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Norm convergence and collision in regime overlaps. Business and human rights in the UN and the EU

Janne Mende 

Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

ABSTRACT

This paper investigates how practices of (de)legitimation deal with regime overlaps by invoking the convergence or collision of norms, rules and procedures in regime complexes. It brings together two strands of International Relations literature – the concept of regime complexes and (de)legitimizing practices in global governance institutions – to analyse the UN Treaty Process as a case study in the field of business and human rights. It makes three main arguments. The first is that regime complexes can be characterized by the concomitance of a collision and convergence of norms, rules and procedures. Second, regime overlaps and the collision of norms and rules may appear within a single international institution. Third, norm collision and convergence are inferred in (de)legitimation practices that characterize contestations in regime complexes. The UN Treaty Process demonstrates convergence and collision as (de)legitimation in light of the UN Guiding Principles (intra-organizational overlap) and the European Union (inter-organizational overlap).

KEYWORDS

Regime complexes; United Nations; European Union; legitimacy; business and human rights

1. Introduction

In 2014, the United Nations (UN) Human Rights Council (HRC) launched an intergovernmental working group (called the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, or OEIWG) with a mandate to draft a binding treaty on business and human rights (referred to hereafter as the UN Treaty Process). The process contributed to the business and human rights (BHR) regime complex that addresses and regulates the impact of business on human rights. However, the working group encountered strong disapproval from the BHR field. The European Union (EU) and other major actors not only rejected the group's aim to create an internationally binding instrument; they also claimed that it 'unnecessarily polarized the debate as if there could be two camps' (HRC_resolution_Explanation_of_vote_EU 2014, p. 1). They voiced their concerns in unusually clear language, refuting not only the Human Rights Council's decision, but even the proposal to discuss the issue: 'We are extremely disappointed with the decision by Ecuador and South Africa to table this resolution. [...] It will unduly polarize these issues, taking us back ten years' (USA_Statement 2014 (to Resolution 26,9), p. 1). Therefore they depicted the initiative as a direct attack on an apparently converged set of norms and regulations that would threaten the entire BHR regime complex.

CONTACT Janne Mende  mende@mpil.de

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A few years later, the working group is still actively drafting and discussing treaty drafts that attract the attention of a steadily growing number of stakeholders.

Three aspects of this vignette deserve further attention. First, contesters depicted the BHR regime complex as norm convergence in order to delegitimize approaches that did not fit into their norms. Second, the controversial Treaty Process nevertheless achieved legitimacy as part of the BHR field by inferring both norm convergence and norm collision in legitimation practices. Third, the collisions also emanated from a single international organization – the UN, as the main institution regulating BHR. To study and explain these processes, this paper brings together two strands of International Relations (IR) literature: the concept of regime complexes and the study of (de)legitimizing practices in international institutions.

The concept of regime complexes captures the linkages and overlaps between global governance institutions (Alter & Raustiala, 2018; Raustiala & Victor, 2004). It conceptualizes regimes as a set of convergent – and regime complexes as containing overlapping and colliding norms, rules and procedures. Accordingly, contestations and conflicts about these norms, rules and procedures ‘are always central to a regime complex’ (Alter & Raustiala, 2018, p. 337). This begs the question of ‘how, if at all, are colliding sets of norms and rules accommodated?’ (Zürn et al., 2018, p. 6)

The extent to which norms, rules and procedures are accommodated depends on their legitimacy (among other characteristics). As Bodansky explains, ‘We call a regime “legitimate” in order to persuade people (or states) to accept it, and we criticize it as “illegitimate” in the hope of undermining its authority’ (Bodansky, 1999, p. 601). In other words, competing norms and rules in regime complexes are criticized or advocated by practices of delegitimation or legitimation, respectively. Against this background, this paper studies (de)legitimation practices associated with the Treaty Process in order to further our understanding of the dynamics and contestations in regime complexes.

This paper makes three concrete claims. First, regime complexes can be marked both by a collision and convergence of norms, rules and procedures (norm collision or convergence for short). Second, regime overlaps and norm collision may occur within a single international institution. Third, norm collision and convergence are inferred in (de)legitimation practices that characterize contestations in regime complexes. Thus this paper focuses on the concurrence of norm convergence and collision, and their implications for the dynamics of regime complexes.

The question is therefore not whether apparently statically given norms and rules collide or converge. The study instead investigates the usages of norms, rules and procedures in regime complexes in practices of (de)legitimation to recognize their dynamic and contested character. This is what makes aligning these two strands of literature (regime complexes and (de)legitimation) so useful: it shows that there is no predetermined path from norm convergence to collision once regimes overlap in regime complexes. This underlines the point from the IR literature that the shared understanding that lies at the heart of every regime (Krasner, 1982, p. 185) does not determine ‘how much convergence of expectations is needed’ (Kuyper, 2014, p. 627; cf. Muzaka, 2011) – and even less so in regime complexes.

The UN Treaty Process demonstrates the concurrence of norm collision and convergence in the field of BHR, and their (de)legitimizing usage, in two ways. First, it fuels the norm collision between legally binding and non-binding regulation.¹ This norm collision most visibly plays out between the UN Treaty Process and the UN Guiding Principles on Business and Human Rights (Guiding Principles or UNGPs hereafter). As they both emanate from within the UN, they represent what I call an intra-organizational overlap.

Second, the Treaty Process seeks to incorporate global regulation into international law. This collides with EU endeavours to regulate BHR on a regional level – what I call an inter-organizational overlap, or what the regime complex literature calls a vertical overlap. According to this literature, states usually ‘prefer regional organizations and policies that will prioritize local issues and be staffed with local officials’ (Alter & Raustiala, 2018, p. 338). This preference for regional rather than global regulation, paired with the EU’s prominent role as a critic of the Treaty Process, strongly challenges the legitimacy of the Treaty Process as part of the BHR regime complex. The inter- and intra-institutional overlap are both marked by a concurrence of norm convergence and norm collision, which are inferred in (de)legitimation practices.

With the UN Treaty Process, the paper focuses on a single-case study to enable an in-depth qualitative analysis. The case study employs an extended qualitative content analysis² of the deliberations taking place in the UN working group that is mandated to navigate the Treaty Process. The corpus of analysed documents³ contains all submissions by state, international and non-state actors to the working group’s annual sessions between 2015 and 2019, as well as supplementary external commentaries during the period 2013–2018. These documents are accompanied by 20 expert interviews;⁴ field visits to the UN and other international and non-governmental organizations in Geneva in 2015, 2016 and 2017; and participant observation of a Treaty Process session in 2016 and the UN Forum on Business and Human Rights in 2019.

The paper proceeds by introducing the conceptual framework of regime complexes and (de)legitimation practices in Section 2. Section 3 delineates the Treaty Process and its intra- (UNGPs) and inter-institutional (EU) overlap in the BHR regime complex. Section 4 investigates how norm convergence and norm collision are used in the Treaty Process deliberations to construct mechanisms of inclusion and exclusion with regard to a shared human rights framework. These mechanisms illuminate the dealing with intra- and inter-institutional overlaps in the BHR regime complex. Section 5 concludes by summarizing how the case study adds to the literatures on regime complexes and (de)legitimation in global governance institutions.

2. Regime complexes and legitimation in global governance

The IR literature on regimes and regime complexes has taken three important steps towards understanding international cooperation. First, they have conceptualized regimes (however ‘woolly,’ Strange, 1982, p. 484) as the ‘principles, norms, rules, and decision-making procedures around which actor expectations converge in a given issue-area’ (Krasner, 1982, p. 285) in order to explain global order and cooperation.

In a second step, the ensuing criticism highlighted how the increasing density and legalization of international politics in global governance made it necessary to go beyond the study of single regimes in the form of individual institutions or single legal treaties around which a set of norms, actors and procedures emerge (Keohane & Victor, 2011, p. 7; Raustiala & Victor, 2004, p. 278).⁵ The concept of regime complexes was established to investigate the overlaps between a plurality of regimes and institutions. Such regime complexes are marked by ‘nested, partially overlapping’ structures (Alter & Meunier, 2009, p. 13), divergent and at times contradictory rules and norms (Raustiala & Victor, 2004, p. 305), and a lack of a clear hierarchy between its overlapping parts (Alter & Raustiala, 2018, p. 332), which ‘are simultaneously held together and kept apart by a series of linkages’ (Kuyper, 2014, p. 628).

In a third, almost simultaneous step, studies emphasized regime complexes as sites of contestation (Muzaka, 2011) that engender open-ended inter-institutional dynamics and norm

developments (Faude & Große-Kreul, 2020) and which integrate diverse public and private actors in addition to formal state and interstate institutions (Abbott & Faude, 2021). Although (or because) regime complexes share a common focus, actors are urged to deal with overlapping and colliding norms, rules and procedures (Raustiala & Victor, 2004). This is due to functional overlaps in memberships of actors in institutions that are part of a regime complex (Faude & Gehring, 2017, p. 189), and has both detrimental and strengthening effects on global governance (Alter & Raustiala, 2018; Hafner-Burton, 2009).

In sum, previous research has broadened the initial focus on norm convergence in regimes to investigate their plurality, interplay and collisions in regime complexes. This paper contributes to this literature by highlighting the concurrence of norm convergence and collision, and how they are used in practices of (de)legitimation in two forms of functional overlaps: intra- and inter-institutional.

(De)legitimation practices lie at the heart of the processes of contestation in (and of) regime complexes. Legitimacy denotes ‘the normative belief by an actor that a rule or institution ought to be obeyed. It is a subjective quality, relational between actor and institution, and defined by the actor’s perception of the institution’ (Hurd, 1999, p. 381, emphasis deleted). Prior IR studies on (de)legitimation practices in global governance institutions investigate the effects of (de)legitimation on the power, authority and even efficiency of international institutions (Tallberg et al., 2018; Tallberg & Zürn, 2019). In regime complexes, (de)legitimation practices play a key role in contestations and deliberations about competing norms, rules and procedures. Those are criticized or advocated by means of (de)legitimation. In these processes, ‘legitimation and delegitimation often shape each other’ (Bäckstrand & Söderbaum, 2018, p. 102; also Rittberger & Schroeder, 2016, p. 586).

This paper investigates practices of (de)legitimation from a sociological perspective, analysing the points of reference that actors employ in political processes (Bäckstrand & Söderbaum, 2018, p. 103). Sociological and normative concepts of legitimacy are distinguished according to who defines the point of reference for legitimacy: the researcher (as normative concepts of legitimacy presume) or the research *subjects* (as sociological accounts indicate) (Agné, 2018, pp. 29–31). This study’s sociological perspective connects (de)legitimation to the actors’ stance on the Treaty Process. The analysis also demonstrates the close interdependence between sociological and normative concepts of legitimacy (Agné, 2018), which is highlighted by the construction of norm convergence. Human rights as a shared framework provide a normative guideline for empirical practices. This paper argues that the normative universality of human rights is pivotal to its empirical usage because it fuels (de)legitimation via two mechanisms: inclusion and exclusion.

Prior studies on the construction of identities have thoroughly elaborated these mechanisms. They have shown how the construction of the self is based on the construction of something that is different, which is thereby dichotomously excluded as ‘the other’ (Adorno, 2004/1966; Derrida, 1992; Hall, 1992; Mende, 2016). What constitutes the self excludes and thereby constitutes ‘the other’ (Hegel, 2010/1812, p. 98f.).

This translates into the construction of norm *convergence* (i.e. a shared normative framework), denoting inclusion in the ‘self,’ and norm *collision*, which is used to exclude opponents from the shared normative framework and designate them as the ‘other.’ The ability to construct norm convergence or norm collision indicates the capacity to deal with challenges stemming from inter- and intra-institutional overlaps in regime complexes. Hence even though norm convergence in the form of a shared framework or an inclusive ‘self’ (e.g. a global demos) is seen to be lacking as a direct accelerator for the legitimacy of international institutions (Hooghe et al., 2019), it does play a pivotal role in regime complexes.

3. Overlaps and (de)legitimation in the UN Treaty Process

The UN Treaty Process was initiated in 2014. It aims to create a legally binding international treaty that introduces regulations for business companies related to human rights, thereby contributing to the BHR regime complex. Based on an initiative led by Ecuador and South Africa, with support from a number of states from the Global South as well as several civil society organizations worldwide, the UN Human Rights Council established the OEIWG with the mandate to elaborate a treaty draft. Since 2015, the OEIWG has convened annual meetings which facilitate deliberations about general questions as well as negotiations about treaty draft formulations. It has produced several draft versions, the latest of which was the *second revised draft of a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises* from August 2020. The Treaty Process deliberations take place between plural stakeholders, not based on solid membership, but on an interest in participating (especially states and other international organizations), on invitations (e.g. individual experts, law firms, business representatives) and on accreditation by the UN Economic and Social Council (notably non-governmental organizations (NGOs), civil society, business associations). These actors regularly contribute to the deliberations with written submissions and commentaries, which form the data base for the extended qualitative content analysis. Apart from neutral or indecisive submissions (mainly states, but also some civil society actors), these statements take a clear stance on either supporting the Treaty Process (mainly NGOs, civil society actors, certain states from the Global South) or rejecting it (mainly states from the Global North, business actors). These stances have been elaborated as variables (pro, contra, mixed) in the content analysis (listed in the dataset). They serve as the basis for my classification of delegitimation (i.e. rejection or criticism) or legitimation (i.e. approval or advocacy) of the Treaty Process⁶ or its elements.

The Treaty Process deliberations are contested by two overlaps. First, the aim to develop a binding instrument is delegitimized by referring to the non-binding UN Guiding Principles as intra-institutional overlap. Second, the EU's fundamental criticism serves as a major obstacle to the Treaty Process as an inter-institutional overlap. Both overlaps engender practices of delegitimation and corresponding legitimation, as this section demonstrates.

3.1. Intra-institutional overlap: the UN Guiding Principles on Business and Human Rights

The Guiding Principles constitute a major and authoritative cornerstone of the BHR regime complex (or even: regime). They address state and business responsibilities for human rights at the global level. They are considered a consensual point of reference for various stakeholders, including states and private companies. Institutionally, the Guiding Principles are very close to the OEIWG: the UN Human Rights Council, which launched the Treaty Process, also endorsed the UNGPs in 2011 and launched the corresponding Working Group on Business and Human Rights with the mandate to promote them. This proximity was exacerbated by the Human Rights Council's endorsement of a resolution prolonging the mandate of the Working Group on Business and Human Rights at the same session in which it created the OEIWG in June 2014 (Tuttle, 2015). Due to their ubiquity and institutional proximity, the Guiding Principles represent an intra-institutional overlap that has seriously challenged the OEIWG's legitimacy – and pressured it to engage in a process of legitimation.

Proponents of the Treaty Process legitimated it as a necessary next step in the development of the BHR regime complex – a step that would fill the gaps left by the Guiding Principles and their

non-binding character. Even though the Guiding Principles request states to implement BHR mechanisms in the form of National Action Plans (including binding ones), the Guiding Principles themselves are non-binding. When their intended implementation at the state level appeared to have stalled a few years after their endorsement, critics of the Guiding Principles' voluntary nature gained momentum. Supporters of the Treaty Process pointed to the absence of binding regulation as a pivotal reason to create a new treaty. The Guiding Principles are depicted as 'a first step, but without a legally binding instrument, it will remain only as such: a "first step" without further consequence. A legally binding instrument would provide the framework for enhanced State action' (Group of Countries_Statement 2013, need of an Int. legally binding I, p. 1).

Yet the juxtaposition of a binding instrument and the non-binding Guiding Principles created a collision of norms and rules that, although intended to increase the Treaty Process' legitimacy, instead fuelled a strong rejection and ensuing delegitimation by numerous stakeholders. Opponents argued that the OEIWG cannot gain any form of legitimacy if it collides with the Guiding Principles (INT 5/UN Organ/November 2019, § 15). The Treaty Process is seen as being:

based on the false premise that the UN Guiding Principles were a 'first step without further consequence'. On the contrary, substantial progress has been achieved [...]. For this reason, we seriously question the usefulness and added value of starting a negotiation on a new legal instrument. Broad international agreement on a new binding instrument is very unlikely, and [...] would take away emphasis, energy and resources from implementing the existing instruments (BIAC_Statement 2014, p. 1).

Even stakeholders who are less critical or even supportive of the OEIWG have expressed concerns about its treatment of the Guiding Principles. They too point out the importance of the Guiding Principles' consensual basis. The OEIWG's dismissal of that consensus is perceived as being detrimental to the entire BHR regime complex, which must be able to integrate various types of stakeholders, especially business enterprises, in order to succeed with both binding and non-binding regulations (INT 17/UN Organ/May 2020, § 47).

This criticism pressured the OEIWG to adapt its legitimating narrative. OEIWG members had to immediately change their strategy during the first session in 2015 under pressure from the EU, which suspended the on-going session until the Treaty Process' convergence with the Guiding Principles was addressed. An expert from within the UN summarized the scene with: 'If you think you can invent something completely different, forgetting the changing narrative, the changing emphasis, the changing principles, you are going to struggle. [...] So yeah, complementarity is the key' (INT 5/UN Organ/November 2019, § 21). Instead of attacking and supposedly substituting for a well-established instrument, the Guiding Principles and the Treaty Process were then increasingly portrayed as complementary parts of a comprehensive BHR regime complex that permits different yet complementary norms and rules. This was the only way for the OEIWG to enhance its legitimacy. Delegitimation through the intra-institutionally overlapping Guiding Principles was not antagonized but accommodated.

This was achieved by creating norm *convergence* (in the broader sense of complementarity) rather than norm *collision*. I explore this point further in Section 4.

3.2. Inter-institutional overlap: the European Union

The EU has had a major impact on the Treaty Process' legitimacy (or lack thereof). At first glance, it appears to be a classic inter-institutional overlap that engenders norm collision in regime complexes. However, the (de)legitimation practices by, alongside and in reaction to the EU paint a more nuanced

picture that demonstrates the concurrence of norm collision and convergence. Before investigating this point in detail in Section 4, this section introduces the two closely linked ways in which the EU constitutes an inter-institutional overlap that challenges the Treaty Process: first, by appearing as a powerful political actor that rejects the Treaty Process, and second, by developing overlapping instruments.

First, throughout the OEIWG's deliberations, the EU has been very critical of the Treaty Process. It has called into question the whole project of drafting a binding instrument, and has specified issues that would need to be resolved for the EU to take part in the OEIWG's drafting process. One of these issues was the collision with the Guiding Principles discussed above. However, even when those issues were largely accommodated in the Second Revised Draft, the EU continued to reject the deliberations. The EU's position has spurred far-reaching delegitimizing effects, within the EU and beyond. Most submissions from EU member states refrain from taking a position on the Treaty Process unless the EU does.⁷ The members argue that the Treaty Process would overlap with EU competences (France 2019, Article 5 (transl.), p. 1), and that they share the concerns expressed by the EU (e.g. Belgium_Panel Vov 2018, p. 1, Spain_Panel Vov 2018, p. 1). Other opponents of the Treaty Process also base their arguments on the EU's rejection, illustrating the strong effects of the EU's positioning.

Second, the EU has recently started taking steps to develop BHR regulation.⁸ The correlation between the EU's latest activities and the Treaty Process might even be causally related, in that the EU had to legitimize its criticism of the Treaty Process by launching its own BHR initiatives (in addition to other causes such as previous processes in the EU as well as the pressing activities of EU-based advocacy networks and civil society groups, which the Treaty Process has strengthened). Regardless of the question of causality, what matters is the extent to which the EU has (de)legitimized the Treaty Process. The EU provides ammunition to stakeholders who are skeptical of any kind of global regulation, and legitimizes EU member states that are not taking part in the Treaty Process. However, the state presence at the OEIWG sessions (or the lack thereof) has a strong effect on the forum's input (lack of participation) and output (lack of effectiveness) legitimacy.

Faced with these two strong effects of delegitimation originating from the EU's position, supporters of the Treaty Process respond with legitimation practices that can be roughly divided into three sets.⁹

The first set of practices develops targeted counter-arguments that address the points of criticism made by the EU (and like-minded actors). These practices seek to directly delegitimize the EU's arguments on substantial grounds.

An enthusiastic supporter of the UNGPs, the EU was among those arguing that the Treaty proposal risked derailing the implementation of the UNGPs. But this has not happened so far. Far from it, in fact there are signs that support for the UNGP process accelerated after the Treaty initiative got underway (ITUC et al. _Report 2017, p. 12).

A second set of legitimation practices criticizes the EU for its stalling tactics. A nuance of this set acknowledges (either fully or partially) the reasons underlying the EU's criticism, but criticizes its behaviour nevertheless. An NGO representative interviewed for this study emphasized that they understand and share the points of criticism, on the one hand, yet

on the other hand, it is clear that if the EU had a genuine interest in the process, it would not just stand there and invoke those arguments; it would try to improve the process. And this has not happened in any constructive way. (INT 3/NGO/October 2019, § 82)

The third set of legitimation practices underlines that the EU does contribute to the BHR regime complex and therefore should also embrace the Treaty Process. This set aims to measure the EU against its own normative yardstick of endorsing human rights and democratic values.

Finally, we would like to express that we regret that after four sessions of the working group, the EU still has not resolved the question of the mandate and is not engaging constructively in this process. This is particularly true since there is currently a strong momentum in the EU for human rights due diligence legislation. [...]. Moreover, there are currently civil society campaigns demanding mandatory human rights and environmental due diligence in 13 member states and 650.000 European citizens signed a petition to call on the EU to actively support the treaty. This is a critical mass. Therefore, it should be of particular interest to the EU and its member states to constructively contribute to the historic chance. (Treaty Alliance Germany 2019 – Article 6, p. 1)

All three sets of legitimation can be better understood and explained by taking the usages of norm convergence and collision into account.

4. Norm convergence and collision as means of (de)legitimation

This section furthers our understanding of the above-mentioned overlaps and associated (de)legitimation practices in the Treaty Process. It investigates how norm convergence and collision, which characterize regime complexes, are inferred in practices of (de)legitimation. The extended qualitative content analysis (in its inductive, grounded-theory based rounds of coding) revealed the shared human rights framework as a basis for constructing norm convergence.

At this point, it could be objected that the human rights framework is not simply used to construct norm convergence, but rather to make a substantial claim to strengthen human rights. While this aim does play a pivotal role in the deliberations, this paper investigates the (de)legitimizing use of human rights as a shared normative framework.¹⁰ This usage comes in the form of two (de)legitimizing practices. First, it constructs norm convergence via inclusion. Second, the reference to human rights is used in an exclusionary way to create the image of norm collision. Taken together, the (de)legitimation practices construct either norm convergence or collision by including or excluding actors, respectively, from a shared human rights framework. This section first delineates the mechanisms of inclusion and exclusion as (de)legitimation, and then investigates their meaning in the two intra- and inter-institutional overlaps.

4.1. Norm convergence as legitimation

Treaty proponents invoke human rights as a shared normative framework within which they situate the Treaty Process:¹¹ ‘We must all unite in the interests of human rights and work constructively towards achieving a strong Binding Treaty’ (ITUC and ITF_Article 2018, p. 2). They also appeal to the EU as part of that shared normative framework in order to counter the EU’s rejection of the Treaty Process:

As Europeans, we are deeply committed to the idea of a European Union whose external policies are guided by its values, including the universality and indivisibility of human rights [...]. We regret that, until now, the EU has not proven capable of putting proposals on the table that would allow it to influence the negotiations in a constructive manner (FIDH_Statement 2018 (Participation of the EU), p. 1).

Similarly:

the EU and its member states were still not willing to enter discussions on the content of the treaty. This would not be in line with the EU’s self-conception that human rights are core values that the EU promotes around the world. It would also not be in line with Germany’s foreign policy, which regards human rights as the basic tenet (Social service agency of protestant church in Germany_General 2018, p. 1).

These arguments seek to convince opponents to support the Treaty Process by constructing norm convergence.

The mechanism of inclusion is also visible in statements from stakeholders who are open to more binding regulation, but do not agree on whether the OEIWG can fulfil that aim. Instead of highlighting such norm collisions, they adhere to norm convergence. Their doubts regarding the potential collisions fall into three categories. The first is the OEIWG's initial failure to integrate the Guiding Principles (cf. Section 3.1).

Second, even strong proponents of the Treaty Process¹² are aware of the danger that a future treaty might not accomplish its intention, but remain toothless, either because its language and aspirations are watered down, or because it will not be ratified by enough (relevant) states, or because it will have insufficient enforcement and sanctioning mechanisms.

A third set of doubts refers to the Ecuadorian chair of the OEIWG. Ecuador's political interests and changing governments are feared to jeopardize the continuity of the OEIWG. In addition, there are concerns that the chair may lack the necessary legal expertise and resources to draft a treaty that touches on a large number of difficult questions and concepts of international law (INT 7/NHRI/February 2020, § 9, INT 14/UN Organ/May 2020, § 18, INT 1/Individual Expert/April 2019, § 74, INT 4/NGO/October 2019, § 47).

In spite of these shortcomings and norm collisions, these actors support the OEIWG by emphasizing concurrent norm convergence. They state that even if the Treaty Process is unable to live up to their expectations, it keeps the discussion of a binding BHR regulation alive, and with it, awareness of the gaps in the current non-binding regulations (INT 3/NGO/October 2019, § 84, INT 4/NGO/October 2019, § 61).

Strikingly, opponents of the Treaty Process also portray themselves as part of a shared human rights framework: 'So, respect for human rights is an essential aspect of who we are as a company. We believe, and I believe personally, that respect for human rights is critically important for all businesses in every part of the world' (Sodexo (Thomas Mackall)_Presentation Panel VI, 2015, p. 1).

Hence both proponents and opponents refer to a shared human rights framework as a basis for norm convergence. Therefore, the analysis must take into account how the inclusion of 'the self' in that framework is accompanied by the exclusion of 'the other.' In other words: How is the usage of norm convergence accompanied by the usage of norm collision?

4.2. Norm collision as delegitimation

Proponents of the Treaty Process strengthen their own inclusion into a shared human rights framework (norm convergence) by excluding opponents from that framework. They construct a norm collision by depicting the opponents' references to human rights as mere strategy and window dressing. From this perspective, even if companies constantly violate human rights, they do not publicly denounce them. 'I have never heard a company saying: "we do not give a crap about human rights"' (INT 4/NGO/October 2019, § 131). Treaty supporters characterize their opponents' positions as a 'business case for human rights' that merely strategically refers to or might even appreciate human rights, but does not prioritize human rights norms over colliding norms and interests: 'We, therefore, need an international instrument which is not rooted in the business case for human rights. Rather it should be underpinned by the normative hierarchy of human rights norms over business, trade and investment norms' (Surya Deva_Statement side-event UNHRC, 2014, p. 3). Describing the opponents' reference to human rights as a mere legitimization practice aims to delegitimize them – by excluding them from norm convergence and

emphasizing norm collision instead. Thus, including the ‘self’ in the human rights framework is strengthened by excluding the ‘other’.

Opponents take note of these practices of exclusion and norm collision: ‘The deliberations exhibit a very aggressive climate. Everyone who communicates even the smallest objection to the treaty is stigmatized as someone who opposes human rights’ (INT 6/Business/November 2019, § 19). In addition, opponents of the Treaty Process also strengthen *their* inclusion in a shared human rights framework by excluding treaty supporters via norm collision. They depict Ecuador and allied states from the Global South¹³ as merely following their own individual interests instead of truly aiming to protect human rights (INT 6/Business/November 2019, § 3, INT 2/State/October 2019, § 119–121, and see the following).

4.3. Convergence and collision in the intra-institutional overlap with the UN Guiding Principles

Treaty opponents (including the EU) invoke the Guiding Principles to facilitate norm convergence (European Union_Panel V (1) 2016, p. 5). They include themselves in a shared human rights framework in order to legitimize their criticism of the Treaty Process.

Remarkably, norm convergence is not restricted to a single regime that emerged around the Guiding Principles. Rather, it encompasses a number of different international organizations and their respective documents, most notably the OECD Guidelines for Multinational Enterprises and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (e.g. IOE et al._Statement (Response to zero draft) 2018, p. 2, European Union_General statement 2018, p. 5, BIAC et al._written contribution 2017, p. 5). Hence norm convergence is constructed between different international institutions in a regime complex.

At the same time, Treaty opponents juxtapose the Guiding Principles-based norm convergence with the norm collision they ascribe to the Treaty Process. They depict the OEIWG’s (initial) dismissal of the Guiding Principles as exclusion from a shared human rights framework:

It makes you wonder why you hear so little about how states such as Ecuador and South Africa implement the Guiding Principles. If they struggle to implement binding regulation, it is a little suspicious that there are so few activities in this regard. Somehow that doesn’t really fit. (INT 2/State/October 2019, § 121)

Treaty opponents antagonize the Treaty Process as violating the Guiding Principles-based norm convergence – a violation that would jeopardize the legitimacy of the entire BHR regime complex: the treaty drafts ‘would take the business and human rights agenda backwards by undermining the UNGPs’ (IOE et al._Statement (Response to zero draft) 2018, p. 5).

This delegitimation creates a crucial incentive for the OEIWG to embrace the Guiding Principles in order to gain legitimacy. It needs to underline that it is part of the shared framework, included in the norm convergence (in the form of complementarity between non-binding and binding instruments), rather than contest that norm convergence in the form of norm collision.

4.4. Convergence and collision in the inter-institutional overlap with the EU

The EU and its member states infer a norm collision between the EU and the Treaty Process. They describe the OEIWG as being too heterogeneous in its interests and legal approaches, and too distant from national and regional politics (INT 2/State/October 2019, § 43, § 159). They contrast the

lack of a shared normative framework at the global level with a supposed shared normative framework at the regional (EU) level. At the same time, however, three cases of norm convergence counter add to the one-sided assumption of norm collision.

First, the EU embraces other UN initiatives in the BHR field. These include, besides the Guiding Principles, the UN Forum on Business and Human Rights, an annual forum for deliberation and exchange, in which critical EU members participate regularly (INT 9/State/February 2020, § 31). For instance, the German Federal Foreign Office distributes free beverages and sandwiches during the forum's breaks in a highly visible show of support.

Second, Treaty supporters highlight the norm convergence between EU regulation and the Treaty Process (cf. Section 4.1): 'Maybe it's a sweet dream, but [...] these national and European initiatives may well be the most effective way towards this international instrument' (French Parliament Member (Danielle Auroi)_Panel V (1) 2016, p. 5, similarly ETUC_Statement 2018, p. 2, ITUC et al._Report 2017, p. 12). Treaty supporters frame UN and EU regulations as complementary.

Third, the Treaty Process has largely accommodated the EU's substantial points of criticism in recent years. Most notably (besides the turn towards the Guiding Principles, as discussed above), the EU took issue with the OEIWG's initial focus on transnational companies, as opposed to all companies. The latest draft reconciles this issue by addressing all companies with a particular focus on transnational activities (cf. in detail Mende, 2021b). 'This is a huge step towards the EU [...] and the EU cannot use this as a counter-argument anymore' (INT 7/NHRI/February 2020, § 25). These accommodations build an improved basis for norm convergence.

In spite of these three cases of norm convergence, the EU adheres to its perception of norm collision, which suggests the need for an additional explanation. The analysis of (de)legitimation practices reveals that this adherence does not simply result from the OEIWG's position at the global or UN level. Rather, the OEIWG (in stark contrast to the embraced Guiding Principles) is perceived to be mainly promoted by actors from the Global South (even though these are eminently supported by civil society organizations from the Global North). The Global South actors are depicted as not sharing the human rights framework (also see above):

Several EU member states do have a National Action Plan, but these are about implementing the UN Guiding Principles, which remain a top priority for us. And we see that a lot of states that promote or support the Treaty Process do not have, for example, a National Action Plan (INT 2/State/October 2019, § 43).

For the sake of constructing a norm collision, the persistent cliché that only states from the Global North are promoting human rights (critically Mende, 2021a) is invoked even in the face of states from the Global South seeking stronger human rights regulation.¹⁴

In contrast, the EU is depicted as unitary, marked by a norm convergence based on the Guiding Principles. The otherwise highly controversial debates within the EU do not come to the fore of this argument. Notably, the EU's rejection of the Treaty Process is controversial within the union. The European Parliament, as well as individual Members of Parliament from EU states, explicitly embrace the Treaty Process and call on the EU to do the same (Parlamentarier Deutscher Bundestag_ 2018, p. 2; European Parliament (ManonAubry)-General Statement 2019, p. 1).

In addition, the EU does not act on the basis of an official mandate to negotiate in the Treaty Process. This would require coordination among the EU member states (INT 7/NHRI/February 2020, § 37) – and hence bring more controversy to light. Instead, the EU rejects the Treaty based on the assumption of its own norm convergence, juxtaposed with the Treaty's supposed norm collision.

5. Conclusion: norm convergence and collision in regime complexes

This paper investigates how norm convergence and norm collision as characteristics of regime complexes are invoked in practices of (de)legitimation in the BHR regime complex. It claims that, rather than conceptualizing regimes as having *convergent* and regime complexes as having *colliding* norms, rules and procedures, regime complexes can be marked by both. What is more, norm collision can also occur within a single international institution. This study furthers our understanding of regime complexes and the role of norm convergence or collision in three ways.

First, inter- and intra-institutional overlaps are both functional overlaps that entail the proliferation of norms, rules and procedures in regime complexes. This ‘creates a range of choices available to states in terms of institutional options through which a state can address a given subject or advance its interests’ (Betts, 2013, p. 69; similarly Alter & Meunier, 2009, p. 16; Faude & Gehring, 2017, p. 189). In addition to the literature on regime complexes, which situates overlaps between different international institutions, such overlaps also manifest within a single institution – the UN. While the UN is a particularly pluralist organization that is prone to intra-institutional overlaps, this result can be generalized to other studies for two reasons. First, the UN plays a pivotal role in numerous regimes and regime complexes. Second, other international institutions also exhibit an institutional plurality that engenders intra-institutional overlaps. The European Parliament’s endorsement of the Treaty Process even though the EU is its biggest critic is but one example.

The second way in which this study advances the literature is by demonstrating that intra-institutional overlap not only affects the involved international institution; it can also either strengthen or damage the entire regime complex. This assertion aligns with past studies in the regime complex literature, which have stated that if overlapping elements of a regime complex cannot be reconciled, this may weaken the regime complex as a whole, and instead strengthen traditional power relations (also cf. Benvenisti & Downs, 2007; Drezner, 2009). At the same time, it counters the expectation that in the field of human rights, overlaps and proliferation strengthen the protection of human rights (Faude & Gehring, 2017, p. 190). The Treaty Process represents an attempt of less powerful actors (mainly states from the Global South alongside civil society actors) to initiate change by creating a new agreement. This attempt did not succeed by invoking a delegitimizing norm collision to the Guiding Principles. What is more, such a collision was perceived to undermine the entire BHR regime complex (thereby weakening human rights protection). Instead, the legitimating reframing as norm convergence countered the deteriorating effects of the overlap.

Third, the (de)legitimizing usage of norm convergence or norm collision contributes to the construction of a shared normative framework. This in turn serves to include (and legitimate) like-minded actors, and to exclude, criticize and delegitimize adversaries. The practices of inclusion and exclusion, and legitimation and delegitimation, are closely interconnected – as is the reciprocal construction of norm convergence and norm collision. Strikingly, both proponents and opponents of the Treaty Process refer to human rights as a shared normative framework. This underscores the connection between sociological (empirical) and normative concepts of legitimacy without indistinctively merging them (Agné, 2018; Beetham, 2013; Bodansky, 1999; Buchanan & Keohane, 2006). This paper contributes to our understanding of that interdependence by emphasizing the uncircumventable power of certain norms for empirical practices. Human rights norms provide a shared framework that is so normatively potent that they are empirically deployed in practices of (de)legitimation, even if they do not correspond to individual beliefs or political interests. Thus human rights constitute a strong basis for legitimation because their normative appeal is nearly uncircumventable, but also a weak basis because they

can be employed with very different interests. They therefore provide an omnipresent – but insufficient – basis for norm convergence or diffusion.

In sum, this paper depicts how practices of legitimation and delegitimation deal with overlaps in regime complexes by invoking the convergence or collision of norms, rules and procedures – both between and within international institutions.

Notes

1. A number of failed attempts to establish binding rules in the past testify to that collision. These include, most prominently, the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights from 2003 (Deva, 2004; Weissbrodt & Kruger, 2003) but also the often forgotten United Nations Code of Conduct on Transnational Corporations, which failed in 1992 (Hamdani & Ruffing, 2015).
2. For a detailed discussion of the extended qualitative content analysis method, see Mende (2020). This approach integrates the rather descriptive and explorative method of qualitative content analysis with elements of grounded theory that further engage with the categories and their dimensions in an interpretive and explanatory manner.
3. The list of documents is available on Harvard Dataverse: <https://doi.org/10.7910/DVN/XK3JX6>. The analysis is illustrated with quotes from these documents. These are labelled with the type of actor, followed by the title of the document as published by the OEIWG (usually including the authoring stakeholder), the year of the document and the page number of the quote.
4. The expert interviews were conducted between April 2019 and July 2020 with all types of relevant stakeholders, including states, UN members, business representatives, national human rights institutions (NHRIs), unions and NGOs. The semi-structured interviews, among others, asked for reasons for criticizing or endorsing (elements of) the Treaty Process, perceptions of the OEIWG, and the relevance of other BHR instruments. The interviewees were guaranteed full anonymity; therefore the interviews are labelled with consecutive numbers, followed by the type of actor, interview date and position of the quote. Direct quotes have been linguistically polished and translated where necessary.
5. Strange highlighted the static and state-centric narrowness of the regime concept and how it 'ignores the vast array of nonregimes' (Strange, 1982, p. 480) in the very collection of papers that brought the regime concept to the fore of IR studies.
6. In the following, 'Treaty Process' refers to the entire process of drafting a binding instrument, and 'OEIWG' refers to the working group as a particular actor. While the terms are often used interchangeably in the documents, stakeholders may support the Treaty Process while being wary of the OEIWG as a political actor.
7. This also includes France, which has implemented a binding law on a parent company's duty of vigilance to prevent human rights abuses in its supply chain.
8. The European Commission initiated a study on due diligence that was published in January 2020 (British Institute of International and Comparative Law, 2020). A Commission Staff Working Document on 'Corporate Social Responsibility, Responsible Business Conduct, and Business & Human Rights: Overview of Progress' (Doc. SWD (2019) 143 final) was finalized in March 2019 (<https://ec.europa.eu/docsroom/documents/34482/attachments/1/translations/en/renditions/native>). Steps towards creating a Multilateral Investment Court are being taken.
9. These sets of legitimation have been coded inductively from the statements of Treaty Process supporters.
10. Accordingly, the coded passages do not extend to all human rights references in the statements, but are limited to practices of (de)legitimation that have been identified in previous rounds of coding.
11. This line of argument refers to statements that employ human rights as a shared normative point of reference as opposed to discussing other questions of human rights, such as how they can be achieved, in detail.
12. This became particularly clear in informal talks during the participant observation.
13. This delegitimation practice is rarely applied to civil society actors that support the Treaty Process, as their adherence to human rights is widely acknowledged. Opponents' delegitimation of civil society

actors instead addresses different issues, such as naiveté or rowdy behaviour (INT 6/Business/November 2019, INT 2/State/October 2019, § 127).

14. This is not to say that these states do not also pursue individual political interests – as do states from the Global North.

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Notes on contributor

Janne Mende is Max Planck Research Group Leader at the Max Planck Institute for Comparative Public Law and International Law. In her Research Group on ‘The Multiplication of Authorities in Global Governance Institutions’ she analyses the authority of state, inter-state and non-state actors of global governance in the United Nations and the European Union. Additionally, she heads the DFG-funded Research Project ‘Business Actors beyond Public and Private: Authority, Legitimacy and Responsibility in the United Nations Human Rights Regime’ since 2018. She has held positions as deputy professor for Transnational Governance at the Technical University of Darmstadt, and visiting positions at the School of Global Studies in Gothenburg, the Danish Institute for Human Rights in Copenhagen, the WZB – Berlin Social Science Center, Research Unit Global Governance and the New School for Social Research in New York, among others. Her research interests include human rights, global norms, global governance and international institutions.

Data availability statement

The corpus of documents for the qualitative analysis is available in a dataset: Mende (2020): Dataset binding treaty on business and human rights. Harvard Dataverse, <https://doi.org/10.7910/DVN/XK3JX6>.

ORCID

Janne Mende  <http://orcid.org/0000-0002-7111-6209>

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