

Business and Human Rights

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From Guiding Principles to Interpretive Organizations:
Developing a Framework for Applying the UNGPs to
Disputes That Institutionalizes the Advocacy Role of Civil
Society

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The late 20th and early 21st centuries have seen a number of important trends in governance, some better known than others. Two are noteworthy in the context of developing governance structures for the detrimental human rights effects of economic activity. The first is the tendency to seek to construct integrated metagovernance¹ orders under which human behavior may be managed; the second is the movement toward the abstraction of the individual even to individual dignity rises to the top of the objectives of metagovernance. The first has produced the great international polycentric systems of human rights governance of economic activity, not the least of which is the U.N. Guiding Principles of Business and Human Rights (2011) (UNGPs), and the necessity of a unifying order to harmonize the state duty to protect and the corporate responsibility to respect human rights under that framework. It has also fostered international movement to bring governance back into the state through a system of international treaties aimed at managing the substance of domestic legal orders.² The second has

¹ Metagovernance can be understood as the governance of governance, the construction of a harmonized set of values, norms and principles underlying governance systems and drawing them together. Cf. Jan Kooiman and Seven Jentoft, "Meta Governance: Values, Norms and Principles, a the Making of Hard Choices," *Public Administration* 87(4) (2009), 818-836. The cyclicity of such efforts grounded in the urge to manage increasingly complex social life is explored in Bob Jessé "Governance and Meta-Governance in the Face of Complexity: On the Roles of Requisite Variety, Reflexive Observation and Romantic Irony in Participatory Governance," in *Participatory Governance in Multi-Level Context* (eds.), Hubert Heinelt, Panagiotis Getimis, Grigoris Kafkalas, Randall Smith and Erik Swynegedouw (New York: Springer, 2002).

² The great human rights instruments that make up the so-called International Bill of Human Rights (IBHR) provides nice example of this tendency toward state-based metagovernance. The IBHR founded on the Universal Declaration of Human Rights. See A Universal Declaration of Human Rights, U.N. General Assembly, *ARES/217* (10 December 1948). The Universal Declaration of Human Rights was codified in international law through the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both 1966.

accelerated the development of mass movements and mass democracy that now serves as the ideological core of legitimate governance. It has also given rise to the emergence of mass collectives, representing either individuals or capital – the great multinational corporations and civil society actors – within which mass politics and mass economic activity can be undertaken. Each represents and embodies the individual who is no longer relevant as an autonomous actor within metagovernance systems. The second would transform global NGOs into the incarnation of individuals whose human rights are adversely affected by state and multinational enterprises.

This chapter considers the ramifications of these trends in the development of a necessary governance architecture for the sound implementation of the UNGPs. The chapter's thesis is this: the logic of emerging metagovernance points to the need to establish a central mechanism for the interpretation of transnational normative governance instruments and particularly the UNGPs, and the logic of emerging mass governance principles points to the need to vest representative civil society organization with the authority to bring cases and advocate before such an interpretive body. Movements to develop comprehensive treaty structures pose a threat to the establishment of a workable transnational order compatible with the realities of contemporary governance. Section 1 briefly contextualizes the issue within the formative trends of metagovernance and mass movements that characterize our age. Section 2 then considers contemporary critiques of the development of the GPs through the UN Working Group on human rights and transnational corporations and other business enterprises (WC), established in 2011 by the U.N. Human Rights Council. On that basis, it suggests the manner in which these trends ought to be applied to develop effective mechanism for the implementation of the UNGPs at the international level, taking advantage of the polycentricity at the heart of governance systems in this century. Section 3 ends with an analysis of the alternative governance framework now advanced by states and suggests the way its reactionary character detracts from the important project of operationalizing metagovernance of the human rights effects of economic activity.

1 FROM LAW, STATE, AND INDIVIDUAL TO METAGOVERNANCE AND MASS POLITICS

The movement toward harmoniously conceived and operated metagovernance has ancient roots. Its modern manifestation appeared both in the construction of 19th century imperial and colonial states, and thereafter, on their collapse under the weight of the contradictions of their own formative logics, in the construction of the international system of the community of states. Indeed, the middle 20th century might be understood as marking the point of apotheosis of the state, when the state assumed internal supremacy within its territory (in dynamic relation with its population under democratic theories of governmental legitimacy) and

among the community of states that retained a global monopoly of regulatory power.³ That power was itself challenged by the most successful product of governance internationalism – globalization. It brought into the equation of power entities other than states, in a well-known process of permeability, porosity, and polycentricity that caused the current crisis of governance management,⁴ and only a portion of which touches on the problem of human rights governance.⁵ That crisis could be understood as such not because globalization created governance gaps, but because governance systems were no longer seamlessly and harmoniously connected (at least in theory to a complex network of public law institutions centered on the state and their international instrumentalities). The resulting anarchy challenged both the old order (represented by the U.N. system and its related bodies) and the ability of powerful governance players, mostly states but also intellectuals and elements of civil society and business, to use that power instrumentally for particular ends. Much of the work of the last thirty years among the great stakeholders of the law-state *ancien régime* has been to try to figure out how to reconstruct integrated and harmonious metagovernance, centered on law and the state, so that governance instrumentalism may again be deployed to proper ends – like human rights – under common standards.⁶ Alternative conceptions including polycentric governance, are viewed as either transitional or with great suspicion as derogating from the legitimacy reinforcing structures of law and the state.

The other is the movement toward the abstraction of the individual. With its origins in Western religion, it acquired a stronger political dimension after the French and American Revolutions of the 18th century and the rise of democratic theories of governmental legitimacy. It acquired its present character during the 20th century and its tendencies toward essentialism (reducing an individual to some characteristic or other) and institutionalization/bureaucratization on the other (understanding individuals as components of collective organisms). These were given concrete expression under both fascism⁷ and Marxist Leninist state organization⁸ in the mid-20th century as well as theoretical grounding in both the

³ How that power was exercised in fact divides academics and others into a variety of "camps" whose positions have fueled generations of academics, the details of which fall outside the scope of this short essay. Cf. *Fifty Key Thinkers in International Relations* (2nd edition) (eds.), Martin Griffiths, Steven C. Roach, and M. Scott Solomon (New York: Routledge 2009).

⁴ Larry Catá Backer, "The Structure of Global Law: Fracture, Fluidity, Permeability, and Polycentricity," *Tilburg Law Review* Vol. 17(2) (2012), 177–199. Available at SSRN <http://ssrn.com/abstract=2001456>.

⁵ Larry Catá Backer, "Economic Globalization Ascendant: Four Perspectives on the Emerging Ideology of the State in the New Global Order," *La Raza Law Journal* Vol. 17(1) (2006), 141–168. Available at SSRN <http://ssrn.com/abstract=91747>.

⁶ James A. Gregor, *The Ideology of Fascism: The Rationale of Totalitarianism* (New York: Free Press, 1969).

⁷ Joseph Stalin, *Problems of Leninism* (Moscow: Foreign Languages Publishing House, 1953).

biopolitics of Michel Foucault⁸ and the systems theories of Niklas Luhmann⁹ and Gunther Teubner.¹⁰ The individual was subsumed within the "masses," a statistical abstraction of common characteristics and behaviors, or the necessarily undifferentiated body of system and subsystem whose collective communication determined the parameters of human behavior and collective response. The collective individual, then, necessarily required a collective personality, one that could protect the abstracted individuals it absorbed without dissolving into the masses that gave them form. This tendency has produced a tendency toward the institutionalization of mass movements, necessary perhaps under the logic of mass democracy. But it has also contributed to the development of an institutionalized civil society that stands for and leverages individual desire, the way, perhaps that corporations stand in for the "desires" of capital as aggregated in the antipode of civil society, the transnational corporation. Civil society has emerged as the form in which the masses may be individualized, and individual dignity protected. Within metagovernance structures, especially in large states and in the international arena, civil society both represents and substitutes itself for the individual, and individual will can be manifested only as an aggregated abstraction. In the absence of the group, the individual is reduced to virtually nothing in global governance (other than perhaps a bundle of rights some of which might be remedied someplace).

These movements together produce the current framework of transnational governance; just as this century heralds the end of the autonomous nation-state, so too does it mark the end of the ideal of the autonomous individual as an instrument of governance. This is an age of *collectives* working within polycentric governance systems operating in an anarchic metagovernance space. But it is also an age of resistance and of efforts to restore the status quo *preglobalization*. The question for this century with regard to the construction of effective governance responses to significant problems focusing on the detrimental effects of economic activity on human rights then is: how can a method of coordinating polycentric systems be created that provides ample and effective political and juridical space within which collective actors can participate, with the object of producing a measure of legal coherence in human rights governance?

The field of human rights has developed "a new governance sense" that is essentially polycentric. It implicitly rejects a rigid embrace of classical regulatory

⁸ Michel Foucault, trans. Graham Burchell, *Security, Territory, Population: Lectures at the Collège de France 1977–1978* (New York: Picador, 2003). See also Michel Foucault, trans. Graham Burchell, *The Birth of Biopolitics: Lectures at the Collège de France, 1978–1979* (New York: Picador, 2010).

⁹ Niklas Luhmann, *Political Theory in the Welfare State* (New York: Walter DeGruyter, 1990); see also Dietrich Schwanitz, "Systems Theory According to Niklas Luhmann—Its Environment and Conceptual Strategies," *Cultural Critique* 30 (1995), 137–170.

¹⁰ Gunther Teubner, "The Corporate Codes of Multinationals: Company Constitutions Beyond Corporate Governance and Co-Determination," in *Conflict of Laws and Laws of Conflict in Europe and Beyond: Patterns of Supranational and Transnational Juridification* (ed.), Rainer Nickel (Oxford: Hart, 2000).

theory centered on law and the state, one which is based on the creation of comprehensive universal and legally binding instruments prescribing policies in a top down fashion and administered through national legal orders in favor of a strand of emerging "new governance theory" which are polycentric in character. "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."¹¹ It rests as well on the premise that these capacities are themselves autonomous regulatory sources with substantial normative power over the communities that have adopted them. Polycentricity, then, suggests regime complexes born of the realities of power fracture in contemporary globalization in which distinct emerging governance regimes are understood as building blocks that may be arranged and orchestrated to particular ends.

But the "new governance" framework for understanding the possibilities of polycentricity itself constrains the analysis. More troubling, it leads almost inexorably back to a framework in which the state is accorded pride of place and for which law serves as a means of conforming the hierarchy of power in which the individual invariably continues to be treated as little more than a well-managed object of instrumental policies effected from the top even if derived from a system that in its formal aspects appears to be drawn "from the bottom up."¹² The essence of the problem of new governance can be understood in three respects. First is the underlying premise of new governance that the object of both theory and practice is to produce not merely coordination but a stronger relationship among emerging governance systems. But polycentricity is not a shattered plate that must be put together again before one can eat off it, an approach that expresses a nostalgia for the unity once represented by state power and an effort to recreate it by other means—a sort of "silver age" approach to governance theory seeking a return to unity and assuming that power is incomplete unless united. It seeks the undoing of polycentric space by harmonizing rather than by coordinating.¹³ The second is the dependence inherent in managing and integrating polycentricity. There is a certain allure to new governance for civil society. It suggests a way in which they might leverage authority off states and enterprises. But that sort of power is always dependent, and ultimately servile. It is safe, but it is also a contingent authority, participation that is always subject to reward for "good" behavior and sanction for bad. Third, polycentricity is only efficient when systems are harmonized. The idea of

¹¹ John G. Ruggie, "Global Governance and 'New Governance Theory': Lessons From Business and Human Rights," *Global Governance* 20 (2014), 5–17.

¹² Larry Catá Backer, "On the Tension between Public and Private Governance in the Emerging Transnational Legal Order: State Ideology and Corporation in Polycentric Asymmetric Global Orders" (2012). Available at SSRN <http://ssrn.com/abstract=2038103>.

¹³ Larry Catá Backer, "Transnational Corporations' Outward Expression of Inward Self-Constitution: The Enforcement of Human Rights by Apple, Inc.," *Indiana Journal of Global Legal Studies* Vol. 20 (2013), 805–879. Available at SSRN <http://ssrn.com/abstract=2050180>.

management and integration is essential for workable polycentricity under a backwards-looking conceptualization of new governance. It ignores the possibility of *coordination* rather than integration. It is possible to suggest that polycentricity in globalization is moving toward anarchy, rather than toward integration. The result may also produce order but of a completely different sort, one grounded in anarchy but within which all governance systems seek legitimacy through coordination grounded in a unifying set of governance principles,¹⁴ one that rejects the anti-contextualism premises of integrationist approaches.

"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."¹⁵ John Ruggie's statement resonates powerfully in the context of framing governance for economic actors' activities detrimental to human rights. The next section considers the possibilities of that specific enterprise.

II FROM THEORY TO THE PRACTICE OF COORDINATING HUMAN RIGHTS GOVERNANCE THROUGH THE UNGPS

The UNGPs drew on the insight of polycentricity in metagovernance and collectivity to construct a structure of managed polycentric governance among three distinct governance systems that the authors identify as state law, corporate governance and civil governance systems (Backer 2012c). The UNGPs start with a view of the principal global challenge for human rights and governance: the regulation of global business. They embrace the notion of both the existence of a governance gap and a need to fill it. That, in turn, suggests that there is a space where there is no governance—a governance free zone—something that is implausible.¹⁶ The premise itself is usefully interrogated, and in any case is belied by the logic of the UNGPs itself. The UNGPs' three pillar framework defines three distinct governance systems whose coordination is necessary for the objective of coherent governance of economic actors' activities detrimental to human rights. The three blocks represent (1) the state and domestic/international law systems, (2) enterprises and social norm/nonstate governance systems, and (3) civil society and remedial objectives through multiple normative systems. The "idea behind the GPs is that each building block is placed in such a way that it compensates for the weaknesses of the others and

¹⁴ Larry Catá Backer, "Governance Polycentrism – Hierarchy and Order Without Government in Business and Human Rights Regulation," *Coalition for Peace and Ethics Working Paper No. 1/1* (2014). Available at SSRN: <http://ssrn.com/abstract=2373734>.

¹⁵ Ruggie, "Global Governance and 'New Governance Theory': Lessons From Business and Human Rights," *Global Governance* 20 (2014), 5–17.

¹⁶ Larry Catá Backer, "Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Legislator," *University of Connecticut Law Review* 39 No. 4 (2007), 1739–1784.

exercises pressure for upward movement, or continual improvement in the protection of human rights affected by business activities."¹⁷

But civil society commentators also suggest that the civil society component is weak and not compensated by the remedial pillar. The solution, for the authors, is the development of a stronger institutional role for civil society by more directly empowering civil society through more robust participation within the mechanisms through which the state duty to protect and the corporate responsibility to respect are discharged. This form of empowerment envisions civil society as something like the private attorney-general from U.S. legal theory¹⁸ – as an autonomous monitoring and accountability force representing the mass of individuals in the protection of their rights as against the institutional forces of state and enterprise. "In polycentric governance terms, this entails an organization playing an 'orchestration' role by engaging the social actors involved in the regime, promoting collaborations and discussions among them and disseminating standards and practices."¹⁹ Civil society, in effect, represents the individual in their aggregate manifestation, and their role ensures that all three major stakeholders in the human rights arena – states, corporations, and individuals – are reified in equivalent form, as aggregations of political, economic, and mass power.

Within this vision of metaharmonization represented by the UNGPs and the aggregation of abstract individuals within the institutional forms of civil society, the WG, established in 2011 by the UN Human Rights Council, serves as an orchestration mechanism overseeing this process of implementation, of placing the building blocks of the UNGPs in coherent fashion. The success of the WG appears to be mixed. Many have characterized the WG's first years by a (far too) narrow interpretation of its mandate. As a consequence, and not without substantial criticism by civil society groups, the WG focused on dissemination and implementation of the UNGPs. Critics have made a case for a skewing of focus by the WG, one that I have made in the context of the 2013 Annual Forum, toward enterprises and the state, with civil society elements relegated to an indeterminate consulting but clearly secondary role. With an eye toward the production of national action plans by European states and encouraging the development of systematic human rights due diligence, the WG missed an important opportunity. That opportunity would have been to extend the focus of its mandate to civil society, and more importantly, to the rights holders who were the objects of the UNGPs. At the same time, the singular focus on national action plans appears to have permitted enterprises to avoid the principal consequences of their autonomous responsibility to respect human rights, and in that process avoided any governance responsibility associated with their human rights due diligence regimes. Even within the limited managed polycentric space of new

¹⁷ See César Rodríguez-Garavito's Chapter 1 in this volume.

¹⁸ William B. Rubenstein, "On What a 'Private Attorney General' Is—And Why It Matters," *Yale Law Review* Vol. 57 No. 6 (2004), 2129.

¹⁹ Rodríguez-Garavito, Chapter 1 in this volume.

governance within which the WG appears to operate according to the logic of the UN system,²⁰ the UNGPs' potential – of a polycentric system of collaborating institutional actors operating symmetrically within the harmonizing framework of the UNGPs – is undermined by the actual WG's operational practice and its asymmetrical implementation of the UNGPs.

One can explain away this state of affairs as a necessary consequence of the WG's need to prioritize. But a better explanation might suggest a faulty prioritization. One can suggest superior alternative priorities. The first is grounded in the establishment of mechanisms that could produce a quasi-judicial facility through the WG. The second is to delegate the role of mediator between individuals and the other mandate stakeholders to civil society. The third and most important, though, then turns on issues of power – that is to the power to constitute and discipline the civil society community within which this authority is to be exercised. This later takes two distinct forms – who gets to participate in civil society events, and who gets to count as civil society for purposes of its role within the WG framework. Each is discussed in turn.

First, the WG ought to serve or to establish a body that could serve as an authoritative source of decisions about the *application* of the UNGPs in disputes brought to it by states, enterprises or civil society acting as *collective representatives* of otherwise voiceless individuals. This suggests one of the most interesting, though lamentably not fully developed, possibilities that polycentric metagovernance offers the WG framework for UNGPs oversight – the missed opportunity of the WG to “consider individual cases of human rights violations in the context of business activity.”²¹ Rodríguez-Garavito suggest a mechanism for interpretation that “could include receiving and responding to individual submissions and complaints.”²² This suggests not only a way for enhancing the autonomous role of individuals (and their civil society advocates) within the UNGPs, but also the fundamental importance of an autonomous interpretive role for the UNGPs outside of the domestic legal orders of states or the governance orders of enterprises. It also suggests that within the third pillar lies the foundation for the authority of individuals to seek remedies for the breaches of state duty to protect or corporate responsibility to respect human rights.

But the WG missed more than that. The WG failed to grasp the opportunity to become the source of the highest and most credible and consistent interpretation of the UNGPs applied in context. *That failure to take on a quasi-judicial role*, not unlike that of the European Court of Justice in interpreting the application of European Law, in *form and effect*, though not binding in fact, has significantly diminished the importance of the WG's work and might well impend the dynamic element of the UNGPs. The UN Development Program (UNDP) remains

²⁰ See, e.g., Jamie Datin Prenkert and Scott J. Shackelford, “Business, Human Rights, and the Promise of Polycentricity,” *Vanderbilt Journal of Transnational Law* 47 (2014), 451–500. Available www.vanderbilt.edu/wp-content/uploads/sites/78/Prenkert-Final.pdf

²¹ Rodríguez-Garavito, Chapter 1 in this volume. ²² *Ibid.*

a framework in search of a jurisprudence. Most significant value lies in its application to concrete disputes among the critical stakeholders to the UNGP – states, business, and individuals on whose behalf civil society plays a decisive role. The principles of the UNDP can only be reified – made concrete – through the dynamic evolution and deepening of the “law” of the UNGPs’ consistent application through a bottom up, case-by-case basis. And this, from the perspective of both static and dynamic evolution of the UNGPs, is fundamental – both for the WG and for those civil society elements that can play a crucial role in bringing such actions and thus adding muscle to the third pillar. To this end an interpretive facility is imperative. There is no evolution of the UNDP without a substantial body of application in which the UNGPs are manifested in the actions of its three stakeholders. This is especially the case were the WG to consider acting as an interpretive facility for National Contact Point (NCP) complaints undertaken pursuant to the OECD’s Guidelines for Multinational Enterprises that have incorporated the UNGPs in substantial measure. In the absence of such a facility dedicated to the interpretation of the UNGP, it is left to the NCP to take up that project through their interpretation of chapter IV of the Multinational Guidelines, which incorporate the UNGPs.²³

The *binding effect* of the determinations of any interpretive facility is less important than the project of producing these interpretations consistently and in the context of disputes actively contested among states, enterprises, and civil society actors before the UNGPs’ neutral interpreters. The production of case based glosses on the UNGPs would, of itself, and irrespective of its binding nature, produce guidance that would invariably be taken up by those bodies with substantially more authority to bind. This is not revolutionary practice but merely the application of a reality that the consistent production of glosses that produce a unified and coherent interpretation of the UNGPs will necessarily have an impact on the work of courts, intergovernmental bodies, enterprises, and civil society actors that would be influenced by, even if not made to, follow the interpretations. It is essential to build a body of interpretive glosses of the UNGP on the context of actual disputes. The work of the Ethics Council of the Norwegian Sovereign Wealth Fund Global provides an example, as does the work of the OECD National Contact Point.²⁴ This can be done; given the political will. And indeed, polycentricity’s logic suggests that it can be done even if states are unwilling by the collaboration of enterprises and business in the creation of such a mechanism, in the way that business and civil

²³ See, e.g., UK National Contact Point, Initial Assessment by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises (May 2014). Available www.gov.uk/government/uploads/system/uploads/attachment_data/file/315104/bis-14-854-palestinian-lawyers-complaint-against-gas-ncp-initial-assessment.pdf.

²⁴ Larry Catá Backer, “Sovereign Investing and Markets-Based Transnational Rule of Law Building: The Norwegian Sovereign Wealth Fund in Global Markets,” *American University International Law Review* 20(1) (2013), 1–121.

society sometimes cooperate in the construction and monitoring of supply chain CSR codes. Even "bad" decisions, decisions that are either rejected by an applying state or that may be repudiated in later decisions, would help move the construction of a coherent vision of the UNGPs as applied in the right direction, and secure an important role for civil society as the advocate for individuals otherwise less well represented in the process of fleshing out the UNGPs. In the absence of an interpretive mechanism, the UNGPs will always exist in a potential state. Without the ability of civil society to bring complaints for interpretation, the individual – the one actor who is at the heart of all of these human rights efforts – will be denied an effective collective advocate in every instance except those where states have undertaken a positive obligation to serve in that capacity, and where that obligation is backed by enforceable law.

Second, the WG's system building must include, along with national action plans, a more robust planning for the roles of enterprises and civil society in their respective fields. In place of the current asymmetrical disavowment of civil society, a "collaborative governance" model might serve as an antidote, one essential to the construction of any quasi-judicial facility in the WG or similar organ. This, in turn, requires building institutional mechanisms that bolster civil society in their representative capacities. Within these mechanisms, civil society would play a mediating role, as "engagers" (the "good citizen civil society organization") and "confronters" (the disruptive civil society actor).²⁵ Moreover, civil society is an essential element of this quasi-judicial facility for the same reason that individuals are understood as reincarnated in mass collectives with a collective authority. That authority is grounded in the embrace of a notion, implicit in the third pillar, of the autonomous rights of the individual, which states and enterprises are obliged to protect and respect, and for which remedies against both are appropriate. The protection of those individual rights against state and enterprise actors does not arise from within the corporate responsibility (and its mechanisms) or from the state duty (and its legal frameworks), but is inherent in the individual human dignity that exists outside of either. This is recognized in the framework of the UNGPs, both in the reference to the source of the corporate responsibility in the International Bill of Rights and ILO Convention (under the new governance or polycentric framework), and to the reference to the state duty in terms of its international legal obligations (under the classical framework of international law). But to be effective it may be exercised collectively. Just as the responsibility to respect human rights is vested in collectives of capital – so the remedial rights of individuals can be vested in civil society as collectives of individuals organized for the protection of their rights. But this view requires a challenge to the all too easy and now quite antiquated preglobalization logic of the law-state system.

²⁵ Rodríguez-Garavito, Chapter 1 in this volume.

Third, the issue of who gets to participate touches on both formal and functional limits built into the WG system that makes it difficult for many civil society actors to participate. In effect, the economics of global governance, like that of the relationship among states, is grounded in economic power and territory. The costs to attend sessions, disengagement resulting from exclusion and exclusionary participation rules contribute to this state of affairs. Just as the most powerful and developed states tend to dominate international public discourse, so do the civil society "usual actors" tend to dominate civil society discourse within those contexts that seek civil society "perspective." And that pattern tends to bind large actors more closely to each other than to either weaker states or smaller NGOs; it may well be that Amnesty has more in common with the bureaucrats within the UK administrative state than they have with smaller UK NGOs in terms of interest, perspectives, modes of operation, communication intermeshing and the like.²⁶ In this context, efforts at reform may be as alienating as the rules they replace.²⁷ More difficult, perhaps, is the issue of disciplining membership in civil society. If civil society is accorded a more prominent institutional role, then who gets to count as "civil society"?²⁸ It is clear that the autonomy of civil society can be perverted by the creation of organizations that are mere instrumentalities of states and enterprises. That should be troubling. What might be in order are more robust rules, or a more aggressive interrogation of the premises underling the structures under which the WG operates.

III THE REACTIONARY TURN: THE WITHERED PROMISE OF A TREATY REGIME AS A GOVERNANCE ALTERNATIVE

Yet this complex construct offered as a coherent response to the complexities of emerging governance premises may well be undone by the allure of the forms of *ancien régime* systems, whose forms offer the outward form of stability and cohesion, but which can deliver neither. One of the most interesting of these formal, gesture-based alternatives currently on offer touching on the GP and WG enterprise is the

²⁶ Cf. Backer, "Economic Globalization Ascendant," p. 6.

²⁷ Cf. Conectas Direitos Humanos, Dejusticia and Justicia Global, Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: A Review of the First Two-and-a-Half Years of Work (25 November 2013). Available http://conectas.org/arquivos/editor/files/6_Dej_Con_JC_WGyears_Nov2013.pdf. "Worse, if the international community uses Global North civil society as the means through which this cram down is to be effected, the resulting colonialism becomes social and cultural-and polycentric-one in which the governance preferences of international civil society, global donors, and foundations, will be leveraged, and disguised as capacity building, substantially and unnecessarily narrow, the choices for Global South states in fashioning their compliance with their Pillar one duties." Larry Catá Backer, "On the Problem of the State in the State Duty to Protect Human Rights—Fostering National Action Plans as a Means of Refocusing the State Duty on the Business of the State Itself," *Law at the End of the Day*, 10 May 2014. Available: <http://lcbackerblog.blogspot.com/2014/05/on-problem-of-state-in-state-duty-to.html>.

²⁸ Considered in Larry Catá Backer, "Fractured Territories and Abstracted Terrains: The Problem of Representation and Human Rights Governance Regimes Within and Beyond the State," 23(1) *Indiana Journal of Global Legal Studies* (2016), 61–94.

substitution of the polycentrism of the UNCPS with a comprehensive treaty on business and human rights. The arguments against this approach are well understood. First treaty making has very high transaction costs. Second, such efforts require substantial state support. Third, treaty making is particularly burdensome for smaller organizations (and states) that seek to participate, and their voices are likely to carry less weight (even as they might bear the brunt of the burdens of the obligations created and waivers permitted). Fourth, a treaty might augment the scope of the state duty and corporate power in bad ways – that is in ways that are detrimental to civil society and perhaps to the individuals who are the objects of all this activity.

All of these drawbacks augment the case for complementarity, for the use of targeted treaty making, rather than the rejection of treaty making as part of the arsenal of managing business and human rights. But the arguments for complementary treaty making (in this case focused on a treaty covering gross human rights violations of enterprises) are more troubling for the enterprise of polycentricity. There is a sense of an Enlightenment master clockmaker view of human rights institutionalism which, deliberately or not, appears to be deployed in the service of an instrumental metamachinery whose parts work together toward a unified single end.

Four principal arguments are typically offered up in support of treaty complementarity, three are elegant and elegantly countered. The last is more subtle and troubling. First it serves to elaborate an integrated approach to the UNCPS construction of “three estate” governance – by states, enterprises and civil society as the new bodies of a human rights “estates general.” Second, it might improve alignment with the edifice of public international law. It might also be subsumed thereunder. Third, it is an example of principled pragmatism in the spirit of that animating the GP project itself that could unleash polycentric and experimental regulation embedded in the GPs. The fourth reason suggests treaty utility proceeding from its power to establish extraterritorial obligations for states to close a structural regulatory gap – by unleashing the particularized interests of states against enterprises operating within the territories of other states unable or unwilling to conform to the desires of the intervening state. Extraterritoriality has always troubled me, and ought to be a source of worry for people from the Global South.²⁹ Of course the answer to the worry about the neocolonialism and developed state imperialism inherent in regimes of extraterritoriality is usually couched in “Third World Approaches to International Law” (TWAIL) terms.³⁰ But even the idea that extraterritoriality is

a process rather than a politically driven force – that is that intervening states would be applying international law, rather than their own, abroad, still ought to be troubling. States can only apply the international law through their own subjective interpretation of it – the interpretation issue. Second, international law applied through states is limited to those portions of those items of international law that have been domesticated and subject to such reservations – the partial international law issue. Extraterritoriality also creates a new regulatory gap, between empowered states and the passive states into which power is projected.³¹

The value of extraterritoriality in the business and human rights regulatory tool kit ought to be reconsidered. It might be more effective, for example, to set up an international body with the authority to hear cases involving states in weak or absent governance. But even this is tricky. The application of this jurisdictional standard to states against which more powerful states might wish to affect suggests one of the ways such extraterritoriality schemes can quickly become undermined in the service of the interests of the states with the power to use it. More useful, perhaps, would be the development of a fact-finding facility at the international level that might apply the UNCPS to particular complaints and whose findings, while not binding on states, could be used as “facts” applicable to local litigation. In the end, extraterritoriality exposes a preference for global players for binding “law” to arc the course of business enterprise and human rights back to its beginning. It is certainly true that within the law-state system, instructions that are not commands have no formal force and are subordinate to lawfully enacted commands. But outside the state system, what may not be binding through states may well be binding within enterprises and other governance communities adopting them. This self-binding makes them no less binding; it just shifts the source of binding power.³²

IV CONCLUSION

The contradictions and conflicts surrounding the development of the UNCPS evidence the power and temptations of the great normative institutional forces that affect the governance projects of transnational society in the early 21st century. They show both the strength of the drive for order and rationality even within emerging polycentric orders beyond the state, and the necessary transformation of the individual within this polycentric universe from singular being to disembodied abstraction made flesh in the body of civil society. But the search for *unifying* order misdirects the project of creating a coherent system of business and human rights compatible with global governance norms. It is in that respect that one can understand the profound ways in which the WG may be missing opportunities. Two of

³¹ Backer, “Economic Globalization Ascendant,” p. 6.

³² Larry Catá Backer, “Multinational Corporations as Objects and Sources of Transnational Regulation,” *ILSA Journal of International & Comparative Law* 14 (2008), 499–533.

²⁹ Larry Catá Backer, “At the and U.N. Forum on Business and Human Rights—Reflections,” in Bilchitz and Dea (eds.), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect? Law at the End of the Day* (1 December 2013). Available <http://lcbackerblog.blogspot.co.il/2013/12/at-and-un-forum-on-business-and-human.html>.

³⁰ Sata I. Seck, “Transnational Business and Environmental Harm: A TWAIL Analysis of Home State Obligations,” *Law Trade & Development* Vol. 3 No. 1 (2011), 164–202.

which are worthy of serious development. The first is a facility for delivering interpretations of the CPs whether or not deemed binding by state or enterprise instrumentalities. The second touches on the creation of an institutional framework for providing a means of hearing specific complaints brought from individuals through representative civil society for determination of the application of the CPs in context. Both require the strengthening of the remedial pillar to deepen its interpretation as an autonomous source of process and governance inclusion for the power of individuals, now represented by a civil society sector that is neither dependent on state nor enterprises, as a subject rather than as an object of CP governance.

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