

THE GLOBAL FORUM

Global Governance and “New Governance Theory”: Lessons from Business and Human Rights



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ON 16 JUNE 2011, THE UN HUMAN RIGHTS COUNCIL UNANIMOUSLY ENDORSED the Guiding Principles on Business and Human Rights that I developed over the course of the previous six years in my role as the Secretary-General’s special representative for business and human rights.¹ The journey involved nearly fifty international consultations on five continents, numerous site visits to individual firms and local communities, extensive research, and pilot projects to road test key proposals. For the council and its institutional predecessor, the Commission on Human Rights, the endorsement was unprecedented. It was the first time that the UN adopted a set of standards on the subject of business and human rights; and it remains the only time the commission or council endorsed a normative text on any subject that governments did not negotiate themselves. Moreover, the uptake of the Guiding Principles (GPs) by other standard-setting bodies, national and international, has been swift and widespread, as has their use as a policy template by companies and business associations as well as an advocacy tool by nongovernmental organizations (NGOs) and workers’ organizations.²

I have told the story of how this came about in my book, *Just Business: Multinational Corporations and Human Rights*.³ Here, I want to relate it to recent conceptual debates in the study of global governance, which I loosely term “new governance theory.”⁴ *Governance*, at whatever level of social organization it occurs, refers to the systems of authoritative norms, rules, institutions, and practices by means of which any collectivity, from the local to the global, manages its common affairs. *Global governance* is generally defined as an instance of *governance* in the absence of *government*. There is no government at the global level. But there is governance, of variable effectiveness. However, the recent literature has identified a secular trend: an already weak system of global governance apparently becoming more so. Global governance architectures, legal and institutional, are said to be fragmenting.⁵ Traditional forms of international legalization and negotiation through universal consensus-based institutions are stagnating.⁶ Regime com-

plexes that often embody divergent norms dominate previously coherent rule systems.⁷ The decline of the West and the rise of the rest add to the centrifugal pull, not only in material terms but also in animating visions.⁸ There may be individual instances of network governance, multilevel governance, private governance, multistakeholder initiatives, and even experimentalist governance.⁹ But the ideal solution of comprehensive and integrated regimes, Robert O. Keohane and David G. Victor contend in the context of climate change, is increasingly unattainable and they urge “making the best of this situation.”¹⁰ Few would argue that the picture is much different in other policy domains characterized by substantial problem diversity, conflicting interests, and uncertainty regarding risks, gains, and losses—which, of course, describes many of the most serious problems on the global governance agenda.

And yet as has been said about Wagner’s music, the situation may not be as bad as it sounds. I undertook the strategic construction of the Guiding Principles aware of the (powerful) systemic constraints and (modest) opportunities identified in this literature, to which I have contributed on occasion.¹¹ Indeed, in my UN reports, I described business and human rights as a microcosm of a larger crisis in contemporary governance: the widening gaps between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. The GPs are far from constituting a comprehensive and integrated global regime. But they do demonstrate that it is possible to achieve a significant degree of convergence of norms, policies, and practices even in a highly controversial issue area. Thus, there may be value in recapitulating some of the GPs’ core strategic elements in the terms of new governance theory, thereby advancing academic understanding of real-world practices and practitioner appreciation for what otherwise might seem fairly obscure academic writings. I begin with a reprise of the terms of my mandate.

The Mandate

UN efforts to regulate multinational corporations go back to ill-fated Code of Conduct negotiations that started in the mid-1970s and were abandoned a decade later. At the turn of the century, the UN Sub-Commission on the Promotion and Protection of Human Rights, comprising independent experts, began drafting a treaty-like document called “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.”¹² Intended to become binding, it attributed to companies the “obligation to promote, secure the fulfillment of, respect, ensure respect of and protect” human rights. This is essentially the same range of duties that states have accepted for themselves under international treaties that they have ratified, separated only by the elastic concept of their respective spheres of

influence and the equally fuzzy distinction between primary and secondary duties. The intergovernmental parent body, the Commission on Human Rights, rejected the proposal. But enough governments from various regions believed that the subject of business and human rights required further attention, even if this particular instrument was unacceptable. Facing escalating advocacy campaigns and lawsuits, business itself felt a need for greater clarity regarding its human rights responsibilities. Accordingly, the commission created a “special procedures” mandate in 2005 and asked Secretary-General Kofi Annan to designate the mandate holder. Annan appointed me—to an unpaid position, lacking any independent authority, and initially with no budget or staff.¹³ To borrow my colleague Joseph Nye’s terminology, this was soft power at its softest.¹⁴

The mandate evolved in three phases. Neither of the latter two was foreordained; each required approval by the Human Rights Council (which had replaced the Commission on Human Rights by then). The first, from 2005 to 2007, asked me merely to identify such things as existing standards and best practices for states and businesses, and to clarify controversial concepts like “corporate complicity” and “corporate spheres of influence.” The council commended the extensive research products that I presented and invited me to take another year to develop recommendations on how best to advance the agenda. I returned in 2008 with only one: for the council to respond favorably to the Protect, Respect and Remedy Framework I proposed, on the premise that the most urgent need was for a conceptual and normative foundation on which future thinking and action could build. The framework rests on three pillars:

1. The state duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication;
2. An independent corporate responsibility to respect human rights, which means to avoid infringing on the rights of others and address adverse impacts with which companies are involved;
3. The need for greater access by victims to effective remedy, both judicial and nonjudicial.

The framework referenced the International Bill of Human Rights (the Universal Declaration of Human Rights and the two Covenants), coupled with the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work, as the authoritative list of internationally recognized rights to be augmented by other instruments (e.g., the Declaration on the Rights of Indigenous Peoples) as warranted by circumstances. The Human Rights Council unanimously welcomed the framework and extended my mandate another three years to operationalize it: to provide concrete and

practical guidance for its implementation. The GPs do so, comprising thirty-one principles, each with a commentary elaborating its meaning and implications for law, policy, and practice.

Strategic Elements

It is impossible here to convey the full range of strategies and tactics—coupled with the many fortuitous developments—that produced the Guiding Principles. My aim below is more modest: to highlight key elements that may help elucidate ways of making new governance work better.

The Old Governance Model

If there is one issue on which all new governance scholars agree, it is that the hierarchical old governance model has limited utility in dealing with many of today's most significant global challenges. By this is meant "the idea of negotiating a comprehensive, universal and legally binding treaty that prescribes, in a top-down fashion, generally applicable policies."¹⁵ The Kyoto approach to climate change is the most widely cited example. Comprehensive binding arrangements may emerge from longer-term developments, as did the World Trade Organization. But in the near term, new governance theory calls for a building blocks approach that develops different elements of an overall solution "and embeds them within an international political framework."¹⁶

That also was my starting point, to the consternation of many human rights groups and some academic human rights lawyers. Human rights discourse is infused with the assumption of a rights-based hierarchy. But there is limited evidence of it in international practice.¹⁷ For business and human rights, there was no shared understanding of the problem, let alone any consensus on solutions. Business had vehemently opposed the Norms on the Responsibilities of Transnational Corporations; interests between and among home and host countries of multinationals diverged significantly; and business conduct affecting human rights is powerfully shaped by other bodies of law, including corporate, investment, and trade law, which no government was about to subordinate by treaty obligation to the broad spectrum of internationally recognized rights. Thus, my proximate objective became gaining strong support for a conceptual and normative framework establishing the parameters and perimeters of business and human rights as an international policy domain. International legal instruments, I wrote in 2007, must and will play a role in the continued evolution of the business and human rights agenda, but "as carefully crafted precision tools."¹⁸

Polycentric Governance

New governance theory rests on the premise that the state by itself cannot do all the heavy lifting required to meet most pressing societal challenges and

that it therefore needs to engage other actors to leverage its capacities. Hence, the literature emphasizes “responsive regulation,” informal cooperation, public-private partnerships, and multistakeholder processes.¹⁹ The need is especially acute where regulating the conduct of multinational corporations is involved. With only rare exceptions, companies are subject not to international law, but to the domestic laws of states where they are incorporated and operate. Moreover, the law construes a parent company and each subsidiary as separate legal personalities, so that the parent generally is not liable for wrongs committed by an overseas subsidiary even where it is the sole shareholder. Though the incidence of extraterritorial jurisdiction by home states is increasing modestly, it remains highly contested and cannot, in any event, serve as a general solution to business and human rights challenges. As for international organizations (IOs) stepping in, Kenneth W. Abbott and Duncan Snidal correctly observe that “states have denied virtually all IOs direct access to private targets and strong regulatory authority.”²⁰ In short, constructing an authoritative framework for business and human rights inevitably was an exercise in polycentric governance.

Indeed, the building blocks for it were there. At the global level, corporate conduct is shaped by three distinct governance systems: the first is the system of public law and governance, domestic and international; the second is a civil governance system involving stakeholders affected by business enterprises and employing various social compliance mechanisms such as advocacy campaigns and other forms of pressure; the third is corporate governance, which internalizes elements of the other two (unevenly, to be sure). What was required was a new regulatory dynamic under which these governance systems become better aligned in relation to business and human rights; add distinct value; compensate for one another’s weaknesses; and play mutually reinforcing roles—out of which cumulative change can evolve. The Protect, Respect and Remedy Framework addresses *what* should be done to move in this direction; the Guiding Principles show *how*.

To foster that alignment, the GPs draw on the different—yet when combined, complementary—discourses reflecting the respective social roles that these governance systems play in regulating corporate conduct. Thus, for states the focus is on the legal obligations they have under the international human rights regime to protect human rights abuses by third parties, including business, as well as policy rationales that are consistent with, and supportive of, meeting those obligations. For businesses, beyond compliance with legal obligations that vary across countries in their applicability and enforcement, the GPs focus on the need to manage the risk of involvement in human rights abuses, which requires that companies act with due diligence to avoid infringing on the rights of others and address harm where it does occur. For affected individuals and groups, the GPs stipulate ways for their further empowerment to realize the right to remedy.

But all of that is conceptual, and conceptual arguments by themselves do not necessarily change minds and practices, no matter how reasonable they may be. Persuasion is much more likely to succeed if it is also experiential. Accordingly, when it came to stipulating how these things should be done, where possible the construction of the GPs was informed by practical engagement with participants from the various stakeholder groups. Illustrative examples include ten companies that conducted feasibility studies of ideas I had suggested for conducting human rights diligence processes and another group of companies that each collaborated independently with local stakeholders in five countries to carry out pilot projects of operational-level grievance mechanisms. A diverse group of states participated in a series of informal retreats using scenario-based exercises to explore the inadequacy of existing legal and policy measures when it comes to ensuring responsible business conduct in conflict zones. Investment agreement negotiators helped shape proposals for better safeguarding human rights within the system of investor protection; human rights organizations and plaintiffs’ lawyers advanced ideas for judicial reform. The various strands were brought together in multistakeholder consultations. In short, the GPs do not merely advocate a theory of polycentric governance; in part, they were produced through such means. Of course, this put limits on how much the GPs could strive to achieve at one go. But at the same time, it endowed them with what Joost Pauwelyn, Ramses A. Wessel, and Jan Wouters term “thick stakeholder consensus”—which, they suggest, can be normatively superior in securing compliance to the “thin state consent” validation requirement associated with traditional international law.²¹ Indeed, in this particular instance, thick stakeholder consensus helped pave the way for unanimous Human Rights Council endorsement.

Orchestration

Few scholars have done more than Abbott and Snidal to systematically map patterns of private and multistakeholder initiatives that have moved into the regulatory gap between globally integrated economic forces and actors on the one hand, and fragmented state-based authority structures on the other. But they also note that “the system currently suffers from a significant orchestration deficit.”²² The result is “a patchwork of uncoordinated schemes competing vigorously for adherents, resources, legitimacy, and public notice.”²³ To mitigate this tendency, they recommend that international organizations endeavor to play a greater “orchestration” role: engaging intermediaries and leveraging their combined capacities. Abbott and Snidal differentiate between “directive” and “facilitative” orchestration—directive meaning, for example, orchestration where benefits for firms can be conditioned on adherence to certain standards; and facilitative meaning orchestration through IOs’ convening powers, by partnering with companies and NGOs, identifying and disseminating best practices, and other such forms of collaboration.²⁴ The

Guiding Principles process was well under way when Abbott and Snidal began to publish on the subject of orchestration, yet something closely akin to it was at the heart of the GPs implementation strategy and thus may again provide an illustrative case.

Strong support for the Guiding Principles by the Human Rights Council was the necessary condition for their having a life after the end of my mandate. But by itself, this would not automatically result in other relevant standard-setting bodies, international or national, deferring to the UN and aligning their own standards with the GPs. Different institutions have different missions, reflecting the sectoral, regional, and national concerns represented in them. Nor does the UN human rights machinery have enforcement powers. Therefore, achieving convergence around the GPs required an active engagement effort, which I began right after the council approved of the Protect, Respect and Remedy Framework in 2008. The precise process differed in each case; the main outcomes include the following:

- The new Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises have a human rights chapter drawn virtually verbatim from the Guiding Principles. They are important because they provide for national complaint mechanisms in the forty-two adhering states, which include emerging market countries, regarding the conduct of multinationals operating in or from those states.

- New provisions in the OECD Common Approaches for Export Credit Agencies requiring assessments of social risks, which affect access to capital at the national level.

- The new International Finance Corporation Sustainability Principles and Performance Standards now include human rights language reflecting core concepts of the GPs. They affect companies' access to international capital, amplified manifold because they are tracked by private sector lending institutions party to the so-called Equator Principles, which account for more than three-fourths of all project financing worldwide.

- ISO26000, a new social responsibility guidance adopted by the world's leading private standard-setting body, the International Organization for Standardization (ISO), has a human rights chapter closely shaped by the GPs. ISO energizes a worldwide army of consultants eager to help companies come into compliance and it has considerable uptake in Asia.

- In the European Union, the European Commission endorsed the GPs and asked member states to submit national action plans for their implementation; the United Kingdom was the first to do so. The Commission has also developed additional guidance for several industry sectors and for small- and medium-sized enterprises.

- In the United States, the concept of human rights due diligence, a central component of the corporate responsibility to respect human rights in the

GPs, wound its way into Section 1502 of the Dodd-Frank Wall Street Reform Act, in relation to conflict minerals procured in Democratic Republic of Congo by US-listed companies.

- The US government referenced the GPs as a benchmark in a new reporting requirement for US entities investing more than \$500,000 in Myanmar when it suspended most economic sanctions.
- The Association of Southeast Asian Nations (ASEAN) is exploring ways to align its new business and human rights program with the GPs; the African Union is on a similar though slower track.

Orchestration may be too strong a word to describe these efforts to achieve convergence among standard setters behind the GPs; several were fortuitous and could not have been planned, while others succeeded only in part. But they illustrate the desirability of engaging intermediaries to achieve greater normative and regulatory coherence, larger-scale effects, and more robust outcomes—intermediaries that, in this particular case, have more direct links to and influence over corporate conduct than the UN alone.

Regime Complexes

In 2006, the International Law Commission (ILC), in an influential report to the UN General Assembly, documented that a dominant feature of the vast expansion in international legalization has been the fragmentation of international law into specialized and autonomous spheres: between trade and environmental law, for example, and even subsets of both. The ILC concluded that “no homogenous hierarchical meta-system is realistically available” within the international legal order to resolve the problem of incompatible provisions between legal spheres, including when different tribunals that have overlapping jurisdictions address exactly the same set of facts and yet reach different conclusions.²⁵ In other words, legal fragmentation is a structural feature. At best, write two leading legal theorists, more sophisticated legal reasoning can achieve “a weak normative compatibility of the fragments,” or “a loose coupling of colliding units.”²⁶ The rest has to be worked out in the realm of practice.

Under the rubric of regime complexes, the new governance literature in political science has begun to address a closely related attribute of institutional arrangements. According to Keohane and Victor, “regime complexes are marked by connections between . . . specific and relatively narrow regimes but the absence of an overall architecture or hierarchy that structures the whole set.”²⁷ Their example is the many international institutional elements and initiatives that exist in the area of climate change. They observe that “the specific international cooperation problems involved in managing climate change are so varied that a single institutional response is exceptionally difficult to organize and sustain.”²⁸ Although it may raise efficiency and

effectiveness costs, the absence of hierarchy in and of itself does not necessarily pose a fundamental problem—unless the underlying regime norms and rules in the relevant policy domains are in conflict.²⁹ Similar to their legal theory counterparts, Keohane and Victor recommend identifying and reinforcing opportunities for “nascent coupling” where the individual fragments intersect or overlap.³⁰

Not surprisingly, given the subject matter, constructing the GPs faced the challenge of dealing with legal fragmentation and regime complexes from day one. The mandate’s authorizing body was the Human Rights Council, and its direct remit is the UN-based human rights regime. The mandate’s objective was to find acceptable ways to expand the scope of this regime to address the conduct not only of states and individuals, which it now does (with mixed results), but also of business enterprises. Of course, states knew that their legal duties and policy requirements extended beyond abuses by state agents. But actual state practice indicated that even the most committed had not addressed the full range of actions that these implied in relation to business. For its part, business acknowledged some responsibility for human rights, if nothing else by virtue of adopting corporate responsibility initiatives. Yet here too, actual practice indicated considerable divergence and shortcomings in the understanding of what those responsibilities were and implied. Finally, remedy for rights holders who have been harmed is an explicit or implicit component of all human rights treaties, but beyond labor standards that impose obligations on states, not on companies directly, no globally endorsed rules and tools existed to further realize a right remedy in relation to business.

But how far could this expansion go? The legal fragmentation and regime complexes literature suggests where the limits might lie. Take the example of corporate law. At the very foundation of modern corporate law is the principle of legal separation between a company’s owners (the shareholders) and the company itself, coupled with its correlative principle of limited liability, under which shareholders are held financially liable only to the extent of the value of their ownership shares. This model of the joint stock company was invented when only people—natural persons—were owners, and it was intended to facilitate the formation of capital among them for investment purposes. Today, the model has been stretched to apply to multinational corporate groups with subsidiaries, joint ventures, contractors, and other types of affiliates in up to 200 states and territories around the world, each of which is legally construed as a separate and independent entity. This raises a fundamental question for business and human rights: how do we get multinational corporations to assume the responsibility to respect human rights for the entire corporate group, not atomize it down to various constituent units that may operate in poorly regulated contexts?

The attempt by the UN Sub-Commission on the Promotion and Protection of Human Rights to impose binding norms on multinational corporations,

which preceded my mandate, aimed a silver bullet at the problem. But it turned out to be a dud. Larry Catá Backer, a legal scholar who has written extensively on the nexus between corporate law and international law, observed at the time:

The Norms internationalize and adopt an enterprise liability model as the basis for determining the scope of liability for groups of related companies. This approach does, in a very simple way, eliminate one of the great complaints about globalization through large webs of interconnected but legally independent corporations forming one large economic enterprise. The problem, of course, is that, as a matter of domestic law in most states, the autonomous legal personality of a corporation matters. Most states have developed very strong public policies in favor of legal autonomy.³¹

A survey of the relationship between corporate law and human rights in thirty-nine jurisdictions around the world, conducted for my mandate by two dozen corporate law firms on a pro bono basis, indicated that some form of legal separation and limited liability exists in all of them. Modest exceptions are made in different jurisdictions, though few with extraterritorial reach. Reform of corporate and securities law and policy came under consideration in many countries as a result of the 2008 financial sector meltdown and its impact on the real economy. But the abandonment of the foundational tenets of modern corporate law is nowhere on the agenda. Dealing with the constraints that they impose in the global business and human rights context is a more complex affair—an affair of maneuvering among regime complexes.

Hence, under the GPs corporate responsibility to respect human rights pillar, I did not set out to establish a global enterprise liability model. That would have been a purely theoretical exercise. Instead, my aim was to prescribe practical ways of integrating human rights concerns within enterprise risk management systems. Multinational corporations routinely assess and address enterprise-wide risks, in addition to the risks faced by local operating units. And when they do so, they aggregate, not atomize, risks across the corporate group and functions. Separate legal personality is rarely invoked in relation to enterprise risk management. But there had been no authoritative guidance for how to manage the risks of adverse human rights impacts. The concept and component elements of human rights due diligence provide that guidance—with potentially significant future implications for corporate law, a leading expert on that subject argues.³²

The extensive involvement of corporate law firms in the GPs process also had several “cascading” effects.³³ It raised its visibility within companies to general counsel and even chief executive officer levels, rather than being confined to corporate social responsibility departments. It contributed to the formal endorsement of the GPs by the American Bar Association, which urged governments, the private sector, and the legal community itself to integrate them into their respective operations and practices.³⁴ In turn, that

inspired a legal advocacy group to develop guidelines for law firms, as businesses in their own right, of socially responsible practices compatible with the GPs, including their client advisory work.³⁵ At the same time, as noted above, governments and official as well as private lending agencies are beginning to require companies to conduct human rights due diligence and to establish grievance mechanisms in certain circumstances. Similarly, affected individuals and communities are invoking those same provisions to engage companies and make demands on governments. In sum, as challenging as it is, the complexity of regime complexes can have some upside potential.

Conclusion

I closed my final presentation to the Human Rights Council with these words: “I am under no illusion that the conclusion of my mandate will bring all business and human rights challenges to an end. But Council endorsement of the Guiding Principles will mark the end of the beginning.”³⁶ By this, I meant that there is now an authoritative foundation on which to build. I repeat those words here so as not to end on too celebratory a note. Much more remains to be done in business and human rights; the final chapter of my book outlines several key steps, including specific legal measures. My aim here has been to draw on the GPs experience to illustrate, and help better link up, new governance theory and practice. Global governance produces suboptimal outcomes. And if new governance theory has it right, it will not get any easier as time goes on. Martin Wolf, the distinguished *Financial Times* columnist, concurs: “Ours is an ever more global civilisation that demands the provision of a wide range of public goods. The states on which humanity depends to provide these goods, from security to management of climate, are unpopular, overstretched and at odds. We need to think about how to manage such a world. It is going to take extraordinary creativity.”³⁷ Fresh thinking and fresh practices need to be informed by one another. As the journal *Global Governance* begins its own new editorial regime, I very much hope that promoting this objective will be among its core missions. 🌐

Notes

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1. The full text is available at www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

2. The London-based Business and Human Rights Resource Centre keeps a running tab on follow-up activities. See www.business-humanrights.org/UNGuidingPrinciplesPortal/Home.

3. John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: Norton, 2013).

4. I use *new governance theory* broadly to encompass analyses premised on the relative absence of global legal and institutional hierarchy, coupled with understanding the governance roles played by nonstate actors as well as by normative and ideational factors. The term *new governance* originated in 1990s scholarly work concerning domestic regulatory reforms and has been explored extensively at the international level by Kenneth W. Abbott and Duncan Snidal, as in Kenneth W. Abbott and Duncan Snidal, "Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit," *Vanderbilt Journal of Transnational Law* 42 (2009): 501–578.

5. See, for example, Martti Koskeniemi and Päivi Leino, "Fragmentation of International Law? Postmodern Anxieties," *Leiden Journal of International Law* 15 (2002): 553–579; Frank Biermann, Philipp Pattberg, Harro van Asselt, and Fariborz Zelli, "The Fragmentation of Global Governance Architectures: A Framework for Analysis," *Global Environmental Politics* 9 (2009): 14–40.

6. Joost Pauwelyn, Ramses A. Wessel, and Jan Wouters, "The Stagnation of International Law," Working Paper No. 97, Leuven Centre for Global Governance Studies, October 2012, Social Science Research Network, <http://ssrn.com/abstract=2271862>.

7. See Kal Raustiala and David G. Victor, "The Regime Complex for Plant Genetic Resources," *International Organization* 58 (2004): 277–309; Karen J. Alter and Sophie Meunier, "The Politics of International Regime Complexity," *Perspectives on Politics* 7 (2009): 13–24.

8. For an interesting international law discussion, see Hanqin Xue, "Chinese Observations on International Law," *Chinese Journal of International Law* 6 (2007): 83–93.

9. On the last of these, see Sandra Eckert and Tanja A. Börzel, "Experimentalist Governance: An Introduction," *Regulation and Governance* 6 (2012): 371–377.

10. Robert O. Keohane and David G. Victor, "The Regime Complex for Climate Change," *Perspectives on Politics* 9 (2011): 19.

11. See, for example, John Gerard Ruggie, "Reconstituting the Global Public Domain: Issues, Actors, and Practices," *European Journal of International Relations* 10 (2004): 499–531.

12. "Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights," UN Doc. E/CN.4/Sub.2/2003/12/Rev. 2 (2003).

13. All UN human rights mandates are minimally staffed and funded. With voluntary contributions from supportive governments structured as research grants to Harvard's Kennedy School of Government, I was able to recruit a team of outstanding professionals and conduct extensive research and consultations.

14. Joseph S. Nye, *The Future of Power* (New York: Perseus, 2011).

15. Robert Falkner, Hannes Stephan, and John Vogler, "International Climate Policy After Copenhagen: Towards a 'Building Blocks' Approach," *Global Policy* 3 (2010): 252.

16. *Ibid.*

17. *Jus cogens* norms are an exception, at least at the conceptual level. This is the name given to norms of general international law that permit no exemption under any circumstances and that are said to trump contrary norms, including treaty provisions.

No definitive list exists, but it is generally believed to include the prohibition of such egregious conduct as genocide, war crimes, and some crimes against humanity. Thus, at an everyday level jus cogens norms do not help resolve ordinary normative conflicts.

18. John Gerard Ruggie, "Business and Human Rights: The Evolving International Agenda," *American Journal of International Law* 101 (2007): 125.

19. See, for example, Kenneth W. Abbott and Duncan Snidal, "Taking Responsive Regulation Transnational: Strategies for International Organizations," *Regulation and Governance* 7 (2013): 95–113.

20. *Ibid.*, p. 96.

21. Pauwelyn, Wessel, and Wouters, "Stagnation of International Law," pp. 1–2.

22. Abbott and Snidal, "Strengthening International Regulation," p. 501.

23. Abbott and Snidal, "Taking Responsive Regulation Transnational," p. 102.

24. *Ibid.*

25. International Law Commission, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law," UN Doc. A/CN.4/L.682 (13 April 2006); the quotation is from paragraph 493.

26. Gunther Teubner and Andreas Fischer-Lescano, "Regime-collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law," *Michigan Journal of International Law* 25 (2004): 999.

27. Keohane and Victor, "Regime Complex," p. 8.

28. *Ibid.*, p. 13.

29. Amandine Orsini, Jean-Frédéric Morin, and Oran Young, "Regime Complexes: A Buzz, a Boom, or a Boost for Global Governance?" *Global Governance* 19, no. 1 (2013): 27–39.

30. Keohane and Victor, "Regime Complex," p. 18.

31. Larry Catá Backer, "Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law," *Columbia Human Rights Review* 37 (2005): 169–170.

32. Peter Muchlinski, "Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance and Regulation," *Journal of Business Ethics* 22 (2012): 145–177.

33. I am using the term *norms cascades* as discussed by Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," *International Organization* 52 (1998): 887–917.

34. See www.abanow.org/2012/01/2012mm109.

35. See Michael D. Goldhaber, "How to Handle Evil Clients," *Litigation Daily*, 30 July 2013, www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202612839408&How_to_Handle_Evil_Clients.

36. See www.ohchr.org/Documents/Issues/TransCorporations/HRC%202011_Remarks_Final_JR.pdf.

37. Martin Wolf, "The World's Hunger for Public Goods," *Financial Times*, 24 January 2012.

