4. The social construction of the UN Guiding Principles on Business and Human Rights

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I INTRODUCTION

The United Nations Human Rights Council (HRC) unanimously endorsed the Guiding Principles on Business and Human Rights (Guiding Principles) in June 2011.[2] To date, they constitute the only official guidance the HRC and its predecessor, the Commission on Human Rights, have issued for states and business enterprises in relation to business and human rights. And this was the first time that either body had "endorsed" a normative text on any subject that governments did not negotiate themselves. UN High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, describes the Guiding Principles as "the global authoritative standard, providing a blueprint for the steps all states and businesses should take to uphold human rights."[3] According to Arvind Ganesan, who directs business and human rights at Human Rights Watch, as recently as the late 1990s "there was no recognition that companies had human rights responsibilities."[4] Needless to say, many factors contributed to this shift, particularly escalating pressure from civil society and adversely affected populations. But in terms of putting a global standard in place, *The Economist* Intelligence Unit has judged HRC endorsement of the Guiding Principles to be the "watershed event."[5]

The Guiding Principles are built on a three-pillar "Protect, Respect and Remedy" framework: (1) states have a *duty to protect* against human rights abuses by third parties, including business, through policies, regulation, legislation, and effective enforcement; (2) business enterprises have an independent *responsibility to respect* human rights: that is, to avoid people's human rights being harmed through their activities or business relationships, and to address harms that do occur; (3) where human rights are harmed, affected individuals and communities should have *access to effective remedy*, and both states and enterprises have a role to play in enabling this to occur. There are 31 Principles in all, each with commentary elaborating

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[2] For the full text, see United Nations, Office of the High Commissioner for Human Rights, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011) http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf accessed 8 June 2017.

[3] Z Ra'ad Al Hussein, 'Ethical Pursuit of Prosperity', *The Law Society Gazette* (23 March 2015) http://www.lawgazette.co.uk/analysis/comment-and-opinion/ethical-pursuit-of-prosperity/5047796.fullarticle accessed 8 June 2017.

[4] Quoted in The Economist Intelligence Unit, 'The Road from Principles to Practices: Today's Challenges for Business in Respecting Human Rights' (13 October 2015) https://www.eiuperspectives.economist.com/strategy-leadership/road-principles-practice accessed 8 June 2017.

[5] ibid.

its meaning and implications for law, policy, and practice. They encompass all internationally recognized rights, and apply to all states and all business enterprises. They do not by themselves create new legally binding obligations but derive their normative force through their endorsement by states and support from other key stakeholders, including business itself. Yet elements of them have already been incorporated into binding regulation and law.

As the author of the Guiding Principles, I naturally take some pride in their achievement.[6] Yet when I presented the Guiding Principles to the HRC for its consideration I stated frankly that they do not mark the end of business and human rights challenges, or even the beginning of the end. "But Council endorsement of the Guiding Principles will mark the end of the beginning, by establishing a common global platform for action, on which cumulative progress can be built, step-by-step, without foreclosing any other promising longer-term developments."[7]

The Guiding Principles have generated a burgeoning academic literature.[8] And by now there are several years of practical experience to inform the debate. But the conceptual and theoretical understanding of global rulemaking that informed my development of the Guiding Principles, and to which I have contributed as a scholar, has not been fully articulated and debated. This chapter aims to close that gap, on the supposition that those ideas might have contributed to the Guiding Principles' relative success where previous efforts failed, and that in some measure they may be applicable in other complex and contested global policy domains.

The chapter is organized into six sections, including this Introduction. Section II highlights some of the broad systemic factors that shaped the global economy and polity from the 1990s into the mid-2000s, the peak of the most recent wave of globalization. Section III summarizes the key features of two very different UN-based initiatives proposed around the turn of the century, both seeking to better protect human rights from corporate harm: the "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" (Norms), and the UN Global Compact. Section IV outlines and illustrates the conceptual constructs underlying the development of the Guiding Principles, while Section V does the same for their dissemination and implementation. Section VI, the Conclusion, offers some reflections on the Guiding Principles' experience for this and possibly other complex and contested domains of global rulemaking.

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[6] From 2005 to 2011, I served as the UN Secretary-General's Special Representative for Business and Human Rights.

[7] Presentation of Report to United Nations Human Rights Council, Professor John G Ruggie, Special Representative of the Secretary-General for Business and Human Rights, Geneva (30 May 2011) http://www.ohchr.org/Documents/Issues/TransCorporations/HRC%202011_Remarks_Final_JR.pdf accessed 8 June 2017.

[8] See, for example, Radu Mares (ed), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Martinus Nijhoff 2012); Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (CUP 2013); Dorthee Baumann-Pauly and Justine Nolan (eds), *Business and Human Rights: From Principles to Practice* (Routledge 2016); César Rodríguez-Garavito (ed), *Business and Human Rights: Beyond the End of the Beginning* (CUP 2017). The Guiding Principles have also featured in debates among moral philosophers on the conceptual and normative questions raised by international human rights law. See, for example, Allen Buchanan, *The Heart of Human Rights* (OUP 2013); John Tasioulas, 'Exiting the Hall of Mirrors: Morality and Law in Human Rights (2017); King's College London Dickson Poon School of Law, Legal Studies Research Paper Series: Paper No 2018-19.

II THE CONTEXT

This section highlights three broad systemic factors that I saw shaping global rulemaking in the early twenty-first century, including in relation to business and human rights.

A Geoeconomic/Geopolitical

In 1982 I published a scholarly article that introduced the concept of embedded liberalism into the field of international political economy.[9] It explained how the capitalist countries learned to reconcile the efficiency and joint gains of markets with broader social norms and institutional practices that markets themselves require in order to thrive and survive. I adapted the term from Karl Polanyi's magisterial work, *The Great Transformation*, published in 1944.[10] The transformation was a long and painful journey.

In stylized form, this was the essence of the embedded liberalism compromise: after World War II the commitment to international liberalization was institutionally coupled with norms and practices protecting national social communities. Governments played a key role in enacting and sustaining it: on the one side, re-establishing a multilateral monetary and trade regime and progressively removing barriers to trade; on the other side, providing domestic social investments and safety nets, while moderating the volatility of cross-border transaction flows by, for example, requiring capital controls to prevent destabilizing flows of "hot money," and allowing for temporary safeguards against sudden surges in imports. Reconciling these two competing policy objectives—open international markets and domestic economic and social stability—required delicate national and international balancing acts, which took different forms in different countries: social democracy, the social market economy, and the New Deal state. In the industrialized world, this grand bargain formed the basis of one of the longest and most equitable periods of economic expansion in history.[11]

At the time I wrote the article the "new protectionism" was all the rage among political economists: the belief that the interventionist and social protection component of the embedded liberalism compromise was eroding international economic openness.[12] The alleged decline of American hegemony was the favored explanation.[13] Permanent US balance of payments deficits could no longer sustain the link between the dollar and monetary gold backing it, thereby forcing the world onto a US paper standard, while the US vigorously "encouraged" countries

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[9] John Gerard Ruggie, 'International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order' [1982] *International Organization* 379.

[10] Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon 1944).

[11] In a detailed statistical analysis, Salvatore Pitruzzello demonstrates that post-Second World War embedded liberalism in the OECD countries generated better long-term economic performance and social protection than its nineteenth-century *laissez-faire* predecessor. Pitruzzello, 'Trade Globalization, Economic Performance, and Social Protection: Nineteenth-Century British Laissez-Faire and Post-World War II U.S.-Embedded Liberalism' in John Gerard Ruggie (ed), *Embedding Global Markets: An Enduring Challenge* (Ashgate 2008).

[12] For example, Melvyn B Krauss, *The New Protectionism: The Welfare State in International Trade* (NYU Press 1978).

[13] For example, Robert O Keohane, 'The Theory of Hegemonic Stability and Changes in International Economic Regimes, 1967–1977' in Ole Holsti et al (eds), *Change in the International System* (Westview 1980).

such as Japan to adopt "voluntary" export controls, hoping to slow the rate of increase of imports into the US of consumer electronic products, steel and automobiles in particular.

However, my article concluded on a strikingly different note: "the foremost force for discontinuity at present is not 'the new protectionism' in money and trade but the resurgent ethos of liberal capitalism."[14] Apart from believing that reports of America's economic decline were greatly exaggerated, as Mark Twain said of his reported death, my theoretical argument suggested that the embedded liberalism compromise was most likely to unravel as a result of a shift in the social purpose of the state vis-à-vis the market, from the domestic compensatory role it had played to buffer the dislocations resulting from international openness, toward some newer form of more unrestrained reliance on market mechanisms. As if on cue, the elections of Margaret Thatcher in 1979 and Ronald Reagan in 1980 promised to embark on just such a shift.

The phenomenon whose rise I had predicted subsequently came to be known as neoliberalism, which in important respects evolved into the dominant ideational and institutional template of economic governance in the 1990s.[15] The literature on neoliberalism is vast, and the phenomenon itself remains highly contested. It is not my aim to rehearse or assess the debate here, but merely to note several factors relevant to our discussion, beginning with the multinational enterprise.

Raymond Vernon, a pioneer in the study of multinationals going back to the 1970s, published a book in 1998 entitled *In the Hurricane's Eye: The Troubled Prospects of Multinational Enterprises*. His decision to write the book, he states in the preface, "grew out of a sense that the world was slipping into a period in which the inescapable clashes between multinational enterprises and nation-states might be growing in frequency and intensity, evoking responses from both the public and the private sectors that would substantial[ly] impair their performance."[16]

Yet today the multinational enterprise is the standard mode of organizing economic activities across countries. From 1991 to 2001, some 94 percent of all national regulations related to foreign investment that were modified across the world were intended to further facilitate it.[17] Nike was one of the first US manufacturing companies to completely offshore production: starting in Japan in the 1970s, shifting to South Korea and Taiwan in the early 1980s, and, when the cost model there came under pressure, convincing its Korean and Taiwanese suppliers to set up shop elsewhere in Asia, including Indonesia and Vietnam.

China entered the World Trade Organization in December 2001, and soon became a leading global manufacturing platform. China launched its "going out"—or foreign investment—policy in 2001, and subsequently became a major home country of multinational enterprises, as to a lesser extent did Brazil, India, and South Africa. Complex value chains linked increasingly dispersed production as well as the delivery of professional and other services. Extractive firms sought new sources of oil, gas, and minerals in ever more challenging operating contexts. Saskia Sassen observed in 2006 that a fundamental transformation had taken place in the social purpose of national economic policy: "In earlier periods, including Bretton

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[14] Ruggie (n 9) 413.

[15] Colin Crouch, *The Strange Non-Death of Neoliberalism* (Polity 2011).

[16] Raymond Vernon, *In the Hurricane's Eye: The Troubled Prospects of Multinational Enterprises* (Harvard 1998) vii–viii.

[17] UNCTAD, *World Investment Report 2002* (Geneva 2002) 7.

Woods, [the organizing logic of economic policymaking] was geared toward building national states; in today's phase, it is geared toward building global systems."[18]

One striking consequence is that "about 80% of global trade (in terms of gross exports) has become linked to international production networks of TNCs [transnational corporations]."[19] And perhaps as many as one out of seven jobs in the world is in the supply chains of multinationals, not counting informal work.[20] Thus, as national economies have become more open, an ever-greater share of production and trade has become internalized within the networks of 80,000 or so multinationals and parties related to them through equity ties or contracts. Yet, at the global level, shared values and institutional procedures to embed such economic forces and actors remained weak, and in some respects are getting weaker.

B Legal and Institutional Fragmentation

The fragmentation of global policy- and law-making was becoming equally clear in the late 1990s. In a study of what they call the "stagnation" of public international law, Pauwelyn, Wessel, and Wouters make this observation:

> The 1990s may represent the apex of formal and legalized international law and organization: end of the cold war; reactivation of the UN Security Council; 1992 Rio Conference; entry into force of the Law of the Sea Convention; creation of the WTO and the Energy Charter in 1994; unlimited extension in time of the Nuclear Non-Proliferation Treaty in 1995; 1997 Kyoto Protocol; 1998 Rome Statute. The turn of the century, in contrast, represents a breaking point.[21]

The number of new multilateral treaties has since declined; fewer have been deposited with the United Nations in each of the past two decades than in earlier decades. Even the number of new investment treaties has been declining. Similar trends exist at regional levels.

Many factors lay behind this growing fragmentation in global public rulemaking.[22] Three are particularly pertinent to the present discussion. The first is that geoeconomic changes were accompanied by geopolitical shifts, which often are felt first in consensus-based international organizations like the United Nations. Emerging powers, with diverse national interests and reflecting different domestic economic, legal, and political systems, began to project greater influence in multilateral forums, making coalition building and consensus seeking more difficult.

A second and partly related factor is what some have called the rise of networked governance: essentially self-constituting transnational public or private governance arrangements, focused on specific policy problems.[23] Typically these were begun by a limited number of

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[18] Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press 2006) 16.

[19] UNCTAD, *World Investment Report 2013* (Geneva 2013) 135.

[20] International Labour Organization, *Decent Work in Global Supply Chains* (Report prepared for 105th Session, International Labour Conference 8 April 2016) http://www.ilo.org/ilc/ILCSessions/105/reports/reports-to-theconference/WCMS_468097/lang--en/index.htm accessed 8 June 2017.

[21] Joost Pauwelyn et al, 'When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking' [2014] *European Journal of International Law* 733.

[22] ibid, especially 739.

[23] For example, Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2004); Thomas Hale and David Held (eds), *Handbook of Transnational Governance* (Polity 2011); Tim Bűthe

countries or private standardsetting bodies with the greatest influence in a particular issue who wished to avoid working through larger, more diverse and more cumbersome multilateral bodies. Examples include the Basel Committee on Banking Supervision, Financial Action Task Force, Financial Stability Board, International Accounting Standards Board, and Proliferation Security Initiative, among many others.[24] Moreover, even as the domain of public international law languished, private international law was expanding rapidly, generating a new *lex mercatoria.*[25] One example is commercial arbitration, and the adaptation of this model to investor/state disputes under bilateral investment treaties and host-government agreements.

A third factor is the sheer substantive complexity of global issues, coupled with the extensive interest diversity across and even within states that many exhibit. Climate change is an archetype of the growing number of "wicked problems." These are defined as "large scale social challenges caught in causal webs of interlinking variables spanning national boundaries that complicate both their diagnosis and prognosis."[26] When we do see collective responses by states in the face of such problems they tend to take the form, not of a single comprehensive governing regime for an entire issue-area, but of separate and typically uncoordinated fragments that are said to make up "regime complexes."[27] In the area of global environmental policy, Keohane and Victor conclude that "it is prohibitively difficult to arrange all couplings [among the individual fragments] ex ante into a single comprehensive regime."[28]

C Scale Mismatches

The case of climate change illustrates one type of scale mismatch: the effects are global, but the authority to deal with them remains largely in the hands of national governments. We see a different kind of scale mismatch in the case of business and human rights. Even as the realm of global public rulemaking has trended to fragmentation, multinational enterprises are a major global economic integrative force, as noted above. However, while in the every-day world multinationals such as Nike, Google, Coca-Cola, Toyota, Novartis, and Sinopec are known to be *one* enterprise, with unity of command, operating under a single global vision and

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and Walter Mattli, *The New Global Rulers: The Privatization of Regulation in the World Economy* (Princeton University Press 2011).

[24] In part, external fragmentation reflects fragmentation within the same government. For example, US Secretary of State Rex Tillerson attributed part of his failure to broker a deal between Gulf nations and Qatar in July 2017 to the 'fragmented' decisionmaking of the US government, which he compared unfavorably to the 'highly structured' process in ExxonMobil, of which he had been CEO. Gardner Harris, 'Qatar Feud Defies Efforts By Tillerson to Unite Gulf' *New York Times* (14 July 2017).

[25] A Claire Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (CUP 2003); Gralf-Peter Calliess and Peer Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Hart 2012); John Gerard Ruggie and John F Sherman III, 'Adding Human Rights Punch to the *New Lex Mercatoria:* The Impact of the UN Guiding Principles on Business and Human Rights on Commercial Legal Practice' [2015] *Journal of International Dispute Settlement* 455.

[26] Juliane Reinecke and Shaz Ansari, 'Taming Wicked Problems: The Role of Framing in the Construction of Corporate Social Responsibility' [2016] *Journal of Management Studies* 299.

[27] Frank Bierman et al, 'The Fragmentation of Global Governance Architectures: A Framework for Analysis' [2009] *Global Environmental Politics* 14; Robert O Keohane and David Victor, 'The Regime Complex for Climate Change' [2011] *Perspectives on Politics* 7; Amandine Orsini et al, 'Regime Complexes: A Buzz, a Boom, or a Boost for Global Governance?' [2013] *Global Governance* 27.

[28] ibid, Keohane and Victor, 13.

strategy, optimizing worldwide operations for efficiencies, market share, and profits, they are not generally recognized as such in public law. National law, with some exceptions, governs whatever separate legal entity may be incorporated within a particular national jurisdiction, not the multinational enterprise as a whole. Thus, a parent company enjoys separate legal personality and limited liability for harm caused by its subsidiaries even if it is their sole owner. International law may "contemplate" multinational enterprises, as Knox has put it, and in some instances even "specify" appropriate conduct, as ILO labor conventions for example clearly do. But it generally imposes correlative duties on states, not on companies directly.[29] Thus, Larry Catá Backer concludes, in a masterful understatement: "from a public law perspective, the framework for the regulation of multinational enterprises can be viewed most charitably as in flux."[30]

These factors—geoeconomic/geopolitical shifts, the fragmentation of international law and global governance arrangements, and scale mismatches—continue to shape and reshape both the context and outputs of global rulemaking. They have made advancing the business and human rights agenda both more pressing and yet also more difficult to achieve through the formal intergovernmental governance system.

III LAW AND LEARNING

As we saw above, Nike was an early mover in offshoring production. It was also an early target of campaigns against abusive workplace practices in the overseas factories that produced its athletic footwear and apparel. Indeed, a perfect storm of bad publicity enveloped Nike throughout much of the 1990s.[31] In response, Nike established a Corporate Responsibility Department and adopted a supplier code of conduct and factory audits. Shell followed a corresponding trajectory in Nigeria. Years of destructive environmental practices, including massive oil spills and permanent gas flaring that affected people's health and their ability to sustain their livelihoods from farming and fishing, generated mounting protests by the Ogoni people in the Niger Delta. As protests escalated and some became violent, Shell temporarily withdrew from its concession in Ogoniland. The Nigerian military junta then began a massive crackdown against the Ogoni, reportedly killing some 2,000.[32] Shell ultimately lost its concession in Ogoniland. In 1995, a military tribunal in a sham trial sentenced Ken Saro-Wiwa, the leader of the Ogoni movement, and eight of his colleagues to hang. Political leaders in Africa and elsewhere called for clemency and pressured Shell to use its leverage. Shell merely issued a meek statement that it was not its role to get involved with governments. Following what Mark Moody-Stuart, who later became Shell's chairman, describes as its *annus horribilis* in 1995, Shell revised its business principles. The new principles included "the right and the responsibility" of Shell companies to make their positions known to governments "on any matter which affects themselves, their employees, their customers, or their shareholders [as

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[29] John H Knox, 'Horizontal Human Rights Law' [2008] *American Journal of International Law* 1.

[30] Larry Catá Backer, 'Multinational Corporations as Objects and Sources of Transnational Relations' (2007–08) *ILSA Journal of Comparative and International Law* 499, 507.

[31] John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* (Norton 2013).

[32] ibid, 9–14.

well as] on matters affecting the community where they have a contribution to make."[33] Also included was the responsibility "to express support for fundamental human rights in line with the legitimate role of business." In short, Nike and Shell both discovered the hard way that having a legal license to operate by itself was insufficient to ensure the social sustainability of their operations.

Major multinationals across a broad array of sectors adopted codes of conduct in the 1990s, together with supply chain audits and other forms of monitoring. A corporate social responsibility (CSR) movement and industry began to blossom. Nike and Shell became the CSR leaders of that period. According to an academic handbook on CSR, its "phenomenal rise" reflects a journey "that is almost unique in the pantheon of ideas in the management literature."[34] Two quite different UN-based initiatives entered the fray in 1999: the drafting of the "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" and the UN Global Compact. They developed independently, and at the outset with limited awareness of one another.

A The Norms

The initiative to develop the Norms, a treaty-like text, reflected a deeply held belief in much of the human rights community that legally binding instruments are the most—if not the only—effective tool to regulate international business conduct. CSR is viewed as little more than self-interested self-regulation, designed to burnish the reputation of companies, limit external pressure, and thereby diminish the prospects of "hard" regulatory measures without providing adequate accountability and remedy.

The Norms were drafted under the auspices of the then UN Sub-Commission on Human Rights, a subsidiary body of the Commission on Human Rights, composed of 26 experts nominated by governments but serving in their personal capacity. The Norms' most far-reaching feature was their intent to impose human rights obligations on business enterprises directly under international law, thereby holding them to single global standards. Moreover, within enterprises' "sphere of influence" the Norms attributed to them essentially the same general obligations that states have under human rights treaties they have ratified: "to promote, secure the fulfillment of, respect, ensure respect of and protect" human rights.[35] The specific standards enumerated in the text were drawn from existing international human rights and humanitarian law, supplemented by others that the drafters thought to be particularly relevant to business, such as consumer and environmental protection. Under the Norms, businesses were to be monitored and required to report and to pay reparations to victims.

Of course, for the Norms to take legal effect, states would have to adopt them as a treaty or otherwise widely incorporate them into national law. While human rights groups were strongly supportive, the Norms had few if any champions among governments and were vehemently opposed by international business organizations.[36] In 2004, when the text was presented for adoption to the Commission, composed of governmental representatives, the

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[33] Mark Moody-Stuart, *Responsible Leadership: Lessons from the Front Line of Sustainability and Ethics* (Greenleaf 2014) 256–57.

[34] A Crane et al (eds), *The Oxford Handbook of Corporate Social Responsibility* (OUP 2008) 3.

[35] For the text, see http://hrlibrary.umn.edu/links/norms-Aug2003.html accessed 8 June 2017.

[36] Ruggie (n 31) 47–55.

Commission reacted coolly. It thanked the Sub-Commission for its "work" but not the product. It granted that the text contained "useful elements and ideas" but added that the Commission had not requested it, that it had no legal standing, and that the Sub-Commission should not undertake any monitoring of corporate conduct.[37] This outcome undoubtedly suited business interests. But the Norms also had serious foundational flaws, such as intermingling state and corporate obligations while providing no boundaries for the latter, which concerned states as well as businesses.[38]

B The Global Compact

The other major UN initiative to address corporate conduct begun in 1999, the Global Compact, followed a different script. Initially it was intended to be merely a challenge by then UN Secretary-General Kofi Annan to the global business community, delivered in a keynote address at the annual meeting of the World Economic Forum in Davos. Promoting business support for UN norms in the area of human rights, labor standards, and the environment, he stated: "you can use these universal values as the cement binding together your global corporations, since they are values people all over the world will recognize as their own."[39] Moreover, he added, UN agencies active in those areas stand ready to help in return.

As Annan's Assistant Secretary-General for Strategic Planning, he tasked me, along with Georg Kell, a staff member with a background in international investment issues, to draft the Davos speech. The overall framing of the initiative was drawn from the embedded liberalism concept. As Annan stated at Davos:

> Globalization is a fact of life. But I believe we have underestimated its fragility. The problem is this. The spread of markets outpaces the ability of societies and their political systems to adjust to them, let alone to guide the course they take. History teaches us that such an imbalance between the economic, social and political realms can never be sustained for very long … The industrialized countries learned that lesson in their bitter and costly encounter with the Great Depression … Our challenge today is to devise a similar Compact on the global scale, to underpin the new global economy.[40]

No one has gained as much from globalization, or has so much to lose, Annan continued, than global business. "Don't wait for every country to introduce laws," he added. "You can uphold human rights and decent labor and environmental standards directly, by your own conduct of your own business."[41]

The reaction to the speech was so positive that Annan felt obliged to create a program, with one full-time staff member and an initial budget of $10,000. Kell and I were tasked with its design; he subsequently became the Compact's Executive Director. Although the Compact has been criticized virtually from the outset for being a weak regulatory instrument, it was never

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[37] UN Human Rights Commission Resolution 2004/11 (U.N. Doc. E/CN.4/2004/L.73/Rev.1, 20 Aprile 2004).

[38] Ruggie (n 31) chapter 2.

[39] United Nations, 'Secretary-General Proposes Global Compact on Human Rights, Labour, Environment in Address to World Economic Forum in Davos,' *Press Release* (SG/SM/6881, 1999) http://www.un.org/press/en/1999/19990201.sgsm6881.html accessed 8 June 2017.

[40] ibid.

[41] ibid.

intended to regulate.[42] From the start, it was described and structured as a values-based engagement and learning network.[43] Moreover, being a personal initiative of the Secretary-General, initially established without General Assembly approval, it could not have been a UN regulatory instrument even if Annan had been so inclined.[44] Instead, the Compact was designed as a norms-based learning forum and engagement mechanism, which we saw as a necessary complement to other approaches, including business initiatives and lawmaking. As a guide to responsible business conduct the Compact promoted ten principles inspired by UN declarations in the areas of human rights, labor and the environment, with anti-corruption added once that UN convention was in place.[45] The ten principles were intended to provide a *public* focal point to help inform proliferating *private* corporate codes. To indicate seriousness, participation in the Compact required a letter from a company's CEO, which typically requires board approval, or from the head of other participating institutions including NGOs and workers' organizations. As a modest accountability measure, the Compact subsequently adopted the requirement that participants submit annual progress reports, which were made public. There is no capacity to review these substantively, but companies failing to submit two years running are "delisted."[46]

In terms of its method of inducing long-term change in corporate conduct, the Compact reflects a broadly "social constructivist" approach.[47] In social science terms, this means taking seriously an independent role of ideational factors, human agency, and institutional learning—in addition to appreciating such standard factors as power and interests. For example, social constructivism explores how norms may lead actors to redefine their interests or the social purposes for which they deploy their power, and how innovative ideas and leadership may help overcome institutional impediments to progressive change.

The Compact's agenda has been to consolidate and disseminate the meta-norm of responsible business conduct, as well as to expand and help inform the community of practice in this domain. Its modalities include conducting learning forums and identifying best practices; generating public/private partnerships around the UN "people and planet" agenda; serving as an incubator for innovative initiatives across different business sectors that are then spun off,

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[42] For a literature review see Andreas Rasche, '"A Necessary Supplement": What the United Nations Global Compact Is and Is Not' [2009] *Business & Society* 511; Andreas Rasche and Dirk Ulrich Gilbert, 'Institutionalizing Global Governance: The Role of the United Nations Global Compact' [2012] *Business Ethics* 100.

[43] See, for example, John Gerard Ruggie, 'global_governance.net: The Global Compact as Learning Network' [2001] *Global Governance* 371; Ruggie, 'The Theory and Practice of Learning Networks: Corporate Social Responsibility and the Global Compact' [2002] *Journal of Corporate Citizenship* 27.

[44] Indeed, Annan's authority to launch the initiative was challenged by some governments. In due course, the General Assembly recognized first the Global Compact Office, and eventually the Compact itself.

[45] The principles draw on the Universal Declaration of Human Rights, the ILO Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the UN Convention Against Corruption.

[46] Some 4,000 firms have been delisted over time, disproportionately small and medium sized enterprises (Interview with COMPACT official).

[47] See, for example, John Gerard Ruggie, 'What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge' [1998] *International Organization* 855; Michael Barnett, 'Social Constructivism' in John Baylis and Steve Smith (eds), *The Globalization of World Politics* (3rd edn, OUP 2005).

such as the Principles for Responsible Investment with 2,800 signatory institutions from more than 135 countries, representing $80 trillion under management; and establishing national networks, including in emerging market countries such as Brazil, China, and India, as well as in developing countries. As early as 2005, the Compact convened a CSR summit in China, then the largest such event in that country, which included representatives from business, government, major international NGOs including Amnesty and Transparency International, and international labor federations.[48] The Compact Network in China includes many of the best-known Chinese firms, such as PetroChina, China Mobile, Baidu, Lenovo, China Minmetals, Sinopec, and the China Development Bank, which is a major source of funding for overseas investments by Chinese companies.[49]

Could the Global Compact have done better at what it was intended to do? Undoubtedly it could have. Nevertheless, today it is the world's largest corporate responsibility initiative (it now prefers the term "sustainability"), with more than 12,000 institutional participants—including companies, civil society and workers' organizations, investor groups, business schools, national networks, and even cities—from 170 countries.[50] The fact that it has more participants from emerging market countries than from North America suggests that it has made inroads where they were most needed. Finally, a survey of corporate participants conducted by a Norwegian consultancy on the eve of the Compact's 15th anniversary found that 60 percent reported being "motivated to advance broader UN goals and issues (e.g., poverty, health, education)"; two-thirds reported that the Compact is "driving our implementation of sustainability policies and practices"; and nearly 50 percent said it is "shaping our company's vision."

Law and learning are complementary. Where law exists, learning is necessary to understand it and act accordingly. Where law does not exist, is weak, or is not enforced, learning is necessary to attenuate the adverse effects and help inform its possible future formation.

IV POLYCENTRIC GOVERNANCE

Having declined to approve the Norms, in 2005 the Commission on Human Rights established a mandate for a "special procedure," meaning an independent expert, and asked the UN Secretary-General to select the mandate holder. That is how I came to be the Special Representative of the Secretary-General for Business and Human Rights.[51] The initial mandate was modest: to identify and clarify standards and best practices in the area of business and human rights, for both states and business enterprises; to clarify such concepts as "corporate complicity" in human rights abuses committed by a related party, as well as "corporate sphere of influence"; and to develop materials for human rights impact assessments. Due to controversies surrounding the issue, the initial mandate was only for two years, not the normal three;

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[48] See http://www.csrwire.com/press_releases/21599-United-Nations-Global-Compact-to-Convene-i-Global-Compact-Summit-China-i-in-Shanghai-30-November-1-December-2005- accessed 31 March 2020.

[49] See https://www.unglobalcompact.org/engage-locally/asia/china accessed 8 June 2017.

[50] The figures reported in this paragraph are taken from DNV-GL Group, *Impact. Transforming Business, Changing the World: The United Nations Global Compact* (DNV-GL Group 2015).

[51] UN Commission on Human Rights, Resolution 2005/69 (20 April 2005).

it was later extended to a full term, and then for a second full term, the limit. No Guiding Principles were called for or even anticipated at the outset. I was merely required to deliver reports annually to the Commission and then the Human Rights Council that replaced it in 2006, as well as to the UN General Assembly.

While I certainly drew lessons from the Compact experience, this mandate was different. To begin with, it *was* a mandate from an intergovernmental body, not a personal initiative of a Secretary-General. Moreover, it involved an in-depth examination of business and human rights. As such, it included the role of states and the question of remedy, neither of which the Compact addressed. I recapitulate briefly the core concepts that informed the development of the Guiding Principles.

A Multiperspectival Framing

Social scientists who study the role of ideational factors, including norms, in promoting policy change have long understood the importance of framing. Successful framing often results from simplicity and hard-to-argue-with principles. For example, in the Access to Essential Medicines campaign concerning the price of HIV/AIDS treatment drugs in developing countries, "patients before patents" and "patents kill" were highly successful tag lines because they evoked deep underlying moral norms.[52] But that campaign, coordinated by *Médecins Sans Frontières*, was aimed at one party: the pharmaceutical industry. And it had one overarching aim: to drive down the price of drugs. My mandate was multidimensional, thus requiring multiperspectival framing.

The Guiding Principles rest on the empirical observation that corporate conduct at the global level is shaped by three distinct governance systems. The first is the traditional system of public law and governance, domestic and international. Important as this is, by itself it has been unable to do all the heavy lifting on many global policy challenges, from poverty eradication to combating climate change. The second is a system of civil governance involving stakeholders concerned about adverse effects of business conduct and employing various social compliance mechanisms, such as advocacy campaigns, lawsuits, and other forms of pressure, but also partnering with companies to induce positive change. The third is corporate governance, which internalizes elements of the other two (unevenly, to be sure) and shapes enterprise-wide strategy and policies, including risk management. The challenge was to try and formulate a normative platform on which the three governance systems could become better aligned in relation to business and human rights, compensate for their respective shortcomings, and begin to play mutually reinforcing roles out of which significant cumulative change can evolve over time.

To foster that alignment, the Guiding Principles draw on the different discourses and rationales that reflect the different social roles each governance system plays in regulating corporate conduct. Thus, for states the emphasis is on the legal obligations they have under the international human rights regime to protect against human rights abuses by third parties within their jurisdiction, including business, as well as policy rationales that are consistent with, and supportive of, meeting those obligations—such as when they do business with business. For businesses, beyond compliance with legal obligations, the Guiding Principles focus on the

[52] Susan K Sell and Aseem Prakash, 'Using Ideas Strategically: The Contest between Business and NGO Networks in Intellectual Property Rights' [2004] *International Studies Quarterly* 143.

need to manage the risk of involvement in human rights abuses, which requires that companies employ due diligence to avoid infringing on the rights of others and address harm where it does occur. For adversely affected individuals and communities, the Guiding Principles stipulate ways for their further empowerment through meaningful dialogue and engagement throughout the due diligence cycle as well as means to realize their rights to remedy, both judicial and non-judicial. These perspectives are combined within the "Protect, Respect and Remedy" framing, and spelled out in the Guiding Principles.

For traditional human rights scholars perhaps the most controversial aspect of the Guiding Principles has been the foundation of the second pillar—the corporate responsibility to respect human rights. I turn to it next.

B Social Norms

Advocacy oriented international human rights lawyers and others informed by them tend to differentiate between two types of norms: moral and legal. From moral norms many then try to derive and drive *lex feranda*: law as it should be. Social scientists and sociologically-minded legal scholars also place great weight on the role of social norms. Of course, there are dynamic relationships among the three. To take one simple linear example, campaigns against smoking in restaurants were initially justified on the essentially moral grounds that others have a right not to be subjected to the health risks of secondary smoke inhalation. This soon turned into an accepted social norm, enforced by pressure from other patrons as well as many restaurants themselves, before becoming a legal norm in many countries.

The Guiding Principles reaffirm that business enterprises must comply with all applicable legal requirements. Over and above legal compliance, they also stipulate that enterprises have the responsibility to respect human rights, irrespective of states' willingness or ability to enforce the law. Where does this responsibility to respect human rights come from? In the Guiding Principles it is anchored in a transnational social norm. But how does that work at the global level, where social norms vary across different countries and cultures?[53]

Social norms are shared expectations of how particular actors are to conduct themselves in given circumstances.[54] They hold within specific spheres of social interaction. The corporate responsibility to respect human rights enjoys widespread recognition as a social norm in what I have elsewhere termed "the global public domain"—which functions much like a domestic civic or public sphere.[55] To illustrate this concept, when Oxfam America funds community activists in Cajamarca, Peru, who organize protests against the local operations of an American mining company, and when it also brings community leaders to the company's annual shareholder meetings or to a UN business and human rights forum in Geneva to make their case to the assembled audience, and to the world beyond through the press and social

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[53] For the purposes of the Guiding Principles, there was no need to engage the question of deeper moral bases of human rights.

[54] K-D Opp, 'Norms' in Neil J Smelser and Paul B Baltes (eds), *International Encyclopedia of the Social and Behavioral Sciences* (Elsevier 2001) Vol 10, drawing on the classic work of George C Homans, *Social Behavior: Its Elementary Forms* (Harcourt, Brace & World 1974); also see Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' [1998] *International Organization* 887.

[55] John Gerard Ruggie, 'Reconstituting the Global Public Domain: Issues, Actors and Practices' [2004] *European Journal of International Relations* 499.

media, those actions unfold in transnational space, not simply in separate locales. Similarly, when Zambian or Andean communities lodge complaints against Chinese companies based on social norms that the communities had previously established with Western companies in the same or nearby locales, and the Chinese managers request guidance from Beijing, and Beijing's guidance in turn draws on the Global Compact, the Guiding Principles, or the OECD Guidelines for Multinational Enterprises, those acts unfold in transnational space. Similar examples can be drawn from virtually any sector of transnational business activity. The totality of such transnational spaces constitutes the global public domain.

The global public domain has become an increasingly densely interconnected arena of discourse, contestation, and action involving both private and public actors, focused around the creation or defense of social norms and policy preferences regarding global public goods. In human rights discourse, respecting rights means to not infringe on the rights of others. We know that the corporate responsibility to respect human rights is a transnational social norm because the relevant actors acknowledge it as such, including governments, civil society, and businesses themselves in their corporate responsibility commitments. This does not imply that a transnational social norm is necessarily more (or less) effective than, or unrelated to, moral and legal norms; it is simply different in how it functions socially. Enterprises of course are free to undertake additional commitments, and governments to encourage or require them to do so. But *respect* is the baseline expectation.

Including the category of social norm with moral and legal norms enables the Guiding Principles to take the important additional step of not only specifying *that* business enterprises should respect human rights, but also providing them with a workable approach to *how.* The logic is straightforward: in order for an enterprise to demonstrate to itself, let alone to anyone else, that it respects human rights it must have systems in place whereby it can know and show that it does. Accordingly, beyond having a policy commitment, the Guiding Principles outline a four-step human rights due diligence process: assessing actual and potential human rights impacts, integrating and acting on the findings, tracking responses, and communicating how impacts are addressed. Moreover, where enterprises have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation; where they have neither caused nor contributed to harm but are directly linked to it through a business relationship they should exercise leverage to prevent or mitigate the harm, and where harm has already occurred to use leverage in incentivizing those partners who have caused/contributed to it.[56]

As for which human rights the corporate responsibility to respect encompasses, the answer the Guiding Principles provide is all internationally recognized rights that an enterprise impacts. The long-standing doctrinal debate about whether business enterprises can be duty bearers under international human rights law is avoided because the Guiding Principles state that businesses should look to current internationally recognized human rights for an authoritative enumeration, not of human rights *laws* that might apply to them, but of human *rights* they should respect. That formulation also made it possible for countries that have not ratified key international human rights conventions, including China and the United States, to endorse the Guiding Principles, which reference such conventions, and to recognize the Guiding Principles in their own national policies and guidance to companies.[57]

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[56] See Guiding Principles 16 through 20.

[57] This was made abundantly clear during the consultation/negotiation process, and not only for these two countries.

Finally, the way enterprises know which rights they might adversely impact is through effective human rights due diligence. Wherever possible, this should include engagement with potentially affected stakeholders or their representatives.

Social norms do not inevitably lead to changes in *lex lata*: law as it is. But where new hard law is not immediately in the offing, creating, consolidating, disseminating, and embedding social norms is an indispensable tool for inducing changes in conduct. Besides, in Amartya Sen's felicitous words, viewing human rights solely as "parents" or "progeny" of law would "unduly constrict"—Sen even uses the term incarcerate—the social logics and processes other than law that drive enduring public recognition of human rights.[58] Human rights are better seen more broadly: as mediators of social relations, especially relations that involve significant power asymmetries, in which hard law is but one part of a larger ecosystem of instruments.[59]

C Reflexive Dynamics

The Guiding Principles are a text, to be sure. But as César Rodríguez-Garavito affirms, they should be evaluated not only as a static text "but also in their dynamic dimension (such as their capacity to push the development of new norms and practices that go beyond the initial content)."[60] Indeed, my hope was that they would trigger an iterative process of interaction among the three global governance systems, producing cumulative change over time. No top-down command-and-control regulation could possibly create such a process at the international level, even if one were to exist. But neither would entirely unrelated actions by the three governance systems. A different path needed to be identified. Elements of so-called reflexive regulation and reflexive law were suggestive.

Gunther Teubner, a leading German legal scholar and sociologist, introduced the concept of reflexive law in a seminal paper published in 1983.[61] Teubner argued that the idea that major social and environmental problems in modern society could be "steered" from one central site had become anachronistic, given society's complexity and the pace of change. But giving free rein to self-regulation would continue to generate mounting social and environmental externalities. Thus Teubner proposed a more procedurally-oriented approach that avoids the regulate/deregulate, mandatory/voluntary, and hard/soft law dichotomies. His is not so much a middle ground as it is different in concept and practice: "The role of reflexive law is to … create the structural premises for decentralized integration of society by supporting integrative mechanisms within autonomous social subsystems."[62] Put in more simple terms, reflexive law prescribes a framework of institutionalized procedures and organizational norms. Within that framework, it seeks to have the entities that are targeted for regulation to acquire the capacity needed to more effectively address their social and environmental externalities. And the framework itself is subject to adjustment based on experiential feedback. From this line of

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[58] Amartya Sen, 'Elements of a Theory of Human Rights' [2004] *Philosophy and Public Affairs* 319.

[59] Friedrich Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law* (CUP 2014); also Christian Reus-Smit, 'Human Rights in a Global Ecumene' [2011] *International Affairs* 1205.

[60] Rodríguez-Garavito (n 8) 11.

[61] Gűnther Teubner, 'Substantive and Reflexive Elements in Modern Law' [1983] *Law & Society Review* 239.

[62] ibid 255.

thinking emerged the idea of "regulating self-regulation," which has had particular uptake in US national environmental law and policy, among other areas.[63]

Of course, at the national level, a central authority can step in more readily to make adjustments or create new mechanisms. That is far more difficult at the international level, which lacks a central authority.[64] Nevertheless, the underlying ideas were useful in thinking about building iterative interactions among the three pillars into the Guiding Principles. Consider these examples. With regard to companies, the prescribed risk management includes assessing risk to people, not simply to the company; human rights due diligence should be ongoing and requires meaningful consultation with potentially affected groups and other relevant stakeholders, such as civil society and workers' organizations; and operational-level grievance mechanisms must be based on engagement and dialogue with the people they are intended to serve, as well as being rights-compatible. As for states, their core legal obligations include protecting human rights from abuse by business within their jurisdiction. Under the Guiding Principles, where states provide financial and other support to business enterprises, they should require the enterprises to conduct human rights due diligence if the nature of the business or operating context poses significant human rights risks. They should promote respect for human rights by enterprises with which they conduct commercial transactions. States should also ensure that they retain adequate domestic policy space to meet their human rights obligations when pursuing other policy objectives, for example, in the areas of trade and foreign investment agreements. Through the Guiding Principles, rights holders who are harmed by business activities, and those who represent or speak for them, gain a new authoritative advocacy tool and basis for participation that can be invoked in relation to business enterprises and states.

In short, the three pillars of the Protect, Respect and Remedy framework are interrelated. They reflect three critical *functions* that need to be performed better, and they seek to engage the three global governance systems—public, civil, and corporate—individually and interactively to advance those aims. Within this framework, further international legalization has a role to play through carefully crafted precision tools intended to reinforce this dynamic, not by means of some single overarching treaty that tries to encompass the entirety of the complex, diverse and contested issues that make up business and human rights as a subject of concern and action.[65]

D Process Legitimacy

Karin Buhmann attributes at least part of the Guiding Principles' success to what she calls the "process legitimacy" whereby they were developed.[66] The subject of legitimacy features centrally in any international process, particularly one conducted by a single independent expert.

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[63] Eric W Orts, 'A Reflexive Model of Environmental Regulation' [1995] *Business Ethics Quarterly* 779.

[64] William E Scherman, 'Reflexive Law and the Challenges of Globalization' [2001] *Journal of Political Philosophy* 81.

[65] John Gerard Ruggie, 'Business and Human Rights: The Evolving International Agenda' [2007] *American Journal of International Law* 819.

[66] Karin Buhmann, 'The Development of the "UN Framework": A Pragmatic Process towards a Pragmatic Output' in Mares (n 8); Buhmann, 'Business and Human Rights: Analysing Discursive Articulation of Stakeholder Interests to Explain the Consensus-based Construction of the "Protect, Respect, Remedy" UN Framework' [2012] *International Law Research* 88.

Nevertheless, Pauwelyn, Wessel, and Wouters suggest that what they call "thick stakeholder consensus" behind an informal governance arrangement can be normatively superior to the "thin state consent" on which many treaties rely. "The actors involved are more diverse and expert. The output … is elaborated more carefully and coherently, supported by a broader consensus, both *ex ante,* when the norm is developed, and *ex post,* when the norm is accepted because it works."[67] Process legitimacy is critical to "thick stakeholder consensus."

In developing and gaining HRC endorsement for the Guiding Principles I sought to achieve process legitimacy largely through four means, described in detail elsewhere.[68] The first was to establish a common factual baseline in the attempt to move beyond the anecdotal evidence that had dominated previous debates on all sides. This involved mapping patterns of corporate-related human rights abuse; identifying prevailing standards and best practices; analyzing the cost to business of failing to respect human rights; examining how corporate and securities law may aid or constrain responsible business practices; documenting the effects of international investment agreements on the state duty to protect; surveying human rights treaty bodies' commentaries on relevant subjects; and exploring the permissible grounds for extraterritorial jurisdiction across a number of different regulatory domains.

The second was convening nearly 50 international consultations on all continents, most being multistakeholder in makeup. These examined the human rights situations in different industries and operating environments, for different groups of people, and explored the viability of various ways of responding to ongoing human rights challenges. Third, I made site visits to the operations of companies in different sectors and countries, ranging from agriculture to manufacturing and mining. Where possible I combined site visits with discussions with local community leaders or workers' representatives, arranged through NGOs or international labor federations. Lastly, my team conducted pilot projects in several sectors and countries to inform the Guiding Principles' provisions for human rights due diligence and grievance mechanisms. Throughout, I regularly briefed governments in Geneva, New York, and national capitals. A draft text of the Guiding Principles was posted online, eliciting comments from individuals and institutions in 120 countries.

By the time the Guiding Principles were considered by the HRC they enjoyed strong support from governments and business, as well as general but not enthusiastic support from the major human rights organizations, which would have wished for a legally binding outcome. Council approval came in two stages. It first "welcomed" the "Protect, Respect and Remedy" framework in 2008, and then asked me to serve another term in order to "operationalize" it. The Guiding Principles, which the Council endorsed in 2011, are that operationalization.

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[67] Pauwelyn et al (n 21) 749.

[68] Ruggie (n 31) chapter 4. Financial support for the mandate was provided by voluntary contributions from governments. I also benefited from pro bono assistance provided by academics, NGOs and law firms. Research results and summaries of consultations and pilot projects remain posted on the Business and Human Rights Centre website: https://business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights

V DISTRIBUTED NETWORKS

Work on the implementation of the Guiding Principles began even before they were formally endorsed. If governments believe that a follow up to a mandate is warranted, the typical UN procedure is to create a new one. Thus, the HRC established an expert Working Group with one member from each of the five recognized regions, tasked with disseminating the Guiding Principles and promoting their implementation.[69] I welcomed this development while also realizing that much more work would be required beyond UN precincts. Borrowing a term from computer science, I focused on identifying a handful of actors involved in some central aspect of business and human rights who might play a role in a larger and more diverse distributed network. Some of these actors adopted core elements of the Guiding Principles outright; others did so in part; still others took the Guiding Principles into entirely new domains. A few examples follow.

The OECD Guidelines for Multinational Enterprises (OECD Guidelines) date back to 1976. They have been revised over time, but continued to lack a human rights chapter. A draft text of the Guiding Principles was ready when the OECD began the Guidelines' latest revision early in 2011. All parties agreed that the two initiatives should be closely aligned so as not to issue competing or even incompatible guidance to business. As a result, the new human rights chapter of the OECD Guidelines is taken virtually verbatim from Pillar II of the Guiding Principles (the corporate responsibility to respect human rights).[70] The OECD Guidelines matter not least because they provide the only international complaints mechanisms under which anyone can bring a "specific instance" of harm committed by a multinational to a designated office in a country adhering to them, where the harmful conduct occurred in that country or the multinational is based in such a country. The designated national office attempts to mediate the dispute and issues a final statement on whether and how it was resolved. Human rights cases spiked after 2011.[71] ISO26000, a guidance document on social responsibility developed by the International Organization for Standardization, was running in parallel with the UNGP mandate; here too we sought to ensure that the human rights provisions were closely aligned.[72] ISO matters to this issue because its other standards and guidance,

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[69] UN Human Rights Council Resolution A/HRC/RES/17/4 (6 July 2011).

[70] Manfred Schekulin, 'Shaping Global Business Conduct: The 2011 Update of the OECD Guidelines on Multinational Corporations' *Columbia FDI Perspectives* # 47 (26 September 2011). Schekulin chaired the OECD's Intergovernmental Investment Committee.

[71] John Gerard Ruggie and Tamaryn Nelson, 'Human Rights and the OECD Guidelines for Multinational Corporations: Normative Innovations and Implementation Challenges' [2015] *Brown Journal of World Affairs* 99.

[72] For discussion of the impact of the mandate on ISO26000 from an NGO perspective, see Sandra Atler, *The Impact of the United Nations Secretary-General's Special Representative & the UN Framework on the Development of the Human Rights Components of ISO 26000* (2011), Harvard Kennedy School, Corporate Responsibility Initiative Working Paper No. 64, https://www.hks.harvard.edu/centers/mrcbg/programs/cri/research/papers, accessed 14 June 2017; and from a business perspective, Alan Fine, 'Impact of the work of the UNSG's Special Representative on business and human rights on deliberations in the Industry Stakeholder Group in ISO's Working Group on Social Responsibility' (2011), https://business-humanrights.org/en/article-provides-ngo-perspective-on-how-the-work-of-un-special-representative-ruggie-impacted-the-iso-26000-guidance-standard-on-social-responsibility#c58836, accessed 14 June 2017.

for instance in quality management and environmental management, tend to have significant business uptake, including in Asia.

The International Finance Corporation (IFC), the private sector arm of the World Bank, has performance standards built into its lending and investment policies. Through close collaboration, the IFC incorporated such key elements of the Guiding Principles as the requirement for clients to respect human rights, and the need in certain high risk circumstances to add human rights due diligence. The IFC matters because it affects clients' access to its capital, and because its criteria are tracked by private sector banks that account for three-quarters of all project lending in the world.[73]

The European Union not only endorsed the Guiding Principles; the Commission changed its own official definition of CSR in response to the Guiding Principles and requested that all member states develop National Action Plans for their implementation.[74] (The UN Working Group subsequently recommended to all UN member states that they produce National Action Plans.) The EU went on to adopt mandatory non-financial reporting requirements of EU-based firms above a certain size, the provisions of which the Guiding Principles helped inform.[75] Moreover, the Guiding Principles' due diligence provisions found their way into both US and EU law concerning conflict minerals, US regulations on investment by American firms in Myanmar, the UK's Modern Slavery Act, and a new French law that imposes a human rights due diligence-like requirement on companies, enforceable by tort liability where injuries result from the failure to have an effective plan.

Leading companies have been a major source of direct uptake. Indeed, several had written to the Human Rights Council recommending that it endorse the Guiding Principles, recognizing that a common foundation was desirable and being comfortable with the Guiding Principles on which they, like other stakeholders, had been consulted. Some companies have since issued stand-alone human rights reports using the Guiding Principles Reporting Framework developed by Mazars, the international audit, accounting and consulting firm, together with Shift, a non-profit established by members of my former UN team in 2011, which I chair.[76] Shift and others have found that while company uptake of the Guiding Principles is becoming more widespread, it remains partial and is not yet deep enough.[77] However, uptake is not limited to Western firms or governments. A dozen developing countries already have issued or are in the process of developing National Action Plans.[78] And regulatory authorities in China are

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[73] See http://www.ifc.org/wps/wcm/connect/6b499080498009a2a78cf7336b93d75f/Phase3_QCR-HumanRights.pdf?MOD=AJPERES, and http://www.equator-principles.com/ accessed 8 June 2017.

[74] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions (2011), *A Renewed EU Strategy 2011–14 for Corporate Social Responsibility* http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52011DC0681 accessed 8 June 2017.

[75] Richard Howitt, 'The EU Law on Non-financial Reporting—How We Got There', *The Guardian* (16 April 2014) <https://www.theguardian.com/sustainable-business/eu-non-financial-reporting-how-richard-howitt> accessed 8 June 2017.

[76] Shift, 'UN Guiding Principles Reporting Framework' (2015) <https://www.shiftproject.org/resources/publications/un-guiding-principles-reporting-framework/> accessed 8 June 2017.

[77] Shift, 'Human Rights Reporting: Are Companies Telling Investors What They Need To Know? (2017) <https://www.shiftproject.org/resources/publications/corporate-human-rights-reporting-maturity/> accessed 8 June 2017.

[78] Business & Human Rights Resource Centre, Government Action Platform <https://business-humanrights.org/en/government-action-platform> accessed 8 June 2017.

drawing on international standards like the Guiding Principles and OECD Guidelines to advise their own companies on appropriate human rights practices in overseas operations—including the recommendation that Chinese mining companies should "observe the UN Guiding Principles on Business and Human Rights during the entire life-cycle of the mining project."[79]

It took time for some of the major human rights organizations to realize the full potential of the Guiding Principles as an advocacy tool. But workers' organizations were supportive from the start, recognizing the limits of relying only on a long history of legal conventions through the International Labor Organization.[80] Corporate lawyers provided pro bono assistance to the mandate, and in turn positioned themselves to advise potential clients on human rights risk management. An additional bonus of their involvement was that law societies in several countries became interested. The American Bar Association was an early endorser of the Guiding Principles. The International Bar Association went so far as to issue official guidance on what the Guiding Principles mean for bar associations as well as for law firms, as businesses in their own right and in their role as wise counsel to clients.[81]

Possibly the most unusual development for a UN-based initiative has been endorsement of the Guiding Principles by FIFA, the governing body of international football, and its knock-on effects. FIFA's reach into countries and people's lives is impressive. FIFA has 211 national member associations clustered into six regional confederations. According to its former president, there are 300 million active participants in football, and 1.6 billion people around the world are involved directly or indirectly in the game.[82] After awarding successive World Cups to Russia and Qatar, FIFA was under escalating pressure in 2014 on matters not only of corruption but also of human rights. Problems in Russia included its anti-LGBTQ law, the manner of land acquisition by the authorities for tournament purposes, and alleged violations of labor standards in the construction of facilities. In Qatar the core issue has been massive violations of migrant workers' rights, who essentially become bonded labor, exploited by recruitment firms and contractors (and even more so by subcontractors) building stadiums and other infrastructure.

Mary Robinson, former President of Ireland and former UN High Commissioner for Human Rights, and I sent a letter to FIFA's president on behalf of the Institute for Human Rights and

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[79] China Chamber of Commerce of Metals, Minerals & Chemicals Importers & Exporters, 'Guidelines for Social Responsibility in Outbound Mining Investments' (2014) 34 <https://www.emm-network.org/case_study/cccmc-developing-guidelines-for-social-responsibility-in-outbound-mining-investment/>

[80] International Trade Union Confederation, 'A Briefing Note for Trade Unionists—The United Nations "Protect, Respect and Remedy" Framework and Guiding Principles on Business and Human Rights' (2011) <https://www.google.com/search?q=Briefing+Note+for+Trade+Unionists+What+is+the+UN+%E2%80%98Protect%2C+Respect+Remedy%E2%80%99+Framework+for+Business+and+Human+Rights%3F&oq=Briefing+Note+for+Trade+Unionists+What+is+the+UN+%E2%80%98Protect%2C+Respect+Remedy%E2%80%99+Framework+for+Business+and+Human+Rights%3F&aqs=chrome..69i57.285726j0j4&sourceid=chrome&ie=UTF-8>

[81] IBA, 'Practical Guide on Business and Human Rights for Business Lawyers' (2016) <file:///C:/Users/jruggie/Downloads/IBA_Practical_Guide_(June%202016).pdf> accessed 8 June 2017.

[82] Extraordinary FIFA Executive Committee Meeting—Press Conference (20 July 2015), video <http://www.fifa.com/aboutfifa/videos/y=2015/m=7/video=extraordinary-fifa-executivecommittee-meeting-press-conference-2666423.html> accessed 24 May 2017.

Business, with which we were both associated.[83] We referenced these issues and urged that FIFA address them by aligning its policies and practices with the Guiding Principles. FIFA subsequently asked me to produce a report identifying its major human rights challenges and make recommendations. I agreed on the condition that I would have full control over the report's content and that it would be published by Harvard University.[84] My effort was welcomed by FIFA sponsors, leading NGOs, and workers' organizations, including the players' union. In response to the report, to date, FIFA has added a statutory provision committing to respect all internationally recognized human rights. It has adopted a human rights policy and established a Human Rights Advisory Board that includes sponsors and representatives from NGOs, labor, and the Office of the UN High Commissioner for Human Rights. Perhaps most important for the people in host countries, FIFA is including human rights criteria in bidding requirements for future World Cups—the most popular tournament of the world's most popular sport.[85]

In 2017, triggered by FIFA's move, the Union of European Football Associations, one of FIFA's regional confederations, adopted human rights criteria for its Euro 2024 tournament, for which Germany and Turkey are competing as host nations. The new bidding requirements state that successful bidders are expected to adhere to the Guiding Principles, including "proactively assessing human rights risks," "culturally embedding human rights," and "implementing means of reporting and accountability" by engaging with relevant stakeholders.[86] The International Olympic Committee is moving along a similar path but at a far more tentative pace. Finally, in July 2017 the World Players Association (WPA) announced a World Player Rights Policy "built around sport's implementation of the United Nations Guiding Principles on Business and Human Rights."[87] The WPA is the global association of players' unions, bringing together more than 85,000 professional players through more than 100 players' associations in some 60 countries, including the sports of football (soccer), American football, rugby, basketball, hockey, and cricket. The announcement marks the beginning of a campaign to have all sports organizations adopt policies and practices to respect the human rights of players in line with the Guiding Principles. Finally, the International Olympic Committee is slowly following suit by establishing an independent Human Rights Advisory Board of its own, chaired by Zeid Ra'ad Al Hussein, who recently stepped down as UN High Commissioner for Human Rights.

Unlike distributed networks in computer systems, the various entities in these social networks remain independent of one another and have their own missions and priorities, so it is rare that they enact the identical norm or standard. But "orchestration problems," as Abbott

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[83] Available at <https://www.ihrb.org/pdf/2014-06-11-Open-Letter-FIFA.pdf> accessed 8 June 2017.

[84] John Gerard Ruggie, 'For the Game, For the World' (FIFA and Human Rights, Corporate Responsibility Initiative, Harvard Kennedy School of Government 2016) Research Report 68 <https://www.hks.harvard.edu/centers/mrcbg/programs/cri/research/reports/report68> accessed 8 June 2017.

[85] FIFA, 'FIFA's Human Rights Policy' (2017) <http://resources.fifa.com/mm/document/affederation/footballgovernance/02/89/33/12/fifashumanrightspolicy_neutral.pdf> accessed 8 June 2017.

[86] UEFA, 'Germany and Turkey Receive Bid Requirements for Hosting UEFA EURO 2024 (2017)' <http://www.uefa.org/mediaservices/newsid=2463164.html> accessed 8 June 2017.

[87] See <http://www.uniglobalunion.org/sites/default/files/files/news/world_player_rights_policy_13_jul_17.pdf> accessed 13 July 2017.

and Snidal describe them, are endemic at the international level.[88] In the case of the Guiding Principles, both the Working Group and OHCHR can and do serve a limited interpretive function. There is also some evidence of consistent interpretive "crowd sourcing." For example, a white paper issued by a group of major corporate and investment banks in January 2017 generated considerable push-back against its premise, which claimed that under the Guiding Principles such banks have very tenuous responsibility for what their clients do with loans or advice the banks provide to them.[89]

In sum, for the Guiding Principles the distributed network approach has turned out to be superior to relying on UN processes and happenstance uptake by other relevant parties alone. Although much of the world has yet to hear about the Guiding Principles, they have spread faster and more widely than would otherwise be the case. The participation of distributed networks has triggered what Finnemore and Sikkink call "norm cascading,"[90] well beyond the Guiding Principles' institutional sphere of origin, into the realm of other international standardsetting bodies, national governments, businesses, civil society organizations, law societies, and the world of popular sports.

VI CONCLUSION

It is widely understood that the balance of power among states is shifting. But so too is the organizational ecology of global governance—the way in which global rulemaking is structured.[91] The two are related, but only in part. As noted earlier, power shifts make it more difficult to reach strong agreements in large consensus-based forums because the number and diversity of interests has increased significantly. At the same time, informal mechanisms are flourishing, be they private, public, or a combination of the two. Factors in addition to power balances play a role in producing this pattern. Among them are the proliferation of so-called wicked problems and scale mismatches; the creation at the international level of limited membership club-like arrangements among domestic regulatory agencies and professional bodies as a byproduct of globalization; greater ease in establishing informal mechanisms as well as flexibility in changing them; and lower costs of entry as well as exit.

The Guiding Principles straddled these two worlds: a formal mandate established by an intergovernmental body; an informal and polycentric process of development; a formal

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[88] Kenneth W Abbott and Duncan Snidal, 'Strengthening International Regulation through Transnational New Governance: Overcoming the Orchestration Deficit (rev. ed, 2009) <https://works.bepress.com/kenneth_abbott/2/> accessed 8 June 2017.

[89] Among others, see Statement by UN Working Group on the issue of human rights and transnational corporations and other business enterprises (2017); statement by Bank Track, Greenpeace, Oxfam & 35 others (2017) 'Significant Concerns Regarding Thun Group Discussion Paper'; and John Gerard Ruggie, 'Comments on Thun Group of Banks Discussion Paper on the Implications of UN Guiding Principles 13 & 17 in a Corporate and Investment Banking Context; all available at <https://business-humanrights.org/en/thun-group-of-banks-releases-new-discussion-paper-on-implications-of-un-guiding-principles-for-corporate-investment-banks> accessed 8 June 2017. The banks issuing the discussion paper include Barclays, BBVA, BNP Paribas, Credit Suisse AG, Deutsche Bank, ING, JP Morgan, RBS, Standard Chartered, UBS Group AG and UniCredit.

[90] Finnemore and Kathryn Sikkink (n 54).

[91] Kenneth W Abbott et al, 'Organizational Ecology and Institutional Change in Global Governance' [2016] *International Organization* 247.

endorsement; and an ongoing combination of formal and informal implementation. It may not be possible to replicate this process in any other complex and contested global regulatory domains. But the underlying dynamics need to be better understood because they are not unique to business and human rights.

A prime example is climate change. At the intergovernmental level, the 1997 Kyoto Protocol, a global binding instrument that included strict emission targets and timetables, is widely described by scholars as a failure of climate governance.[92] Building on a phrase used by Olmstead and Stavins, it was too little, too fast, too binding, and too asymmetrical in its obligations between past and emerging emitters. In contrast, the 2015 Paris Agreement has been hailed as a success that draws on lessons of the past and a deeper understanding of climate governance challenges.[93] And yet the Paris Agreement rests on national pledges, which are not binding, coupled with a periodic review process, which relies on national self-reporting. Moreover, it is generally accepted that the Agreement by itself will not meet the aspirational target of limiting global temperature rise to 2˚ Celsius, let alone 1.5. Thus, while the following questions may be moot for climate change they may be relevant for other global policy domains: what if governments in 1997 had moved from the 1992 Framework Convention on Climate Change, not to Kyoto, but to a Paris-like pledge-and-review arrangement? Where would we be today? Could it have avoided the extreme polarization of climate change politics in the United States? Would it have engaged emerging and future emitters earlier? Indeed, might we be closer today to what Kyoto hoped to achieve? Why did we get it wrong, and how can that be avoided elsewhere?

The idea of human rights is both simple and powerful. The operation and effectiveness of the global human rights regime is neither. The simplicity and power of human rights reside in the idea that every person is endowed with inherent dignity and equal rights. But the fundamental challenge remains, as Kratochwil has put it so well, "how a political project framed by the discourse of rights can be made to 'stick' as our interests widen … while familiar communities lose their unquestioned standing and their integrating force."[94] The term political, in this context, does not mean tactical maneuvering or scoring partisan victories. Politics in its deeper sense "lies at the intersection of instrumental and ethical deliberation and action."[95] It is here that ideas and norms have the opportunity to inform and shape social constructs of the common good. There is a long way to go before we can speak of business enterprises being "embedded" in transnational social norms and institutional practices. Bearing witness to human rights abuse and enduring commitments to realizing rights are critical elements toward that end. But so too are evidence-based insights into such matters as how to induce cognitive and normative change, build and expand communities of good practice, and address the com-

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[92] For example, Robert Falkner et al, 'International Climate Policy after Copenhagen: Towards a "Building Blocks" Approach' (2010) *Global Policy* 252; Sheila M Olmstead and Robert N Stavins, 'Three Key Elements of a Post-2012 International Climate Change Architecture [2011] *Review of Environmental Economics and Policy* 1; David G Victor et al, 'The Climate Threat We Can Beat: What It Is and How to Deal With It' [2012] *Foreign Affairs* 122.

[93] David G Victor, 'What the Framework Convention on Climate Change Teaches Us About Cooperation on Climate Change' [2016] *Politics and Governance* 133.

[94] Kratochwil (n 59) 229.

[95] Christian Reus-Smit, 'The Strange Death of Liberal International Theory' [2001] *European Journal of International Law* 573.

plexities of institutional design as well as sequencing in policy processes. Both are essential elements in making the business and human rights project stick.