and investment instruments.
Introduction

In December 2014 the UK government announced its support for the Corporate Human Rights Benchmark, an insurance industry scheme for ranking the human rights performance of global companies. Such private-sector initiative on corporate respect for human rights, combined with explicit government backing, would have seemed remarkable a decade ago.

Reflecting in part wider shifts in societal expectations of business responsibility over this period, the Benchmark scheme illustrates the distance travelled since the mid-2000s, when business and human rights began to become institutionalized on the multilateral agenda. That process was entrenched by the multilateral consensus reached in the UN Human Rights Council in 2011 around the Guiding Principles on Business and Human Rights (GPs). By the time of the Council meeting in Geneva in June 2014, however, it was apparent that this diplomatic consensus had not held. This is the case even as many firms, industry groups and financial institutions proceed steadily to integrate human rights issues within their management systems.

In this context, this paper offers an overview of some current debates and developments regarding business and human rights, an area that is still emerging in terms of international law. In particular, it considers the re-emergence of disagreement at the multilateral level. It assesses the significance of these factors for the medium-term trajectory of diplomacy and debate on international forms of regulation and remedies in the area of business and human rights.

Box 1: Illustrating the issues

The impact of business on the enjoyment of human rights extends from familiar cases of garment ‘sweatshops’, or abuses by security forces around mining or drilling sites, to issues such as the role of global tech companies in cooperating with governments on cyber monitoring. International law is implicated in various ways – for example in calls for a treaty to commit companies’ ‘home’ states to establish mechanisms to deal with claims for alleged corporate rights abuses committed abroad.

The business and human rights agenda appears unlikely to decline in prominence. Yet within this broad trend, the paper’s theme and diagnosis are of divergence. The divisions witnessed in 2014 at intergovernmental level are mirrored elsewhere, with states and businesses responding to the agenda with widely varying degrees of intensity. Some of the divergences can be explained by differing capacities, but the issue is also about incentives for reform – both structurally and for individual states and businesses. These enduring features are unlikely to shift appreciably over the medium term.

Background: 2011–14

For three decades from the 1970s to the mid-2000s, a partly ideological stalemate had accompanied consistent proposals for regulating the human rights responsibilities of businesses (and states’ related duties) through some binding international legal instrument. However, little clarity or consensus had developed on the substantive legal obligations directly applicable to businesses (and/or states with jurisdiction over them), in respect of which recognized human rights, and which types of business entities.

Such division and uncertainty explained why most observers welcomed the 2011 consensus on the GPs. Drafted following an extensive consultative process from 2006, their adoption ushered in a period where it seemed understood that the focus was to shift from pursuing a multilateral treaty solution – and from seeking in the abstract to delineate the content of norms and duties. The GPs’ main author, John Ruggie, had in fact expressly ruled out taking the ‘treaty path’ as a serious or desirable option in the search for effective and legitimate remedies for business-related human rights claims. Instead, from 2011 the consensus was that the focus was to be on promoting national-level awareness and uptake of the GPs’ ‘respect, protect, remedy’ framework.

By mid-2013 it was increasingly evident that certain developing states, with some civil society support, would attempt to revive demands for the negotiation of a binding treaty. The reasons for this shift have been extensively analysed elsewhere. Some proponents had never abandoned the idea. For them, apparently progressive voluntary schemes such as the Corporate Human Rights Benchmark simply highlight the absence of a specialized binding legal instrument that would clarify corporate

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obligations and provide for remedies; from this perspective, the GPs were a parallel development and are no substitute for moving towards a treaty.

Other advocates of reviving attempts at a treaty may have seen the strategic merits of shifting to focus on the GPs and national measures, but by at least mid-2013 they had become disillusioned with states' complacency after 2011. Illustrative of this group is Amnesty International, the secretary-general of which has recently argued that post-2011 inaction means that a treaty is needed to make some GP elements mandatory.5

Some other treaty proponents have seemed driven more by quasi-ideological factors, which have led them to demand an instrument dealing with large listed Western transnational corporations. This focus is 'ideological' because it appears not to be motivated by an objective search for what might work best in preventing or remediying abuse. It has also seemed uninterested in evidence that many relevant abuses, from child labour to denial of free association, take place within local and not transnational firms.

2014: Geneva resolutions

The outcome of revived treaty calls was that there were two draft resolutions on business and human rights for diplomats to consider at the June 2014 meeting of the UN Human Rights Council.

'Resolution I'

The first resolution was sponsored by Ecuador and South Africa, along with Bolivia, Cuba and Venezuela:6

- The resolution did not dwell on the GPs. It called for the establishment of an 'open-ended intergovernmental working group' under the auspices of the Council 'to elaborate an international legally binding instrument to regulate … the activities of transnational corporations and other business enterprises'.7

- The resolution did not offer any particular rationale for a treaty (as opposed to other measures); nor did it delineate the abuses to which it related (stating generally 'international human rights law'), or explain why it should be limited to 'transnational' firms – a clear throwback to 1970s debates on a treaty in this area.

- The resolution was adopted, narrowly, after extensive debate. The voting breakdown illustrates clear division: 20 votes for (mainly from the BRICS8 and developing countries); 14 against (mainly countries of the Organisation for Economic Cooperation and Development – OECD); and 13 abstentions.

- Beginning in 2015, the resolution directs the new intergovernmental group to conduct 'constructive deliberations on the content, scope, nature and form of the future international instrument'. The group is to solicit inputs on the instrument’s ‘possible principles, scope and elements’ and ‘prepare elements for a draft legally binding instrument’ intended for ‘substantive negotiations’ by its third session.

This is a highly ambitious, almost unworkable time frame within which to prepare an instrument capable of supporting substantive negotiations. Indeed, important opposing states have informally declared their intention not to engage with the new working group.

Box 2: Fragmented processes in 2014

Resolution I: A new, open-ended intergovernmental working group is ‘to elaborate an international legally binding instrument to regulate … the activities of transnational corporations’.

Resolution II: The UN Secretariat is ‘to facilitate the sharing and exploration of the full range of legal options … to improve access to remedy for victims of business-related human rights abuses’.

UN Human Rights Council, June 2014

'Resolution II'

The second resolution was co-sponsored by a large number of countries,9 and was adopted by consensus:

- It was mainly devoted to overseeing and helping to fund national-level implementation of the GPs, the Working Group’s (extended) mandate and functions, and the (extended) Forum on Business and Human Rights.10

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3 The resolution defines ‘other business enterprises’ as enterprises with a ‘transnational character’, expressly excluding ‘local businesses’. This would probably prove either indefensible or unworkable.

4 Russia, India, China and South Africa voted in favour; Brazil abstained.


• The resolution requested the UN High Commissioner for Human Rights to facilitate a consultative process with states, experts and others to explore ‘the full range of legal options’ and practical measures to improve access to remedy for victims of business-related human rights abuses. It asked the Working Group to include judicial and non-judicial remedy issues on the Forum’s agenda, in order to foster ‘mutual understanding and greater consensus among different viewpoints’.

The December 2014 Forum meeting did not produce a breakthrough in relation to the parallel UN-level intergovernmental processes resulting from the two resolutions.

Box 3: Fragmented voting in 2014

**For treaty path (20):** China, Russia, India; also Indonesia, South Africa and others.

**Against treaty path (14):** France, Germany, Japan, South Korea, United Kingdom, United States and others.

**Abstentions (13):** Brazil and Mexico, among others.

UN Human Rights Council, June 2014

(Re-)evaluating the treaty path

Since their motives are not entirely clear, it is difficult to say how committed the state sponsors of Resolution I are to seeing the new intergovernmental process through its first years. The cautious terms under which China and others gave support to the resolution do not constitute a basis for assuming that these powers – whose own private and state-owned firms increasingly operate transnationally – will show any strong or sustained enthusiasm for the long and arduous process of pre-treaty negotiations. Their vote may simply reflect a strategic political posture of South–South solidarity on the basis that a new instrument of any significance is most unlikely to emerge for at least a decade.

Indeed, it is the time and opportunity cost associated with the treaty path that unites those states and civil society groups opposed to Resolution I.11 In their view, the path is over-ambitious in its scope and scale, and has very little prospect of success. In any event, it purports to regulate ‘transnational corporations’ against the votes of the United States, Japan, Germany, South Korea and other countries that are host to many of the world’s major global companies.

Opponents of the treaty path, resurrecting pre-2011 arguments, point out that even a fully subscribed treaty on human rights would not, of itself, necessarily translate into any greater substantive protection of rights. They state that the treaty path risks fragmenting UN-level processes – further draining the residual 2011 consensus, and diverting energies and momentum away from implementation and monitoring of the GPs and other measures. These other avenues are likely to be of greater utility and relevance for rights claimants than any treaty. As one observer noted, an open-ended intergovernmental working group will tend to place all the attention on treaty issues and take the pressure off state representatives in Geneva ‘to explain what progress they have made at home’.12 Following the experience of other controversial treaty negotiation processes, these arguments have very considerable weight.

Yet the position of those strongly opposed to Resolution I is not without its weaknesses. Arguably, those who are advocating a singular focus on country-level implementation of the GPs are either in denial (the debate has already widened out beyond just the GPs), or are misconstruing the GPs’ significance (they were never intended to set out obligations under international law, or to exclude a search for supranational remedial mechanisms). Indeed, shortly after Resolution I was adopted, Ruggie – the main ambassador for prioritizing national efforts to implement the GPs – observed that some form of further international regulation, focused on specific governance gaps, is both inevitable and necessary.13

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For most businesses and their advisers, these debates on the merits of various approaches are less immediately important. Their interest in what should happen is likely to be far less significant than a clearer sense of what is likely to happen at the intergovernmental level over the medium and longer term. Perhaps the simplest answer is that as far as the law is concerned, legislative measures at national level (and trends in extending home state jurisdiction to claims of harms occurring abroad) will remain far more significant than will any developments out of Geneva.

However, there are two caveats. First, the map of state measures will remain very sparsely and unevenly patterned, even as within supra-jurisdictions such as the European

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Second, as Resolution II and its preamble make clear, the overall trend at the multilateral level is towards finding appropriate modes or institutions to facilitate access to remedy for business-related human rights claims, especially for transnational claims where local forums are unable or unwilling to process these. Indeed, the desire of anti-treaty opponents to outflank those advancing the treaty path – and to preserve consensus – will tend to help drive this search for acceptable alternatives. A range of scenarios also exist for support to gather behind viable so-called ‘precision instruments’ on certain doctrinal, jurisdictional or access-to-justice issues. Moreover, much of the regulation in this area will matter for businesses will not necessarily be ‘mandatory’ in international law terms, or be generated by state authorities. Rather, it will be generated by industry bodies, stock exchanges, insurers and others. Businesses have some legitimate stake in, and opportunity for, shaping those processes, as they do in Geneva-level debates.

Of the governments that opposed Resolution I or abstained therefrom, many will also be anxious to preserve the spirit of 2011 and prevent the June 2014 resolutions leading to any wider North–South divide. For them, the 2015–16 period will involve efforts better to understand what might have driven voting in relation to Resolution I, and how to influence the views of key pro-Resolution I states (China, Russia, India, Indonesia and South Africa) as well as influential abstaining countries (particularly Brazil and Mexico). The picture will likely only be clearer ahead of the Human Rights Council meeting in June 2016.

Emerging trends in state practice

At the national level, the recent pattern is of considerable divergence in states’ uptake of the GPs. This is likely to continue in the medium term. Formal National Action Plans (NAPs) related to the GPs have only been produced by a handful of (exclusively EU) countries, although more than 10 countries – including the United States – have undertaken to produce NAPs or are developing these. These are important commitments, but in pure number terms this list accounts for a very insignificant proportion of UN member states, most of which are inactive on the GPs.

Beyond the GPs and multilateral initiatives, there is of course scope for states to regulate nationally and/or extraterritorially in respect of breaches by business entities of recognized human rights. As noted, in terms of obligations imposed by states under domestic legislation, there is a trend of integrating corporate due diligence reporting requirements for human rights into wider regulatory schemes (illustrated by the recent EU directive on non-financial reporting), as well as in the form of ad hoc interventions on particular sectors, issues or countries that attract political attention (such as US reporting requirements for firms operating in Myanmar). However, state practice in this regard remains very limited. Especially in the current constrained global growth conditions, no particular reason exists for believing that this trend will change over the medium term.

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One area to watch over the medium term will be attempts to integrate human rights issues into bilateral, regional and multilateral trade agreements and other conventions. For example, at the December 2014 UN Forum on Business and Human Rights, the head of the World Trade Organization (WTO) argued in favour of integrating the decades-old International Labour Organization labour rights conventions into the WTO agreements. There is still considerable scope for better integrating human rights into international trade and investment instruments and rules; the GPs make reference to investment agreements as one vector for business impact on human rights. Within the World Bank Group, the International Finance Corporation is moving to rationalize its performance standards by reference to the GPs. There is also scope for greater integration of public law standards in private law instruments (contracts), consistent with work on ‘responsible contracting’ during the GPs consultation process. The forthcoming Chatham House research paper will explore such questions in greater detail.

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14 This issue forms the subject of a current research project by the International Law Programme at Chatham House, with a paper due to be published in mid-2015.
16 Denmark, Finland, Italy, the Netherlands, Spain and the United Kingdom.
17 One likely trend is that civil society becomes sucked into monitoring or assisting the implementation of those states that do produce NAPs, and is somewhat diverted from advocacy around those that show no sign of doing so. Often the result does not reflect the objective pattern of human rights problems.
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Business responses: capacity and incentive

The relevant medium-term regulatory thrust will, as noted, not come through international law or state measures. It will mainly comprise pre-emptive, self-regulatory measures and standards by industry bodies, stock exchanges and so on. An example is the Benchmark index referenced above.

Nevertheless, such measures feed into the evolution of international regulation – for instance a potential emerging ‘soft norm’ around exercising due diligence on human rights impact. Many areas noted as priorities for business and human rights are ones already regulated by health and safety, labour or environmental laws at national level. Their enforcement is unrelated to international law efforts. Yet they reveal that the regulatory map is already fuller than is sometimes conveyed by claims that business operates in a human rights vacuum.

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Market-based human rights benchmarking, (self-)regulatory and reporting initiatives are not new, even if they have gathered momentum. Focused mainly on procedural rather than substantive compliance, considerable research is still needed to demonstrate how their uptake may be linked to measurable behavioural and decision-making improvements in human rights impact terms. Beyond reinforcing incentives on bigger firms to improve due diligence mechanisms, it is questionable whether the GPs have acted or will act as a noticeable driver of the existing trend of corporate and financial initiatives. Firms and funds already act or do not act on these issues for a range of reasons (for example, in order to differentiate their investment products). They generally seem unlikely to adjust their approaches markedly in response to the GPs themselves.

As with state-level activity, what will become more apparent over the next few years is the divergence in business responses. Larger transnational firms, funds and insurers are tending, slowly but steadily, to build human rights diligence frameworks into their internal systems. These measures may have regulatory impact along the value chain, right down to smaller, national-level firms. However, especially in the absence of state action, the vast majority of national-level businesses will lack the awareness or capacity to respond; most will also lack any incentive to do so.19

Activism and advocacy: access and strategy

Civil society and the legal profession play a critical role in this emerging field. Indeed, one further concern with the new (Resolution I) intergovernmental working group is that while negotiation of any international legal instrument is a matter for states, the credibility and durability of any such process will be contingent on the scope for meaningful input of appropriate non-state, non-business actors.

Civil society organizations and think tanks operating in this field are faced with some strategic choices in addition to the treaty path debate. There is widespread consensus on pushing country-level awareness and implementation of the GPs. Beyond this, however, some players appear to be struggling to select priority issues in the business and human rights agenda. In an already wide field, conceptualization of human rights impacts is broadening to encompass more and more issues.

On one hand, issues such as climate change and tax justice can be readily articulated as human rights issues, since they can be conceived as impacting on individual rights as understood in international human rights law. On the other hand, in terms of longer-term strategy it is arguable that efforts by some actors to integrate business and human rights issues into other social campaigns (such as against tax avoidance) may dilute the business and human rights agenda. That is to say, the understandable urge to draw linkages could deprive the business and human rights agenda of the critical and universalizing force that arises from its being specifically an international law project.

This dilemma is exemplified by one leading organization’s recent ‘Top 10’ list of human rights and business issues for 2015.21 Several of the listed priorities are important global issues but are not obviously ones that directly relate to international rights norms. For instance, one stated priority is supporting trade unions amid the growing casualization

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19 See IHRB, State of Play (2014).
of labour. This may be a major social justice issue, but casualization is not necessarily a human rights issue (with all the normative force and universal fundamentals that this implies) unless, for example, it unjustifiably infringes on freedom of association. Without this link, such issues are important but not ones with the special protective status of international human rights law. Another stated priority is corporate tax evasion or avoidance, and illicit financial flows. Again, these are serious issues impacting, for instance, the state’s capacity to fund poverty reduction efforts. However, more precise and persuasive work is needed to sustain a claim that these issues are sufficiently connected to recognized, remediable duties in international human rights law.

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If business and human rights is to gain traction as a universal legal project, advocacy cannot credibly recruit international human rights law in support of everything it wants to see reformed. Some very important issues of responsible, lawful or ethical business are not thereby also about human rights-compliant business. It may be good campaign strategy to articulate issues such as tax avoidance as issues of human rights. Yet this risks diluting the force of claims made in the name of international law. As a result, business and human rights becomes about everything – and therefore about nothing. Such overly broad framing risks alienating and confusing both business and regulators. More work is needed so that claims linking issues such as climate change and tax justice to human rights are made in forensic ways that render visible their roots in the international human rights law framework, and just how these trigger the differentiated responsibilities of states and corporations.

The 2015 Sustainable Development Goals

2015 will also see the promulgation of a formal global development framework, in the form of the Sustainable Development Goals, to succeed the UN 2000–15 Millennium Development Goals. Attention to the private sector’s positive role in helping design and deliver the development agenda has never been higher. On balance, there is a strong case for scaling up the systematic engagement of businesses in efforts to build greater peace and prosperity, including through leveraging the long-term self-interest of business actors. The same conclusion may be reached when development cooperation is considered through the lens of international law. This approach would see business and human rights not simply in terms of abuses attributable to commercial enterprises (i.e. the typical representation of the topic). Instead, it would conceive the private sector as a major existing and potential partner in the realization and fulfillment, in particular, of those socio-economic rights that are recognized in international law. Companies will of course rightly be wary of seeing their social and developmental contributions framed in terms of human rights duties. As a matter of both legal and democratic principle, those duties belong to governments. Here again, the ability of civil society and the media to monitor state action and inaction will continue to prove significant, further illustrating the interrelationship between political and socio-economic rights.

Conclusion

Over the next few years, business and human rights will remain fairly high on the corporate strategy, diplomacy and activism agendas. This is certainly true for states’ multilateral human rights engagement and rhetoric, much of the effort in terms of which in 2015–16 will be devoted to preserving and cultivating greater consensus on questions of avenues for remedial measures at the international level. There will also be greater focus on what states are doing or not doing to implement the GPAs (and related NAPs), together with diagnostic work both on barriers to greater uptake and on the scope for leveraging existing measures in national law. Although the focus may be on states’ moves, over the medium term it is arguably with large firms, industry groups and supply chain alliances – and not government institutions – that much of the pertinent preventive work will be done. Corporate attention will be sustained – as a function of wider trends (by no means limited to OECD countries) – on risk management and on adjusting for commercial reasons to shifts in expectations regarding the role and regulation of responsible business in society. Transforming adverse practices within smaller and national-level firms will prove much harder, and be complicated by some states’ ideological preferences to view only ‘transnational’ firms as potential targets of international measures.


However, and contrary to the sustained profile of business and human rights, this area does of course constitute only one field in wider international law, and in global discourse on development, peace or justice. At least from the perspective of international human rights law, and in terms of apportioning diplomatic and advocacy efforts, important questions will remain on whether the business and human rights agenda has lately assumed disproportionate significance. The vast aggregate majority of violated civil or political rights and unfulfilled social or economic rights worldwide are attributable to government actions or omissions, not corporate ones.

It is true that business and human rights topics are currently attracting greater proportions of rights-related funding, capacity building and diplomatic attention. There are some ‘quick wins’ in shifting corporate practices that obviously impact human rights; and issues of labour standards affect millions globally and will inevitably attract a human rights dimension. At some point, however, activists and others conscious of the significance of state abuses will probably begin to ask whether corporate-related human rights abuses deserve the same attention as international law issues relating to (for instance) mass human displacement, or torture.

Beyond the medium term, it remains to be seen whether business and human rights proves, like counterterrorism and human rights during the 2000s, to be in part a ‘wave’ issue. One explanation for the uneven and diverging performance of states on the GPs is that not all issues regarding universal norms will prove to be of universal interest or urgency. Still, at the commercial level, uncertainty over the area’s evolution and its overlap with core commercial and reputational considerations will incentivize larger global brands, firms and funds to seek guidance on scenarios for the direction of international regulation in this field.

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