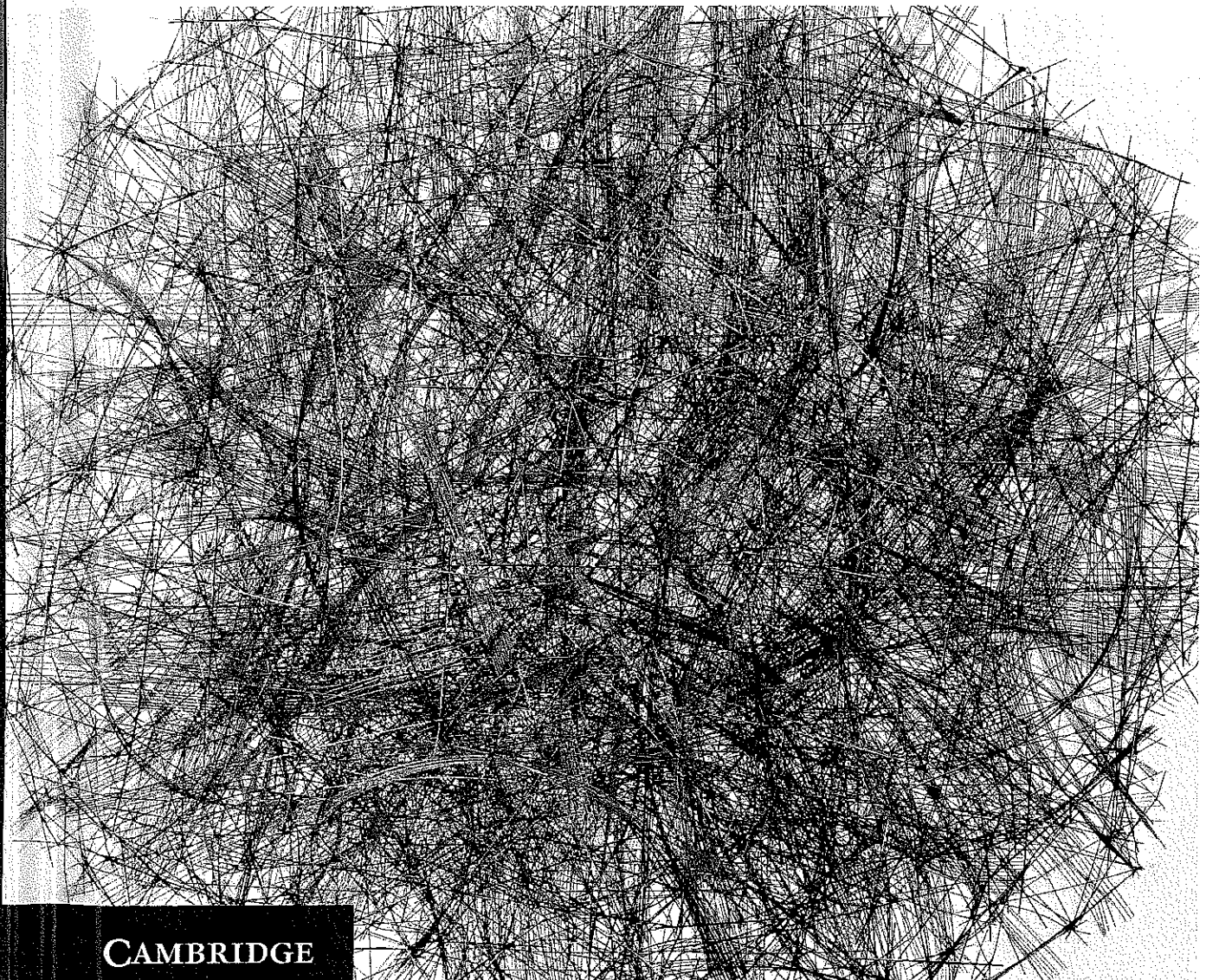


# **Contested Regime Collisions**

Norm Fragmentation in  
World Society

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## Governance polycentrism or regulated self-regulation

*Rule systems for human rights impacts of economic activity where national, private, and international regimes collide*

LARRY CATÁ BACKER

It has become something of a commonplace to understand that at just the moment when a half millennium of effort devoted to the construction of an impermeable and eternal political system of states – omnipotent internally within their territorial borders and incarnate beings interacting as aggregate persons among a species of similarly constituted beings within a societally ordered community of states<sup>1</sup> – produced instead the framework of its own eclipse, but not its obliteration.<sup>2</sup> That political moment, when the structures of economic globalization acquired enough of a momentum to produce a reality of economic and social interactions beyond the ability of any single political system to control, produced a space (we argue whether it is political, social, economic, religious, cultural, moral, or mixed) from out of which other governance systems have emerged and operate, to the chagrin and despite the opposition of the law-state system and its acolytes.<sup>3</sup> The State and its detritus remains an obsession, especially among lawyers and theorists of governance, even those driven by the dictates of emerging functional realities of practice to reconsider the state system within a larger governance context.<sup>4</sup> Loyalty, here, might well be a necessity of the construct of the lawyer, the judge, and legal academic, to the system of which they form an integral part, the passing of which might well reduce their privileged role as seneschals of the law-state system.<sup>5</sup>

Yet even for those who do not dismiss the reality and power of societally constituted regimes, the institutional premises of the old order

<sup>1</sup> Anghie, *Imperialism, Sovereignty*.      <sup>2</sup> Zürn, "Sovereignty and Law," pp. 39–71.

<sup>3</sup> Falk, *Predatory Globalization*; Sachs, "Beyond the Liability Wall," p. 843.

<sup>4</sup> Weissbrodt, "Keynote Address," pp. 384–90.

<sup>5</sup> See, e.g., Backer, "Retaining Judicial Authority."

survive in large measure and a certain nostalgia for reproducing the ancient regime of an orderly and vertically integrated universe constituted under rules produced by *Natura* or some variant of an Enlightenment deity. It is possible that even the vanguard of the societal constitution movement distrust a heterodox governance system without order or hierarchy.<sup>6</sup> It is also possible that some find it comforting to transpose the premises and habits of law and law-state systems (including its elaborate systems of justifications and legitimacy) onto emerging governance regimes, if only because familiarity makes analysis easier. More pointedly, such transposition might permit an easier disciplining of emerging regimes within the premises of the old.<sup>7</sup>

It is in this context that it is useful to speak to the issue of "regime collisions."<sup>8</sup> The concept can be used to describe the fact that fragmentation into an increasing number of international regimes with overlapping areas of competence can lead to contradictory decisions or mutual obstruction. For some, given that such regimes are driven by radically different rationalities, this poses more than a technical problem. The problem is the same of that which confronted the political bodies when they sought to craft public international law as an ordering system among otherwise autonomous actors with distinct character and ambition. They argue, for example, that in the absence of a hierarchy of norms, only heterarchic "collision rules" can coordinate parallel action and manage collisions by allocating competences, taking into account the different regime rationales.

I have suggested otherwise, positing that it is necessary to move away from state-focused legal paradigms, redolent with hierarchy and order, and to embrace *ἀναρχος* (anarchos), an aggregation of systems without rulers, but with an order quite distinct from the late feudalism of the law-state system embedded within it.<sup>9</sup> I have previously written<sup>10</sup> that what I call global law, the law of non-state governance systems, can be understood as the systematization of anarchy, as the management of a loosely intertwined universe of autonomous governance frameworks operating dynamically across borders and grounded in functional

<sup>6</sup> But see Calliess and Zumbansen, *Rough Consensus and Running Code*.

<sup>7</sup> Consider in this light, Alston, "The 'Not-a-Cat' Syndrome," p. 17; Johns, "The Invisibility of the Transnational Corporation"; Ward, "Securing Transnational Corporate," pp. 461-2.

<sup>8</sup> See, e.g., Teubner, *Constitutional Fragments*.

<sup>9</sup> Backer, "Transnational Constitutions," p. 879.

<sup>10</sup> Backer, "The Structural Characteristics of Global Law."

differentiation among governance communities. Considered in this context, the structure of global law can be understood as an amalgamation of four fundamental characteristics that together define a new order in form that is, in some respects, the antithesis of the orderliness and unity of the law-state system it will displace (though not erase). These four fundamental characteristics – fracture, fluidity, permeability, and polycentricity – comprise the fundamental structure of the disordered orderliness of global governance, which now includes but is not limited by law. These also serve as the structural foundations of its constitutional element, its substantive element, and its process element. Rather than order grounded in public international law, now transformed to serve a wider assemblage of governance actors, disorder premised on a polycentric ecosystem of competing and cooperating systems in constant, sometimes friction producing, interaction, defines the stability of governance systems in globalization. As a consequence, the problem of societally constituted organisms in a world once populated entirely by states and their creatures operating through the rigidly organized hierarchies of law, may well be the intrusion of law where it is neither necessary nor natural.

The purpose of this essay, then, is to consider the issue of collision within one of its most interesting nexus points: in the elaboration of governance frameworks touching on the human rights impacts of economic activity by states, enterprises, and individuals. That elaboration produces collisions between the state and international, public, and private organizations (enterprises and civil society actors), each with their distinct governance regimes. The thesis of this essay is as follows: the development of governance regimes for the human rights impacts of economic activity suggests the way in which non-legal approaches play a crucial role in the creation of structures within which the collisions of polycentric governance, its necessary character as *ἀναρχος*, can be managed (but not ordered), and consequently the way in which law (and its principles of hierarchy and unitary systemicity) plays a less hegemonic role, that is, the way in which law has less to contribute toward the governance problem thus posed.

The thesis is explored by considering the way in which the management of anarchy and the collision of governance regimes are being attempted through the operationalization of the United Nations Guiding Principles for Business and Human Rights (UNGPs),<sup>11</sup> and the three

<sup>11</sup> Special Representative of the Secretary-General, "Guiding Principles on Business and Human Rights," endorsed by the UN Human Rights Council in 2011. UN Doc. A/HRC/RES/17/4 (July 6, 2011) [hereafter UNGP].

pillar framework from which it arose (state duty to protect, corporate responsibility to respect, and effective remedies for adverse effects of human rights),<sup>12</sup> and its incorporation into the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises.<sup>13</sup> The focus of that effort has been the management of the behavior of enterprises in accordance with international human rights norms. The operationalization of that framework touches on collisions between the governance aspirations of public international organizations, the prerogatives of states, governance structures of the largest global economic enterprises, and the emergence of global civil society, media and other stakeholder communities that have morphed into members of the *demos* of shifting governance communities. But rather than order and the privileging of international law, fracture and polycentric co-existence appear to be emerging as the stable state.

Section I ("The guiding principles for business and human rights as framework for inter-systemic collisions") considers the structures and premises of the emerging governance framework built into the UNGP and its points of collision with law-based systems. Section II ("From out of disorder . . . ") then considers the ramifications of collision and the possibilities for systemic equilibrium by reference to three questions suggested by the thesis: (1) What may be the role of law for the solution of collision problems, and how does that role relate to non-legal regimes?; (2) What may be the role of non-legal approaches to a solution, and how do they relate to law?; and (3) What might concrete solutions look like? Law remains an important element, but no longer the sole ordering principle of a unified system within which rule collisions may be resolved. Non-legal systems built around societally constituted governance organisms, autonomous from each other and from the law system with which they collide, may better serve as the framework for mediating collisions among these constellations of governance orders. The most useful means for providing these collision management structures may be sought within public international organizations that provide an arena within which such collisions may be made predictable and their results more certain. The answers may not be positive for those who still cling to the ideals of the primacy of law. First, law both supports and impedes

<sup>12</sup> UN Human Rights Council, Forum on Business and Human Rights, A/HRC/FBHR/2013/2, para. 10.

<sup>13</sup> OECD, Guidelines for Multinational Enterprises (2011).

solution to collision problems precisely because, by its nature, it invariably seeks to privilege itself over non-law regimes. Second, the societally constituted autonomous regulatory regimes that can produce increasingly dense networks of jurisprudence with the functional effect of customary law but in the absence of the state is threatened by law, which seeks to subsume societally constituted systems, and the social norms that animate it, within the domestic legal orders of states. Third, the concrete solution may well look like the UNGP-OECD Guidelines framework itself.

### I. The guiding principles for business and human rights as framework for inter-systemic collisions

The UNGP framework sought to capture the essence of the emerging diffusions of governance among an emerging constellation of distinct political organizations only one group of which are nation-states.<sup>14</sup> It identified at least three principal self-constituted governance group "types": states, economic enterprises, and international organizations. It then sought to establish a framework within which these three groups might harmonize their interactions – that is, minimize the friction of their collisions – in the service of a singular objective, the safeguarding of the human rights of individuals and communities against deprivations proceeding from economic activity.<sup>15</sup> This it sought to accomplish in three ways. First it sought to weave together the domestic legal order regimes of states, the societally constituted governance orders of enterprises, and the autonomous multilateral law-norm regimens of international organizations. Second, it sought to intermesh this framework into the internal governance orders of these three groups of regimes. Third, it sought to describe a governance space within which remedial projects might be undertaken in the service of the objective. To that end, it structured itself with direct reference to the government obligations of two of the three great governance great actors – states and multinational enterprises.<sup>16</sup> On that foundation, the UNGP then knit together the respective duties and responsibilities of states and enterprises through the mediating (and legitimating) offices of public (and private) international organizations, which were to be expressed (and applied) through

<sup>14</sup> Ruggie, *Just Business*. <sup>15</sup> UNGP, General Principles.

<sup>16</sup> UNGP, General Principles.

law (the state), behavior controlling norms (enterprises), and the remedial structures offered through both.<sup>17</sup>

With respect to states, the UNGP speaks to the human rights law obligations of states, that is, of their duty to protect human rights.<sup>18</sup> Thus, states must protect against human rights *abuses* within their territories and against those actors within their jurisdiction.<sup>19</sup> States should transpose these obligations onto their domestic legal orders for transparent application to enterprises under their control.<sup>20</sup> But the extent of that obligation is ambiguous. It speaks to the human rights *law* obligations of states as setting the borders of a state's duty, but does not specify whether that border is set by the international organizations from which these proceed, or the more conventional notion of only that portion of international law that has been embraced within the domestic legal order of a particular state.<sup>21</sup> It appears to seek to minimize the problems of the vagaries of a state-based embrace of international law by also suggesting a role for regulation through *policy* as well as law.<sup>22</sup> Policy oriented approaches by states recognize its role both as a regulator and a participant in markets over which it has varying degrees of control. Policy, then, is understood as a means of extending beyond the constraints of law in the face of its irrelevance in areas where state may engage in activity but within which the traditional mechanics of law prove inadequate. These include the troublesome area of state owned enterprises,<sup>23</sup> privatization activities,<sup>24</sup> and especially where states engage as participants in markets for economic activity.<sup>25</sup>

Likewise the UNGP state duty to protect appears to nod approvingly toward the extraterritorial application of international human rights law,<sup>26</sup> especially in so-called conflict or weak governance zones where extraterritoriality is meant to substitute foreign governance apparatus for its domestic absence, at least in part.<sup>27</sup> Yet the door opening for

<sup>17</sup> UNGP General Principles (c). <sup>18</sup> UNGP paras. 1–10. <sup>19</sup> UNGP para. 1.

<sup>20</sup> UNGP para. 2. <sup>21</sup> UNGP para. 1 Commentary.

<sup>22</sup> UNGP Principle, para. 3, which speaks both to the transposition of international legal obligations into domestic legal orders (and their enforcement) and to the obligation of states to develop guidance measures for enterprises (ibid., para. 3(c)) and soft law provisions that serve to "encourage, and where appropriate, require, business enterprises to communicate how they address their human rights impacts" (ibid., para. 3(d)). This last of course is meant to harmonize national with global efforts of transparency and markets driven conduct regulation. See, e.g., Backer, "From Moral Obligation to International Law," pp. 591–653.

<sup>23</sup> UNGP para. 4. <sup>24</sup> UNGP para. 5. <sup>25</sup> UNGP para. 6.

<sup>26</sup> UNGP para. 2 Commentary. <sup>27</sup> UNGP para. 7.



extraterritorial application also provides a gateway for the internationalization of both law-norm making and the elaboration of remedial architectures, and notably among them the integration of state legal architectures with the governance mechanisms of public international bodies, and principally among them "multilateral soft-law instruments such as the Guidelines for Multinational Enterprises of the Organisation for Economic Co-operation and Development."<sup>28</sup> That integration effort is also suggested through policy based obligations that may be understood as a consequence of the state duty arising from its insertions within the web of international law. Thus states "should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprise."<sup>29</sup> Likewise, these suggestions (for states *should* but are not *obliged* under the UNGP) extend to state participation in multilateral organizations.<sup>30</sup> This last opening reinforces both the autonomy of public international actors and the role of states within them, producing a circularity in which the international obligations of states are reinforced by privileging the international sources of state domestic duty in organizing and applying domestic legal (and now policy) order.<sup>31</sup>

In contrast to the language of law, of policy, and of the intermeshing and consolidation of state legal duty within the greater contours of international law, the UNGP quite radically uses the *language of responsibility*, and of the binding character of societally constituted governance regimes in the context of the behavior constraints of multinational enterprises.<sup>32</sup> Business enterprises, the UNGP declare,<sup>33</sup> should respect human rights.<sup>34</sup> This responsibility to respect human rights derives not from law but from the societally constituted governance constraints of multinational enterprises themselves.

<sup>28</sup> Ibid.    <sup>29</sup> UNGP para. 9.    <sup>30</sup> UNGP para. 10.

<sup>31</sup> Thus, when acting as members of multilateral institutions that deal with business related issues, states should "(c) draw on these Guiding Principles to promote shared understanding and advance international cooperation in the management of business and human rights obligations" UNGP para. 10.

<sup>32</sup> UNGP paras. 11-24.

<sup>33</sup> "Nothing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights" UNGP General Principles. However, that limitation on the *law-based* project of the UNGP is directed only to states.

<sup>34</sup> UNGP para. 11.



The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfill their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.<sup>35</sup>

It arises within those governance spaces beyond the state but connected to the equally autonomous public international governance orders, which reflect and produce the normative content of global non-state governance. Thus, the UNGPs define the human rights responsibilities of enterprises with reference to international law and norms, a task that was impossible under the international law framework applicable to states, and indeed one that includes norms that would not bind states as law.<sup>36</sup>

This responsibility to respect exists not just autonomously of states, but also potentially adverse to the legal structures of state-based governance, the harmonization of which is an object of the UNGP themselves, as between the autonomous governance frameworks of states and societally constituted enterprises, but also with respect to the relationship of both to the objects of these governance efforts – those adversely impacted by the activities of states and enterprises whose remedial rights are meant to serve as a focal point of convergence.<sup>37</sup> And thus the UNGP devote attention to its principal function – as a collision mediating apparatus.<sup>38</sup> It sets out a mechanism for both acknowledging conflict and resolving them among different political organizations – in this case states and enterprises. That mechanism relies principally on a premise that may be hard for either to accept – the privileged status of international law and norms as the basis of the constitutional constraints of both states and enterprise organizations.<sup>39</sup> The UNGP thus posit that enterprises are

<sup>35</sup> UNGP para. 11 Commentary. <sup>36</sup> UNGP para.12.

<sup>37</sup> Ibid., "Business enterprises should not undermine States' abilities to meet their own human rights obligations, including by actions that might weaken the integrity of judicial processes."

<sup>38</sup> The Working Group framed the objective in collision reduction terms: "The Guiding Principles reflect the differentiated, but complementary roles of States and businesses with regard to human rights. By outlining more clearly the role of each, the Guiding Principles provide a framework that attributes the respective duties or responsibilities to States and businesses to help them address their adverse human rights impacts in specific instances." UN Human Rights Council, Forum on Business and Human Rights, A/HRC/FBHR/2013/2, para. 25.

<sup>39</sup> Cf. Peters, "Compensatory Constitutionalism."

bound to comply with law but understood in two senses – the domestic legal order of states in which they operate or within which they might owe some duty, and internationally recognized human rights now transposed into their own societally constituted governance apparatus.<sup>40</sup> Where these conflict, enterprises (but not, it appears, states) must “seek ways to honor the principles of internationally recognized human rights.”<sup>41</sup> But where enterprises may not avoid conflict they are bound to “treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate.”<sup>42</sup> In this later case, the object is to avoid complicity in the breach, effectively, by states of their paramount duty to protect human rights.<sup>43</sup>

The character of the human rights responsibility of business enterprises is centered on avoiding causing or contributing to adverse human rights impacts,<sup>44</sup> and preventing or mitigating such adverse impacts.<sup>45</sup> In keeping with the foundational premise that the UNGPs deal with enterprises beyond the constraints or organizing principles of aggregated economic activity in national law, it rejects any limitation of law in the application to the activities of the global operations of business enterprises however organized. Though states deal with economic enterprises as creatures subject to their law in those circumstances when their power may extend to them and to the extent that the domestic legal orders of states do not otherwise protect enterprises from liability, especially with respect to the partitioning of their assets,<sup>46</sup> the UNGP recognize societal reconstitution beyond these legal constraints.<sup>47</sup> And the expression of that responsibility is understood by its societally constituting gestures – a policy commitment to acknowledge and meet its responsibilities expressed through its constituting documents,<sup>48</sup> a human rights due diligence process to implement this societally constituted obligation,<sup>49</sup> and a process of remediation through which the enterprise expresses its

<sup>40</sup> UNGP para. 23(a). <sup>41</sup> UNGP para. 23(b). <sup>42</sup> UNGP para. 23 (c).

<sup>43</sup> UNGP para. 23 Commentary. <sup>44</sup> UNGP para. 13(a). <sup>45</sup> UNGP para. 13(b).

<sup>46</sup> Discussed in Backer, “The Autonomous Global Corporation.” <sup>47</sup> UNGP para. 14.

<sup>48</sup> UNGP paras. 15(a), 16.

<sup>49</sup> UNGP paras. 15(b), 17–21. Human rights due diligence includes both a transparency and a risk assessment/mitigation aspect. Enterprises must implement systems that identify and assess actual or potential adverse human rights risks (UNGP para. 18), integrate the findings from impact assessments across relevant internal functions and processes (UNGP para. 19), track the effectiveness of their responses (UNGP para. 20), and account for their human rights due diligence operations transparently with outside stakeholders through programs of disclosure (UNGP para. 21).

power to bind.<sup>50</sup> There is collision conflict reduction with respect to the remedial obligation as well.<sup>51</sup>

The joint obligation of states and enterprises to provide mechanisms for appropriate remediation provides a point of convergence of the respective obligations of both operationalized through states but grounded in international public law and *norms*.<sup>52</sup> The UNGP seems to circle back to the state as a primary actor, and law as the primary legitimating structure, of remedying human rights wrongs, a perspective that civil society actors have sought to advance.<sup>53</sup> The central premise of the remedial mechanisms of the UNGP framework is the state duty to protect human rights (internationally defined and transposed into domestic legal orders) on a territorially based jurisdiction-by-jurisdiction basis.<sup>54</sup> Though the state serves as the nexus point for remedy, it is understood to serve in that capacity sometimes more as a gateway (though quite a narrow one) to rather than as the resting place for remedial mechanisms, founded on state based remedies but integrated with operational level grievance mechanisms and those of supra national human rights mechanisms.<sup>55</sup> Thus UNGP Principle 25 speaks to the administration of state-based grievance mechanisms through a variety of bodies, some of which are non-judicial, and at least one of which transposes remedy from the state to a state administered international apparatus.<sup>56</sup> The operational principles of remedial mechanisms draw much from the emerging set of international norms on the operation of a legitimate result producing judicial enterprise. These include reducing barriers to relief,<sup>57</sup> avoiding limiting state-based relief structures to the judiciary and the courts,<sup>58</sup> and the provision of a space

<sup>50</sup> UNGP paras. 15(c), 22.

<sup>51</sup> UNGP para. 24 provides a rule of precedence where the local legal framework is absent or ambiguous.

<sup>52</sup> UNGP paras. 25–31.

<sup>53</sup> See, e.g., Skinner, McCorquodale, and De Schutter, "The Third Pillar."

<sup>54</sup> UNGP para. 25. <sup>55</sup> UNGP para. 25 Commentary.

<sup>56</sup> "Examples include the courts (for both criminal and civil actions), labour tribunals, national human rights institutions, National Contact Points under the Guidelines for Multinational Enterprises of the Organisation for Economic Co-operation and Development, many ombudsperson offices, and Government-run complaints offices" UNGP para. 25 Commentary.

<sup>57</sup> UNGP para 26.

<sup>58</sup> UNGP para. 27. Here the UNGP make a case for the expansion of the remedial apparatus beyond the courts to a variety of new actors, some of which may be quite problematic under the constitutional constraints and traditions of some states.

for non-state-based grievance mechanisms.<sup>59</sup> Surprisingly, for all of the language about the autonomy of enterprise societally constituted governance systems, these autonomous characteristics do not appear to extend to the remedial function, one that appears firmly embedded within national legal structures under the UNGP. Thus, for example, non-state grievance remedial structures are understood as subordinate adjuncts to the principal roles that are played by state based mechanisms for remedies.<sup>60</sup> Likewise the UNGP warn that non-state grievance mechanisms "should not be used to undermine the role of legitimate trade unions in addressing labour-related disputes, nor to preclude access to judicial or other non-judicial grievance mechanisms."<sup>61</sup> Indeed, an alternative not embraced might have grounded the remedial duty as centered on the individuals who suffer human rights wrongs, internationalizing constitutional principle of human dignity, the consequences of which include the obligation for states and other actors to remedy wrongs.<sup>62</sup>

At the same time, the door is left open to multilateral non-state-based remedial mechanisms. These suggest, though more subtly perhaps, that the grievance mechanisms of non-state organizations, both public and private, might also serve the same function as those of states, and might, indeed, substitute for those of the state.<sup>63</sup> These are embedded in the societal constitutions of non-state actors:

commitments undertaken by industry bodies, multi-stakeholder and other collaborative initiatives, through codes of conduct, performance standards, global framework agreements between trade unions and transnational corporations, and similar undertakings.<sup>64</sup>

But for these, the UNGP are careful to transpose a number of principles for legitimate and effective operation – these are more likely to affect the constitution of a remedial mechanism within enterprise and non-state organization than those of states.<sup>65</sup>

The broad hints for coordination set out in the UNGP have had some success in enlisting a number of states and non-state organizations to

<sup>59</sup> UNGP paras. 28–29.      <sup>60</sup> UNGP para. 28 Commentary.

<sup>61</sup> UNGP para. 29 Commentary.

<sup>62</sup> Cf. Bailey and Mattei, "Social Movements as Constituent Power."      <sup>63</sup> UNGP para. 30.

<sup>64</sup> UNGP para. 30 Commentary.

<sup>65</sup> UNCP para. 31 (including principles of accountability, accessibility, predictability, fairness, transparency, rights compatibility, and self-referencing character grounded in communication among organizational stakeholders).

embrace them as a means of collision conflict reduction.<sup>66</sup> Among the most interesting might be the embrace of the UNGP by the OECD through its Guidelines for Multinational Enterprises (2011). The focus of that interest centers on three aspects of the Guidelines. The first is that the Guidelines incorporated the UNGP within its substantive provisions as a mechanism for binding enterprises to a set of internationalized social norms<sup>67</sup> to be enforced through the Guidelines' societally constituted governance organs.<sup>68</sup> The second is that the Guidelines provide – in a potentially path breaking way – for the development of a remedial mechanism that is centered in a public international organization but grounded in the autonomous international standards that describe the constitutional constraints of societal constitutions with respect to human rights responsibilities specified in the UNGP.<sup>69</sup> The third is that the mechanics of this transposition of internationalized standards onto autonomous systems of non-state governance implemented through a quasi-judicial complaints system independent of states are administered through states as part of their obligations as states adhering conventionally to their obligations under the OECD framework.<sup>70</sup>

Chapter IV of the Guidelines now incorporates the UNGP within its substantive framework. It recognizes the autonomous obligations of enterprises beyond that imposed by the domestic legal orders of the states in which they operate,<sup>71</sup> as well as the relationship between those standards and the elaboration of international pronouncements (law,

<sup>66</sup> UN Human Rights Council, Forum on Business and Human Rights, A/HRC/FBHR/2013/2, para. 28. See also *ibid.*, Annex, "Other inter governmental mechanisms, tools and guidance."

<sup>67</sup> "The Guidelines' recommendations express the shared values of the governments of countries from which a large share of international direct investment originates and which are home to many of the largest multinational enterprises" OECD Guidelines, Forward.

<sup>68</sup> "The Guidelines occupy a central role in the current landscape of RBC [responsible business conduct] tools: they are endowed with a unique implementation mechanism and include a human rights chapter that is drawn from the UN Guiding Principles" OECD, Annual Report 2013, Executive Summary, p. 10.

<sup>69</sup> OECD Guidelines.

<sup>70</sup> The collision mediating aspects of this mechanism is not overlooked: "The Guidelines are supported by a unique implementation mechanism of National Contact Points (NCPs), agencies established by adhering governments to promote and implement the Guidelines. The NCPs assist enterprises and their stakeholders to take appropriate measures to further the implementation of the Guidelines. They also provide a mediation and conciliation platform for resolving practical issues that may arise" OECD Guidelines, *supra*, Forward.

<sup>71</sup> OECD Guidelines Chapter IV Commentary, para. 38.

custom, declaration, sentiment and the like) from public international organizations as a framing element to those obligations. The transposed obligations of the UNGP to the OECD Guidelines, includes the recognition that the autonomous responsibilities of enterprises arise irrespective of the legal frameworks of states that might otherwise shield a part of an enterprise from some or all of the responsibility to respect human rights. In the Guidelines, this is effectuated through enhanced coverage in the context of supply chain responsibility.<sup>72</sup>

These substantive obligations are supposed to be implemented in part through the National Contact Point (NCP) complaint processes. Though the OECD Guidelines themselves are voluntary recommendations to governments erected to multinational enterprises, the obligation to establish and operate NCPs is mandatory.<sup>73</sup> The role of the NCP is collision minimizing, a focal point of intersections between state legal orders, international obligations and the governance frameworks of societally constituted non-state actors. NCPs are required to further the effectiveness of the OECD Guidelines "in accordance with the core criteria of visibility, accessibility, transparency, and accountability to further the objective of functional equivalence."<sup>74</sup> Among its other functions, the NCP is understood to function as a site for the interpretation of the Guidelines and especially in its application to concrete disputes among parties. "The National Contact Point will contribute to the resolution of issues that arise relating to implementation of the Guidelines in specific instances in a manner that is impartial, predictable, equitable, and compatible with the principles and standards of the Guidelines."<sup>75</sup> It is free to engage in the resolution of these disputes, that is, in fleshing out the implementation of the UNGPs through the OECD Guidelines, through a number of distinct approaches.<sup>76</sup> A jurisprudence of sorts is contemplated by the rules.<sup>77</sup> And this approach has begun to see a measure of elaboration, though still sporadic and tentative.<sup>78</sup>

More importantly, the anarchic character of the space within which this collision-managing device is being developed is also becoming more evident. Application of the framework has been used to establish the

<sup>72</sup> OECD Guidelines Commentary on General Principles, paras. 16–18.

<sup>73</sup> OECD Guidelines, Amendment of the Decision of the Council on the OECD Guidelines, Part I, para. 1.

<sup>74</sup> OECD Guidelines Procedural Guidance Part I. <sup>75</sup> *Ibid.*, Part I. C. <sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

<sup>78</sup> For discussion see Backer, "Rights and Accountability in Development," citing in part Queinnec, *The OECD Guidelines*, p. 8.

autonomy of international norms (applicable to non-state economic actors in transnational space).<sup>79</sup> That autonomy creates not merely a space for the development of substantive norms, but also of process norms as well.<sup>80</sup> But its structures have been used strategically as well. Among individuals harmed by the adverse human rights effects of corporate activity, it provides a means of applying a substantial challenge to the monopoly of conflict resolution through the application of domestic legal orders by local courts.<sup>81</sup> Among states, it provides a basis for the extraterritorial application of nationalized international norms through private market investment activities.<sup>82</sup>

The combination of UNGP and OECD structures permits the possibility of constructing a remedial framework beyond the control either of states (dominated by the interests of their domestic legal orders) or non-state actors, principally enterprises (dominated by their functional objectives in their spheres of operation). That combination thus permits a measure of self-constitution for the system of human rights related normative principles and the rules developed thereunder with relation solely to those principles. The self constituting is made possible not merely because of the possibility of developing an autonomous remedial framework, supported by states, grounded in international substantive norms, and reflecting the customs and social norm structures of enterprises, but because that autonomous remedial framework will be capable of itself elaborating an increasingly deep set of interpretations of these normative structures in the application of the norms to complaints brought to it by stakeholders within each of these autonomous governance communities. In effect, NCPs have the potential to play the role of common law courts in the development, organically, of a customary system of governance rules (not law – law is reserved after all to the state and grounded in the ideology of state legitimacy) that might transform a system of principles (UNGP) and guidelines (OECD Guidelines) into a complex and fully functioning customary rule system autonomous of any of its sources and its constituent parts.

<sup>79</sup> Final Statement 09/1373, discussed in Backer, "Governance without Government," pp. 87–123.

<sup>80</sup> Initial Assessment by the UK National Contact Point March 27, 2009.

<sup>81</sup> Final Statement On Pakistan's Khanewal Factory, 2009; Final Statement On Pakistan's Rahim Yar Khan Factory, 2009.

<sup>82</sup> Discussed in Backer, "Sovereign Investing."



This constitution from the ground up might be as useful today in the transnational sphere as it was in medieval England, for the construction not of a singular law-state, but of a heterodox space within which the governance regimes of states and non-state actors collide and couple in ways that produce a sufficient measure of cooperation to produce a somewhat stable system. But it posits, as well, a light touch, especially from those wedded to the notion of either hierarchy or of the formal structures of law (and its legitimating ideology so closely tied to the formalities of states). The OECD Guidelines also play a role in the useful conflict/collision among state and enterprise governance systems, under the aegis of internationalized normative standards.<sup>83</sup> Here we see the possibility of *anarchos*, a rule system without center or principal – amalgamating horizontally arranged rule systems to the extent necessary to permit, via coupling, a modicum of cooperation between systems through an autonomous mechanism of applying custom grounded in principle. This approach is consonant with the logic of global law,<sup>84</sup> one that posits a stable universe of objects of regulation around which governance systems multiply, the inverse of the traditional approach to law grounded on the presumption of a dynamic population of governable objects bound to static and stable governance systems. The UNGP–OECD system serves both as router and as governance norm producer, though what it produces is neither law, nor system, in its conventional monopolistic and hierarchically superior sense.<sup>85</sup>

Taken together, the UNGP–OECD Guidelines framework presents a curious enterprise, one that recognizes the distinct and autonomous character of governance regimes – among them states, international organizations, and non-state actors – that constitutes at least one of them, and provides a framework, centered on itself, for the management of regime collisions. It is a delicate exercise, made plausible only by a balancing of duties, responsibilities, normative standards, and remedial frameworks, that makes plausible coordination (structural coupling of a sort) among autonomous actors, intermeshed through the mediating language and norm legitimating functions of public international organizations tied sufficiently to states to suggest the traditional relationships between them and also tied to non-state actors to suggest a respect for their governance power and behavior cultures. Translating these normative structures

<sup>83</sup> See, e.g., Final Statement on Pakistan's Khanewal Factory.

<sup>84</sup> Cf. Backer, "The Structural Characteristics of Global Law," pp. 177–99.

<sup>85</sup> Cf. Calliess and Zumbansen, *Rough Consensus and Running Code*.

"into legal doctrine is, of course, a difficult task, not least because today's legal vocabulary is usually obsolete, as it is the product of a bygone societal context."<sup>86</sup> In place of translation, the UNGPs posit mediating collision for coordinating activity when such may be necessary.<sup>87</sup>

## II. From out of disorder . . .

For all of the exuberance of the preceding section, the UNGP framework is itself still quite fragile. "While numerous relevant actors around the world have already incorporated elements of the Guiding Principles into their work, many continue to express the need for further learning opportunities, explanations, and information."<sup>88</sup> Indeed, although one can theorize a robust polycentric environment from out of the structures of the UNGP and the OECD Guidelines along the lines suggested here, the emerging realities of its operationalization, its glosses applied in the coupling of autonomous organizations, might also suggest regulated self-regulation.<sup>89</sup> In particular, Gunther Teubner's notion of self-constitutionalizing regimes that is founded not on polycentricity as order without a center, but rather as the construct of a network of linkages that produces both self constitution and dependent autonomy.<sup>90</sup> Teubner does find a center, an ordering point within heterodox systems, and one that is located within the web linkages that produce substantive norms. These linkages then have substance; like the Norns spinning the threads of fate at the foot of Yggdrasil, they do not produce order *formally*, but they do have the *functional effect* of ordering relations among autonomous actors based on the effects of their communicative interventions.<sup>91</sup> This is because they link politically posited law and private governance in what could be called an externally regulated self-regulation. From such a perspective, both ways of regulation do not

<sup>86</sup> Rödl, "Fundamental Rights," p. 1017.

<sup>87</sup> Cf. Teubner, "Legal Irritants," pp. 417–41; Also Cutler, *Private Power And Global Authority*, p. 199.

<sup>88</sup> UN Human Rights Council, Forum on Business and Human Rights, A/HRC/FBHR/2013/2, 2.

<sup>89</sup> See, e.g., Backer, "Private Actors and Public Governance Beyond the State"; cf. Riles, "The Anti-Network."

<sup>90</sup> See, Teubner, "Self-Constitutionalizing TNCs?"; Bernstein, "Merchant Law."

<sup>91</sup> The linkages themselves exhibit a peculiar quality that recalls both the initial thrust of comparative law in early twentieth century Europe and the use of translation to bridge and harmonize. See, e.g., Foster, "Critical Cultural Translation."

constitute mutually exclusive forms of regulation; rather, the potential results from the link established between both forms of regulation itself anchors and directs in accordance with its own logic.<sup>92</sup>

Both the fragility of the transformation of theory to fact, and the governance cultures driving powerful elements to gloss polycentrism out of the UNGPs have been made evident during the course of the Second<sup>93</sup> and Third<sup>94</sup> Forums on Business and Human Rights. These Forums are one of the principal consultative mechanisms<sup>95</sup> for the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, established by the UN Human Rights Council to promote their effective and comprehensive dissemination and implementation.<sup>96</sup> The impulse noted in the First Forum, to refocus on the state duty to protect human rights and on traditional and conventional mechanisms of international law to elaborate a mechanics to that end, appeared to accelerate.<sup>97</sup> The effect both reinforces the relationship between the state, law, and the international public organization they created, but may also drive post national and global governance organizations elsewhere – substantially reducing the ability of the UNGP to serve as a collision mediating architecture, and enhancing its network characteristics.<sup>98</sup> And indeed, this may suggest the dichotomy between hierarchical approaches<sup>99</sup> on the one hand and the deregulated variant of social norms production<sup>100</sup> on the other within the socio-legal debates on transnational law in the constitutional sphere.<sup>101</sup>

<sup>92</sup> For a judicial variant consider Wiener and Liste, "Lost without Translation?"

<sup>93</sup> UN Human Rights Council, Forum on Business and Human Rights, A/HRC/FBHR/2013/2.

<sup>94</sup> See Human Rights Council Forum on Business and Human Rights Second session Item 1 of the provisional agenda, Agenda and organization of work December 2–3, 2014, Concept Note, A/HRC/FBHR/2014/2 (September 23, 2014).

<sup>95</sup> Human Rights Council resolution 17/4, para. 6. "[T]he Forum aims to serve as a key annual venue for stakeholders from all regions to engage in dialogue on business and human rights, and to strengthen engagement towards the goal of effective and comprehensive implementation of the Guiding Principles." UN Human Rights Council, Forum on Business and Human Rights, A/HRC/FBHR/2013/2, para. 7.

<sup>96</sup> Human Rights Council resolution 17/4, para. 6.

<sup>97</sup> UN Human Rights Council, Forum on Business and Human Rights, A/HRC/FBHR/2013/2, para. 11.

<sup>98</sup> Renner, "Occupy the System!," pp. 941–64.

<sup>99</sup> See, e.g., Koh, "Transnational Legal Process"; Anderson, "Societal Constitutionalism"; Also Watt, "Private International Law Beyond the Schism," p. 417.

<sup>100</sup> See, e.g., Shamir, "Corporate Social Responsibility"; Fischer-Lescano and Teubner, "Regime-Collisions"; Teubner, "Legal Irritants."

<sup>101</sup> Thornhill, "A Sociology of Constituent Power."

The plenary sessions of both the Second and Third Forums developed the framework of inter-linkages suggested by Teubner.<sup>102</sup> Most of the major stakeholders – states, multi-national enterprises (MNEs), and civil society actors – continue to grasp onto those doctrines and approaches that are most advantageous to each. The UNGP has, at least for the moment, succeeded in providing a common language through which these groups can continue to further their interests. But now those interests appear constrained (if only loosely and rhetorically for the moment) by the principles of the Guiding Principles framework. The *idea of the UNGP, rather than its operationalization* as governance structures, appears to be the animating spirit of the third meeting of these estates general. And that is to be regretted, though it may not be surprising. Having worked hard to become the basis for discussion of the range of governance issues that touch on business and human rights, the UNGP now suffers from its success. Thus, for example, the focus on extraterritoriality lends itself to the augmentation of the hegemony of those states, some of which tend to be the most skeptical about the UNGP project. Freeing business from the constraints of social norms and the pressure of key consumer, labor, and investor communities (organized globally), permits the regulatory fracture within which MNE abuse can be strategically compelling and can be practiced with impunity. Leaving civil society to its own devices produces both nihilism and extremism, grounded in principle and passion, that substantially reduces the relevance and effectiveness of civil society efforts, but that is also bounded by the linkages between these self-constituting bodies and the states and business collectives among which they operate.

The organization of the meetings also reinforced the classical division between states, enterprises, and an amalgam of civil society “others.” It is a normative organization that incarnates Teubner’s self-constitutionalizing regimes producing both self-constitution and dependent autonomy.<sup>103</sup> The great constitutional actors within this inter-linked space, spaces within which normative structures are built and exported back for absorption, was represented physically by the occupation of space within the forums themselves. States, business elements, and a mass of civil society (and others) each spoke through and at each other – creating linkages from protected autonomous spaces. Those linkages could be powerful. For example, at one forum the business

<sup>102</sup> These are discussed in Backer, “The 2nd UN Forum,” and Backer, “The 3rd UN Forum.”

<sup>103</sup> Teubner, “The King’s Many Bodies”; Teubner, “Societal Constitutionalism.”

community renewed their efforts to recognize the constraining authority of national law in their self-constitution under the UNGP responsibility to respect human rights.<sup>104</sup> The interventions of business sought to essentialize the world of governance, and restrict it to its most narrow and traditional jurisdictional bases. Civil society interventions sought to fragment discussion to the listing of a litany of highly particularized wrongs in need (and quite rightly to be sure) of redress. Both looked to law, through and away from the UNGP, at either the national or international level, suggesting a dependent relation between social norm and public law.<sup>105</sup> There is irony here. States have remained unwilling to *describe the extent of their state duty* (except in the most general terms and under the logic of their own constitutional orders) and yet found the forum a useful site for expressing their *willingness to commit their corporations to normative standards they might refuse to adopt within their own legal systems*.

The conceptual weakness of the UNGP's remedial pillar, one that appears to be derivative in nature, is sound but incomplete. It is certainly true that the remedial obligations of states and the autonomous remediation obligations of MNEs are foundational and a critically important consequence of the state duty and MNE responsibility. Yet, those who drive UNGP interpretation may have missed an opportunity to liberate the remedial pillar from its embedding in solely either the judicial apparatus of states or the remedial mechanisms of MNEs. The failure here to ground the substantive element of the remedial pillar in the human dignity interests of individuals and groups makes the UNGP blind to the possibility of the organization of legitimate remedial apparatuses autonomous of states or MNEs. These include remedial mechanisms organized through public international bodies or otherwise through governance collectives. Yet that lacuna is precisely what the OECD Guidelines sought to fill. The resulting network for managing collisions within a substantive framework that embraces a disordered system of governance organizations permit interactions among governance systems, societal and law-based, that makes possible not just conflict but also cooperation.<sup>106</sup> It manages this from structural coupling rather than as a means of forging a unitary and vertically arranged system out of the centerless universe of systems that flow out of a globalized order. This

<sup>104</sup> Joint IOE-ICC-BIAC Comments.

<sup>105</sup> Mollers, "Transnational Governance Without Public Law?"

<sup>106</sup> Cf. Ellis, "Constitutionalization of Nongovernmental Certification Programs," p. 1035.

is a polycentric rather than a legal universe.<sup>107</sup> Andreas Fischer-Lescano has noted: "Globalization is a challenge that rouses the legal system to emancipate itself from a fixation on the institution of the state."<sup>108</sup> The remedial pillar is likewise a challenge that rouses the normative system of rights to emancipate itself from a fixation on the institution of law, and moves toward polycontextuality.<sup>109</sup>

More generally, industry, civil society, and state actors have combined, in their own ways and for their own purposes, to attack the fundamental premises of the UNGPs and OECD Guidelines, to protect their freedom from regulation by championing a re-nationalization of law making.<sup>110</sup> For civil society actors there is the certainty of unified state structures and the familiarities of law – civil society might well prefer the simplicity of state to the disorganization of the market, but one which is likely to produce nothing as states continue to resist any effort to formally internationalize law beyond the state.<sup>111</sup> But there is also a subversive element – resistance to internationalized norms and autonomous norm regimes makes it possible to move from *anarchos* to chaos – by positing the most lawless state of transnational governance, one in which the only law available is that which might be exercised by states through their domestic legal orders, beyond which there is . . . nothing.

The critiques of the UNGP-OECD framework reflect the deep and unrelenting suspicion of non-law based governance systems.<sup>112</sup> That critique poses a challenge to the horizontal nature of the linkages among states, enterprises, and civil society. But it also suggests the corporeality of the space within which these issues are communicated and then reabsorbed within each of these actors. Civil society and states, especially, tend to view the concept of social norms and/or societally constituted communities both as illegitimate and as ineffective against the ideal of law. This may reflect fears of democratic legitimacy<sup>113</sup> and also reflect a view that international public law must sit at the top of a single hierarchy of governance that constrains both the law system of states and the social norm system of non-state actors, and to do so directly.<sup>114</sup> That is a view, though, that states continue to reject in large part, and that non-state

<sup>107</sup> Hamann and Fabri, "Transnational Networks and Constitutionalism."

<sup>108</sup> Fischer-Lescano, "Global Constitutional Struggles," p. 14.

<sup>109</sup> Sand, "Polycontextuality." <sup>110</sup> Cf. Habermas, "A Political Constitution," pp. 322 ff.

<sup>111</sup> See, e.g., Williamson, "Amnesty Criticises UN." For the biting response of John Ruggie see Ruggie, "Bizarre response."

<sup>112</sup> Teubner, "Global Bukowina," p. 3. <sup>113</sup> Watt, "Private International Law," p. 417.

<sup>114</sup> Kumm, "The Legitimacy of International Law."

actors sometimes view as irrelevant. This critique threatens the linkage system itself by suggesting a profound critique of the underlying premises of the UNGP. But this is a general critique of the response to societal constitutions and the globalized anarchy of multiple governance. To reject the premise that such constitutionalization is possible and to view its expression as illegitimate or illogical ignores facticity in favor of an increasingly elegant but empty normative universe in which the state alone is resident.

This leaves open three important questions worth considering, at least in preliminary form: Which role does the law play for the solution of collision problems, and how does it relate to non-legal regimes? Which non-legal approaches to a solution are there, and how do they relate to law? What might concrete solutions look like? With respect to the first question, the UNGP's state duty to protect human rights suggests that law both supports and impedes solutions to collision problems, precisely because, by its nature, it invariably seeks to privilege itself over non-law regimes. Law does not merely trip over itself; as a manifestation of state power, but also trips over public systems resisting any inversion of legal relationship on which domestic legal orders must give way to an international order construct. With respect to the second question, the UNGP's corporate responsibility to respect offers a more horizontal relationship between law and the societally constituted autonomous regulatory regimes of corporations and other non-state actors. But the foundational premises of classical law systems threaten that relationship. The logic of these law system premises would seek to subsume societally constituted systems, and the social norms that animate it, within the domestic legal orders of states, or ignore them altogether to the extent they could not be translated into law or harmonized within existing legal norms. With respect to the third question, the answers might require independence rather coordination; cooperation rather than the construction of a singular system bounded by law and its idiosyncrasies. The solution may, indeed, require the rise of a new class of governance facilitator, something more than a lawyer (bound by the normative cultures of the law-state) and flexible enough to move between governance cultures.

The UNGPs, then, stand at the center of a set of deep divisions among civil society and state actors about the nature and role of regulation of business at the supra-national (above the state) and transnational (beyond the state) levels. But the UNGPs also serve as the thread with which constitutional linkages have been developed among the



autonomous self constitutionalized communities of states, business, and civil society. As theory, its *formal structures* suggests anarchic polycentricity; *as implemented it functions* like autonomous systems tethered together through their complex inter-linkages, their intermeshing,<sup>115</sup> that serves as the medium through which norms are generated and each of these autonomous bodies are disciplined<sup>116</sup> within the logic of their structural coupling. A new model emerges.

### Conclusion

Poul Kjaer's insight about the nature of transnational normative orders is particularly helpful in contextualizing the UNGP-OECD Guidelines order within a universe of disordered governance communities. He explains: "Constitutions never stand alone, but always emerge in co-evolutionary settings where several orders emerge simultaneously."<sup>117</sup> The constitution of human rights constraints on the activities of governing orders – states, enterprises, and the international community – provide a glimpse of such a constitutional ordering, one that arises as much from out of the space between collisions as from the delineation of collision itself. But it also suggests that societally constituted organizations are essentially polycentric and disorganized.

To that end, I would argue that the inherent nature of polycentricity embraces the absence of an ordering principle, though not the absence of order. Order without hierarchy in a more complicated governance space in which states serve as one actor, and an important one, among many and not all of a similar sort. One ought to be able to invoke all relevant rule systems simultaneously to push each of these governance units in a direction you want.<sup>118</sup>

They find points of convergence in those areas where they collide – in this case around the normative structures of human rights.

Within this normative order, law is relevant but not central; non-legal approaches produce the possibility of coordination (but not a "solution," which suggests conflict rather than coordination). And the concrete solution is unacceptable to states seeking to preserve the primacy of their old order, to acolytes of public international law, who seek to impose a

<sup>115</sup> See, Teubner, "The Corporate Codes of Multinationals."

<sup>116</sup> See, e.g., O'Neill, "The Disciplinary Society."

<sup>117</sup> Kjaer, "Transnational Normative Orders," p. 797.

<sup>118</sup> Backer, "A Conversation about Polycentricity."

primacy of a supra-national order on a community of states within which non-state organizations are understood as derivative authority, and to enterprises who might see in the chaos of open conflict, of collision without order, a means of avoiding law (and social norms) entirely. The resulting framework may not produce unified law, as classically understood, but it may manage ordered interaction among systems in a governance universe without a center (one that in the classical period had been provided by the ideal of "law" and the *Rechtsstaat*). Here, we move from the generative project of occupying a system<sup>119</sup> to co-existence grounded in something like rough consensus,<sup>120</sup> but without the drive toward unifying harmonization. The emerging UNGP-OECD Guidelines framework provides a window onto a procedural framework within which self-constituted bodies collide to shape their respective relations. But rather than order and the privileging of law, the emerging framework suggests a constitutional framework within which fracture and poly-centric co-existence, of short duration, appear to be emerging as the stable state.

The "protect, respect, and remedy" framework lays the foundations for generating the necessary means to advance the business and human rights agenda. It spells out differentiated yet complementary roles and responsibilities for states and companies, and it includes the element of remedy for when things go wrong. It is systemic in character, meaning that the component parts are intended to support and reinforce one another, creating a dynamic process of cumulative progress – one that does not foreclose additional longer-term meaningful measures.<sup>121</sup>

The UNGP-OECD Guidelines framework posits order without hierarchy and the management of collision between three great autonomous governance communities – states, enterprises, and public international organizations – whose interactions produce intermeshing around specific normative challenges, but which necessarily resist the hegemony of law.

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