

Introduction

WHY BUSINESS AND HUMAN RIGHTS?

Historians may look back at the 1990s as a “golden age” for the most recent wave of corporate globalization. Multinational firms emerged robustly, in larger numbers and greater scale than ever before. They weaved together integrated spheres of transnational economic activity, subject to a single global strategic vision, operating in real time, connected to and yet also transcending merely “national” economies and their “inter-national” transactions. Soon half of world trade comprised “internal” transactions within networks of related corporate entities, not the traditional arms-length “external” exchange among countries. Multinationals did well, and so, too, did people and countries that were able to take advantage of the opportunities created by this transformative process.

But others were less fortunate. Evidence mounted of sweatshop conditions and even bonded labor in factories supplying prestigious global brands; indigenous peoples’ communities displaced without adequate consultation or compensation to make way for oil and gas company installations; foods and beverages firms found with seven-year-old children toiling on their plantations; security forces guarding mining-company operations

accused of shooting and sometimes raping or killing trespassers and demonstrators; and Internet service providers as well as information technology companies turning over user information to government agencies tracking political dissidents in order to imprison them, and otherwise helping those governments to practice censorship.

How, in a world of profit-maximizing firms and states jealously guarding their sovereign prerogatives, can multinational corporate conduct be regulated to prevent or mitigate such human costs? How can companies that continue imposing them be held to account? Globally operating firms are not regulated globally. Instead, each of their individual component entities is subject to the jurisdiction in which it operates. Yet even where national laws exist proscribing abusive conduct, which cannot always be taken for granted, states in many cases fail to implement them—because they lack the capacity, fear the competitive consequences of doing so, or because their leaders subordinate the public good for private gain.

As if by some dialectical force, individuals and communities adversely affected by corporate globalization began to invoke the language of human rights to express their grievances, resistance, and aspirations. Human rights discourse—affirming the intrinsic worth and dignity of every person, everywhere—became a common ground from which they began to challenge and seek redress for the human costs of corporate globalization. Of course, such efforts lack the material power of multinationals or states. What has emerged, as a result, is a complex and dynamic interplay between “the power of norms versus the norms of power.”¹ But this raises two further questions: How can human rights norms most effectively be embedded in state and corporate practice to change business conduct? More challenging still, how can this be fostered and achieved in the global sphere where multinational

corporations operate but which lacks a central regulator? On these questions human rights proponents and global businesses have been locked in a stalemate. The main global public arena in which this clash has occurred has been the United Nations, which first attempted, unsuccessfully, to negotiate a code of conduct for multinational corporations as far back as the 1970s.²

In the late 1990s, the UN Sub-Commission on the Promotion and Protection of Human Rights began drafting a treaty-like document called “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights” (“Norms”). In 2003 it presented the text for approval to the Commission on Human Rights, its intergovernmental parent body (which later became the Human Rights Council). The Norms would have imposed on companies, within their “sphere of influence,” the same human rights duties that states have accepted for themselves under treaties they have ratified: “to promote, secure the fulfillment of, respect, ensure respect of and protect human rights.”³ The Norms triggered a deeply divisive debate between human rights advocacy organizations and the business community. Advocates were fervently in favor because the Norms proposed making these obligations binding on companies directly under international law. Business vehemently opposed what it described as “the privatization of human rights,” transferring to companies obligations that they believed belonged to states. The proposal found no champions on the Commission, which declined to act on it.

But enough governments from various regions of the world believed that the subject of business and human rights required further attention even if this particular instrument was unacceptable to them. Facing escalating advocacy campaigns and lawsuits, business itself felt a need for greater clarity regarding their human rights responsibilities from some reasonably

objective and authoritative source. The governments also realized, however, that an intergovernmental process was unlikely to achieve much progress on so new, complex, and politically charged an issue without first finding some common terrain on which to move forward. Hence the Commission established a special mandate for an individual expert, which was intended to signal its concern but remain modest in scope: mainly to “identify and clarify” existing standards for, and best practices by, businesses, and for the role of states in regulating businesses in relation to human rights; and to research and clarify the meaning of the most hotly contested concepts in the debate, such as “corporate complicity” in the commission of human rights abuses and “corporate spheres of influence” within which companies might be expected to have special responsibilities. To add a degree of visibility to the mandate on the international stage, the Commission requested that the UN Secretary-General appoint the mandate-holder as his “Special Representative on the issue of human rights and transnational corporations and other business enterprises.”

And so it came to be that in July 2005 I received a call from then-Secretary-General Kofi Annan, asking me to serve in this post. I had been Annan’s Assistant Secretary-General for Strategic Planning during his highly successful first term, from 1997 to 2001. My main role was to help develop initiatives and messaging that advanced his vision of the United Nations in the new century—pushing the UN’s concerns beyond the precincts of governments toward *We the Peoples*, the title of his celebrated report to the 2000 Millennium Summit. This included more effective engagement with civil society and the business community; devising the Millennium Development Goals, a global set of poverty reduction benchmarks; a more intense focus on universal rights, including promoting the idea that sovereignty should no longer be

permitted to serve as a shield behind which governments feel free to butcher their own people; and several rounds of institutional reforms. In 2001, Annan was awarded the Nobel Peace Prize for, among other achievements, “bringing new life to the organization.” I then returned to my previous life as an academic.

The new assignment, Annan explained in his call, required someone with knowledge of business and human rights issues but, in light of their political sensitivity, did not represent any of the major stakeholder groups involved—governments, businesses, and civil society—while being able to work with them all. It would be a two-year, part-time project that I could conduct without leaving Harvard. I would submit a report each year summarizing my work, conduct one or two consultations around the reports, and then recommend next steps. It seemed both interesting and doable, so I accepted. Little did I know then how challenging, how consuming, and how consequential this assignment would become.

I soon found myself at the center of a storm, as *The Economist* magazine later described it.⁴ The prior polarized debate continued, barely stopping for a breather, because the main international human rights organizations did not accept that the “Norms” initiative had come to an end, having invested heavily in it. Amnesty International USA, for example, hailed the Norms as “representing a major step toward a global legal framework for corporate accountability.”⁵ The Amnesty International Secretariat had published a “glossy” (booklet) and lined up its national chapters for a global campaign in support of the Norms’ ultimate adoption. The International Federation for Human Rights, comprised of more than 150 organizations in over 100 countries, sent me a letter stating that they “insist on the central role in the current debate of the Norms. . . . The question now is how to build on [them] and how to further

implement these Norms; it is not whether to repeat this exercise all over.”⁶ But on the other side, business insisted on precisely the opposite. In a joint letter the Secretaries-General of the International Chamber of Commerce and the International Organisation of Employers, the largest global business associations, stated that I should “explicitly recognize that there is no need for a new international framework.”⁷ Instead, they urged me to focus on identifying and promoting good practices and providing companies with tools to enable them to deal voluntarily with the complex cluster of business and human rights challenges. When I asked representatives of governments in an informal Geneva meeting shortly after my appointment what advice they had for me, I got only one direct answer: “Avoid a train wreck.” It was an inauspicious beginning.

Now fast-forward to June 2011—after six years, nearly fifty international consultations on five continents, numerous site visits and pilot projects, and several thousand pages of research reports. The UN Human Rights Council unanimously endorsed a set of “Guiding Principles” on business and human rights that I developed, with the support of all stakeholder groups—even though the Council had not requested any such thing. This also marked the first time that either the Council or its predecessor, the Commission, had “endorsed” any normative text that governments did not negotiate themselves. The Guiding Principles lay out in some detail the steps required for states and businesses to implement the “Protect, Respect and Remedy Framework” I had proposed to the Council in 2008 and which it had welcomed. It rests on three pillars:

1. the state duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication;

2. an independent corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and address adverse impacts with which they are involved;
3. the need for greater access by victims to effective remedy, both judicial and nonjudicial.

Simply put: states must protect; companies must respect; and those who are harmed must have redress.

At the conclusion of my mandate, the Council established an interregional working group of experts to oversee the UN's follow-up, focused on disseminating and implementing the Guiding Principles, supporting efforts to assist underresourced countries and smaller firms, and advising the Council on additional steps that may be required. Moreover, core elements of the Guiding Principles have also been adopted by other international standard-setting bodies, including the Organisation for Economic Co-operation and Development, the International Standards Organization, the International Finance Corporation, and the European Union. This has created an unprecedented international alignment coupled with a broad portfolio of means for securing implementation. Numerous companies and industry associations as well as governments have announced plans or have already begun to align their practices with the Guiding Principles. NGOs and workers' organizations are using them as a tool in their advocacy.

Thus, in a relatively short period of time the global business and human rights agenda shifted from a highly polarized and stalemated debate to significant convergence. This hardly means that business and human rights challenges have come to an end. Nor does it mean that everyone was equally happy with the outcome. But as I stated in my final presentation to the

Human Rights Council, it does mark the end of the beginning: by providing a common global platform of normative standards and authoritative policy guidance for states, businesses, and civil society.

This book has two aims. One is to tell the story of how we got from there to here in the case of my particular business and human rights mandate. That story is interesting in itself because success hinged on taking the main protagonists beyond their comfort zones, in which they had failed to achieve progress. Human rights advocates traditionally have favored going the international treaty route—what they call the “mandatory” approach. The business community traditionally has favored the combination of compliance with national laws where companies operate, coupled with the adoption of voluntary measures and promotion of best practices by business, arguing that the market then would drive the process of change. As for states, even when recognizing a need to act, they have also been conflicted. States that host multinationals compete for foreign investments; home states are concerned that their firms might lose out on investment opportunities abroad to less scrupulous competitors; and both are pressured by their respective business communities to favor voluntary over mandatory means.

But binding international standards require an international treaty—or the slow and gradual accretion of customary international law standards. What is more, the leading human rights NGOs were demanding some overarching and comprehensive legal framework, not merely corporate accountability in relation to a specific set of rights, and a framework that would impose duties on companies directly under international, not national, law. Apart from issues of effectiveness and enforcement, which I address in a later chapter, major treaties on complex and controversial human rights subjects require time for

the subject to ripen and negotiations to conclude. To cite but one example, in 2007 the UN General Assembly adopted a “soft law” declaration, which is not legally binding, on the rights of indigenous peoples—one of a score of subjects that would have to be included in a business and human rights treaty—and it was twenty-six years in the making. At minimum, then, even the treaty approach would require interim measures to respond to current needs. As for market-based solutions, a pure model of self-regulation for so systemic a challenge as business and human rights lacks *prima facie* credibility, and it is difficult to imagine how the identification of best practices alone would get markets to a tipping point unless it was coupled with some authoritative way of determining what constitutes “best” as well as some means of dealing with those who act otherwise. Achieving significant progress, I believed, would require moving beyond the mandatory-vs.-voluntary dichotomy to devise a smart mix of reinforcing policy measures that are capable over time of generating cumulative change and achieving large-scale success—including in the law. This book recounts how I developed that heterodox approach and the results it is producing.

My second aim is to tell that story in such a way that broader lessons can be learned from it. Multinational corporations became the central focus of business and human rights concerns because their scope and power expanded beyond the reach of effective public governance systems, thereby creating permissive environments for wrongful acts by companies without adequate sanctions or reparations. Thus, business and human rights is a microcosm of a larger crisis in contemporary governance: the widening gaps between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. Yet human rights are not merely the proverbial canary in the coal mine signaling that

all is not well; respect for human dignity also can and should be one of the foundations on which to bridge those governance gaps, from the local level to the global, and in the private sector no less than the public. Creating a more *just* business in relation to human rights involves finding ways to make respecting rights an integral part *of* business—that is, just making it standard business practice. However, there is no single Archimedean leverage point from which this can be achieved; success depends on identifying and leveraging a multiplicity of such points, but within the same normative and strategic framing. This is also true, I believe, of bridging other highly complex and controversial instances of global governance gaps, such as climate change, where neither centralized command-and-control regulation nor business as usual offers a viable solution.

This book comprises five chapters. The first summarizes some of the emblematic cases that put business and human rights on the international policy agenda, from the first global campaign against Nike for its overseas labor practices to the scathing criticism the CEO of Yahoo! faced in a U.S. congressional hearing for turning user information over to Chinese authorities. It also outlines more broadly the country and sector attributes in which corporate-related human rights abuses have tended to occur with greatest frequency. Chapter 2 explains why neither mandatory nor voluntary responses to these challenges by themselves provide a fix, and it outlines the contours of the heterodox approach I developed. Chapter 3 presents the Protect, Respect and Remedy Framework and the Guiding Principles for implementing it, which embody that approach. Chapter 4 lays out the strategic paths that led from my mandate’s modest beginnings in “identifying and clarifying” things to the widespread endorsement and uptake of the Guiding Principles, which also may help inform similar efforts at clos-

ing global governance gaps. Chapter 5 addresses next steps in driving the business and human rights agenda forward. The remainder of this Introduction sketches in the context for the discussion to follow.

I. ECONOMIC TRANSFORMATION

Human rights traditionally have been conceived as a set of norms and practices to protect individuals from threats by the state, attributing to the state the duty to secure the conditions necessary for people to live a life of dignity. The postwar international human rights regime, a remarkable achievement in a world of self-regulating states, was premised on this conception. The idea that business enterprises might have human rights responsibilities independent of legal requirements in their countries of operation is relatively new and still not universally accepted.

Business and human rights became an increasingly prominent feature on the international agenda in the 1990s. The liberalization of trade, domestic deregulation, and privatization throughout the world extended the scope and deepened the impact of markets. The rights of multinational corporations to operate globally increased greatly through, for example, more robust and enforceable rules protecting foreign investors as well as intellectual property. According to one UN study, some 94 percent of all national regulations related to foreign direct investment that were modified in the decade from 1991 to 2001 were intended to further facilitate it.⁸ At the same time, innovations in transportation and communication technology made those global operations cost-effective and near-seamless. But standards protecting people and the environment from the

adverse effects of these developments did not keep pace. Manufacturing companies in the industrialized world adopted new business models sourcing their products in low-cost and weakly regulated overseas jurisdictions. Extractive companies, such as oil, gas, and mining, have always had to go where the resources were found, but by the 1990s they were pushing into ever-more-remote areas, often inhabited by indigenous peoples who resisted their incursion, or operating in host countries engulfed by the civil wars and other serious forms of social strife that marred that decade, particularly in Africa and parts of Latin America. Financial and professional services followed their clients abroad.

In relation to business and human rights, two features stood out on this transformed economic landscape: it became clear that many governments were unable or unwilling to enforce their domestic laws in relation to business and human rights, where such laws existed at all; and multinational firms were unprepared for the need to manage the risks of their causing or contributing to human rights harm through their own activities and business relationships. Advocacy groups organized campaigns against multinationals. Local communities began to push back, particularly against extractive companies with their large physical and social footprints. The language of human rights became part of the vernacular of affected individuals and groups around the world, emerging as an increasingly prevalent narrative challenging harmful corporate practices.

For their part, some businesses on the frontlines of globalization responded with policies and practices pledging to follow responsible business conduct—what became known as corporate social responsibility, or CSR for short. Companies began to establish CSR units to monitor workplace standards in their global supply chains, whether in consumer electron-

ics or apparel and footwear. So-called fair trade labeling and other certification schemes extended similar promises, ranging from coffee beans to toys and forest products. A number of collaborative initiatives were established with industry partners, sometimes including NGOs and governments as well—the Kimberly Process to stem the flow of conflict diamonds being a notable example.

The political ethos of the era also contributed to the rapid expansion of CSR. To oversimplify only slightly, as governments moved toward greater deregulation and privatization, they promoted CSR initiatives and private-public partnerships in place of more direct governance roles. This was as true of Tony Blair’s “Third Way” and Bill Clinton’s “New Democrats” as it was of the Chinese government’s privatization of state-owned enterprises and whatever obligations they had to workers and communities. A growing number of governments, including in emerging market countries, adopted national policies promoting voluntary CSR practices, such as having companies issue reports describing social and environmental policies though rarely actual performance. At the UN, I was a chief architect of the Global Compact, launched in 2000 and now the world’s largest CSR initiative with some 7,000 company participants and national networks in more than 50 countries. It was not conceived as a regulatory instrument, however, for which it had no mandate from governments. It was designed as a learning forum to promote socially responsible practices in the areas of human rights, workplace standards, the environment, and anticorruption; share best practices and develop tools; recruit new actors into the CSR world, ranging from emerging market firms and their governments to investors and business schools; and to disseminate the CSR message to new market segments, such as mainstream investors. The Compact is the archetype of

voluntarism, and many governments, including in the so-called BRIC countries (Brazil, Russia, India, and China), encouraged their firms to join.

CSR initiatives evolved rapidly, though less so in human rights than in other social and environmental domains. But they also exhibit built-in limitations: most do not address the role that governments must play in bridging governance gaps; they tend to be weak in terms of accountability provisions and remedy for harm; and by definition they involve only companies that voluntarily adopt such measures, in a form and at a pace of their own choosing. When I began my mandate, of the 80,000 or so multinational corporations in the world, fewer than 100 were known to have any policies or practices in place that addressed the risk of their involvement in human rights harm—beyond whatever specific and highly variable legal requirements might exist in their countries of operation.⁹ Hence the drive by advocacy groups, affected individuals and communities, as well as other stakeholders to strengthen the international human rights regime directly by expanding its scope and provisions to encompass business enterprises.

II. THE HUMAN RIGHTS REGIME

The idea of human rights is both simple and powerful. The operation of the global human rights regime is neither. The simplicity and power of human rights reside in the idea that every person is endowed with “inherent dignity” and “equal and inalienable rights.” The essence of rights is that they are considered entitlements, not granted by the grace or at the discretion of others. Hence, international human rights instruments speak of “recognizing” rights, not creating them. The interna-

tional human rights regime was built on this precept, beginning with the Universal Declaration of Human Rights, adopted by the UN General Assembly in 1948 “as a common standard of achievement for all peoples and all nations.”¹⁰

Two United Nations Covenants adopted in 1966, which entered into force a decade later, turned many of the Declaration’s aspirational commitments into legal obligations, for states that ratified them, to respect the enumerated rights and ensure their enjoyment by individuals within their territory or jurisdiction. One covenant addresses such civil and political rights as life, liberty, and security of the person; fair trial and equal protection of the law; the right not to be subjected to torture or other forms of cruel, inhuman, or degrading treatment; not to be subjected to slavery, servitude, or forced labor; freedom of movement, thought, and conscience; the right to peaceful assembly, family, and privacy; and the right to participate in the public affairs of one’s country.¹¹ The other covenant addresses economic, social and cultural rights, including the right to work and to just and favorable conditions of work; to form and join trade unions; to social security, adequate standards of living, health, education, rest, and leisure; and to take part in cultural life and creative activity.¹²

The Declaration and the two Covenants together constitute the “International Bill of Human Rights.” They have been supplemented by seven additional UN treaties, further elaborating upon prohibitions against racial discrimination, discrimination against women, and torture; affirming the rights of the child, migrant workers, and persons with disabilities; and prescribing national prosecution or extradition for the crime of forced disappearance. The International Labour Organization (ILO) has adopted a series of conventions regarding workplace rights, again with ratifying states as the duty-bearers within their

respective jurisdictions. Its Declaration on Fundamental Principles and Rights at Work, representing what might be described as “the core of the core” internationally recognized workplace rights, includes freedom of association and the effective recognition of collective bargaining; elimination of all forms of forced or compulsory labor; effective abolition of child labor; and elimination of discrimination in respect to employment and occupation.¹³

Separate regional human rights regimes exist in Europe, Africa, and the Americas. In 2002 the Rome Statute of the International Criminal Court (ICC) came into force. The Court can prosecute individuals for genocide, crimes against humanity, and war crimes in a number of circumstances: where national courts of states parties are unwilling or unable to investigate and prosecute such crimes; where the accused is a national of a state party, or the alleged crime took place on the territory of a state party irrespective of the nationality of the accused; or where a situation is referred to the Court by the UN Security Council, in which case none of the other criteria need to be met. The Security Council did so, for example, in the case of Sudan’s President Omar Hassan Ahmad Al Bashir who was indicted on ten such counts; Saif al-Islam Gaddafi, son of Colonel Muammar Gaddafi, also stands indicted. But the Court lacks the power on its own to bring them to The Hague for trial. The combination of these institutional innovations—the UN and regional human rights systems, coupled with the ILO core conventions and the ICC—constitute what is often referred to as the twentieth-century “human rights revolution.”

However, the UN-based human rights regime is neither designed nor is it capable of acting as a centralized legal regulative system. To begin with, states adopt and ratify treaties voluntarily; none can be forced to do so. Not all states have

ratified all human rights treaties, and not all implement those they have ratified. Even where legal obligations do exist, the regime lacks adjudicative and enforcement powers. Expert committees (called treaty bodies) are established under each treaty to receive, and make observations on, reports that states parties are required to submit periodically regarding their adherence to treaty obligations, and to offer recommendations and commentaries on treaty provisions in light of evolving circumstances. But most countries do not accept treaty bodies' views as a source of law. In addition, many economic, social, and cultural rights—the rights to adequate standards of living, health, and education, for example—are subject to “progressive realization,” that is, achievement to the maximum extent permitted by available resources. This adds to the difficulty of assessing compliance, especially in relation to third parties such as business enterprises. In any case, implementation falls to the individual state—its domestic judicial and political processes—and to such assistance or leverage as other actors, whether states, international agencies, or activist groups, are willing and able to bring to bear on those whose performance falls short.

These challenges are magnified where the conduct of multinational corporations is involved. By multinational corporations I simply mean companies that conduct business in more than one country, whether as vertically integrated firms, joint ventures, corporate groups, cross-border production networks, alliances, trading companies, or through ongoing contractual relationships with off-shore suppliers of goods and services; and whether publicly listed, privately held, or state-owned.

International human rights treaties impose duties on states that ratify them. In turn, companies are subject to whatever standards states apply to them in their home and host countries. For example, the United States has not ratified the economic,

social, and cultural rights covenant, nor has China ratified the covenant on civil and political rights. Thus, variations exist as to which international human rights standards apply in different countries, and multinational corporations are likely to be subject to different, sometimes contradictory, standards in their countries of operation. Advocates have urged that companies should simply adhere to international standards where they are more protective of human rights than national laws. But that can be tricky to satisfy when the two are in conflict. An internationally recognized right may be legally prohibited by the host country—the right to form unions, for example, or gender equality. There are no authoritative international means to resolve such conflicts of standards, and requiring divestment in all such cases might do more harm than good and would be resisted by multinationals and states alike.

Only in limited instances has international human rights law reached companies directly—for instance, if they commit or are complicit in the commission of egregious violations, such as genocide, war crimes, torture, extrajudicial killings, forced disappearances, and slavery-like practices. But even then, the law can be enforced only in jurisdictions where such charges can be brought against companies. The most prominent venue has been the United States under the Alien Tort Statute. This was adopted in 1789 to combat piracy, protect ambassadors, and ensure safe conducts. It was discovered by human rights lawyers more than two hundred years later as a means for foreign plaintiffs to bring civil suit in federal courts, first against individuals and then against multinational corporations as “legal persons,” for violating “the law of nations or a treaty of the United States.” The pathbreaking case against a major corporation was *Doe v. Unocal*, in which Burmese villagers sued the California-based oil company (subsequently bought by Chev-

ron) for complicity in forced labor, rape, and murder allegedly committed by Burmese military units constructing and securing Unocal's pipeline route through that country to Thailand. That case was settled, reportedly for \$30 million. Some one hundred such cases have been brought against multinationals in U.S. courts, but the statute's applicability to legal as opposed to natural persons is currently under review by the U.S. Supreme Court.

Furthermore, while the layperson's image of multinational corporations may reflect their actual day-to-day practices, that image does not conform to prevailing legal doctrine. Multinational corporations operate as globally integrated entities or "groups." But legally, the parent company and each subsidiary are construed as a "separate legal personality," subject to the individual jurisdictions in which they are incorporated. Therefore, the parent company is generally not liable for wrongs committed by a subsidiary, even where it is the sole shareholder, unless the subsidiary is under such close day-to-day operational control by the parent that it can be seen as being its mere agent. This makes it extremely difficult for any jurisdiction to regulate the overall activities of multinationals, and it can prevent victims of corporate-related human rights abuses from obtaining adequate remedy.

Yet the global corporate group has numerous ways of influencing governments. It may threaten to withdraw its investment from a host country. It may be able to sue the host government under binding international arbitration if its investment has been negatively affected by legislative or administrative measures. Ad hoc panels of arbitrators may construe such measures as breaching an international investment agreement, even if the host country is merely enacting its international human rights obligations in a nondiscriminatory manner as between domestic and foreign investors. Additionally, the subsidiary has access

to its home country as a potential source of political leverage, and through it to the international financial institutions, such as the World Bank, on which the host country may depend for support.¹⁴ Multinationals have also been known to threaten to relocate their home base in order to avoid robust domestic regulation: for example, there are more mining companies listed in Canada than in any other country, and the threat of setting up headquarters somewhere else hung over an ultimately unsuccessful effort through a private member's bill in Parliament to impose regulations on those companies' overseas operations.¹⁵ Thus, under the existing rules of the game, multinational corporations pose regulatory challenges not posed by national firms, while the absence of a global regulator makes those rules hard to change.

Having said all that, multinational corporations are also subject to a variety of pressure points to which states and national companies may be less vulnerable. Each link in the distributed network of a multinational increases the available entry points through which other social actors can seek to leverage the overall company brand, its operations and resources, with the aim of improving the firm's social performance—by investors, consumers, and home country regulatory agencies; local communities and civil society actors, often supported through transnational links; and a company's own personnel concerned about differential treatment of human rights in overseas-vs.-home-country workplaces and communities. In short, the conduct of multinational corporations may be susceptible to a diverse set of economic and social compliance mechanisms that differ from those affecting states and national companies—so that lessons from the experience of the latter may not fully capture the opportunities for driving change through multinationals.

International law must and will continue to evolve in order

to guide and govern aspects of the business and human rights agenda. But the desire to achieve that goal through negotiating an all-encompassing legally binding framework is at best a long-term proposition. Even if one were to start down that road, responding to existing needs requires identifying and undertaking shorter-term measures as well. And great care must be taken when promoting longer-term solutions to avoid having an idealized image of the end point—the perfectly conceived and perfectly enforced international legal regime—trump consideration of effective measures in the here and now. Amartya Sen, philosopher and Nobel laureate in economics, takes to task those who view human rights as mere “proto-legal commands” or “laws in waiting.”¹⁶ His view is that human rights are “strong ethical pronouncements as to what should be done. They demand acknowledgement of imperatives and indicate that something needs to be done for [their] realization. . . .”¹⁷ But he does not believe that the very idea of human rights is or should be confined to their role as either laws’ antecedents or effects. To do so would unduly constrict—Sen actually uses the term “incarcerate”—the social logics and processes other than law that drive evolving public recognition of rights.¹⁸ I share Sen’s view.

In short, this is what I found when I surveyed the global business and human rights picture at the outset of my mandate: a deeply divided arena of discourse and contestation lacking shared knowledge, clear standards and boundaries; fragmentary and often weak governance systems concerning business and human rights in states and companies alike; civil society raising awareness through campaigning against companies, and sometimes also collaborating with the most willing among them to improve their social performance; and occasional lawsuits against companies brought mainly through the innovative use of legal provisions that were originally intended for differ-

ent purposes. To gain a more granular understanding of these issues in one particularly troubled industry sector, I arranged a visit to the Peruvian highlands in January 2006, where conflicts between mining companies and communities had been in the news—and continue to be to this day.

III. CAJAMARCA

The province of Cajamarca, roughly the size of the U.S. state of Rhode Island, lies in northwestern Peru. It is a region of pastures and peasants, largely indigenous, who farm and graze cattle. One of the most heavily mined areas in Peru, a country where mining accounts for more than 60 percent of export earnings, it is also one of the poorest. Not far from the provincial capital of the same name is South America's largest gold mine, Minera Yanacocha. It is a joint venture between Denver-based Newmont Mining (just over half of the shares) and Compañía de Minas Buenaventura, Peru's largest publicly traded precious metals company. The International Finance Corporation (IFC), the World Bank's private sector arm, holds a 5 percent stake as part of its program to promote economic growth through private investment in the natural resources sector.

In October 2005 the mine was the subject of lengthy investigative journalism coverage in the *New York Times* and a program in the *Frontline* series of the U.S. Public Broadcasting System.¹⁹ Newmont invited me to visit the operation to see firsthand their efforts to respond to their challenges. Through Oxfam America, I also arranged to meet with community leaders and NGOs in Cajamarca and Lima. I make no attempt here to fully assess the situation at that time, but merely provide a brief sketch of

the main factors and actors as I saw them, and of how they informed my framing of the UN assignment I had been given.

Yanacocha rises from approximately 10,000 to nearly 14,000 feet, with the operation spread across 600 square miles.²⁰ Constructing the site involved blasting mountaintops, and mining it consists of progressively carving out a pit roughly 60 square miles in size, carting off boulders and leaching them in a diluted cyanide solution. This process allows small deposits of gold to be separated from the rock and then smelted—30 tons or more of rock and earth for every ounce of gold—while consuming large quantities of water and releasing a variety of minerals and heavy metals, including mercury. The water then needs to be treated and the by-products contained and disposed of safely.

There are few if any issues related to the operation that did not generate some level of community objection and opposition from the start: allegations of inadequate consultation and compensation for the resettlement of people; lack of job opportunities for locals (mining is capital-intensive and many jobs require skills that locals do not have and would need to be trained for); inward migration of people looking for work, bringing overcrowding and rising crime, including prostitution, to the city; large numbers of dead fish floating belly-up in lakes and streams around the mine. In 2000, a company-contracted truck spilled more than 300 pounds of mercury over 25 miles of road, reportedly poisoning 900 people. In 2004, Newmont sought to expand its operation to a nearby mountain, Cerro Quilish, which is said to have spiritual significance for the indigenous population and supplies Cajamarca with water. In response, more than 10,000 people laid siege to the mine. Police and special forces fired tear gas; someone fired bullets. Newmont gave in and halted the project. By the time I arrived in early 2006, the company had

identified another site nearby, Minas Conga, where it hoped to apply the lessons learned at Yanacocha to better manage its relations with the community. Newmont did develop far more extensive and sophisticated CSR policies and practices over time. Nevertheless, in November 2011, operations at the Conga site, at \$4.8 billion the biggest single investment in Peru's history, had to be suspended when the government imposed a state of emergency, citing public safety concerns raised by massive protests that had become inextricably entwined with national and local political rivalries.²¹

At the time of my visit, Newmont was not alone among mining companies in lacking effective systems to assess its potentially adverse impacts on the environment and community before operations or expansions began; or for engaging stakeholders in ongoing consultations thereafter, addressing grievances about any harm done. In the wake of Cerro Quilish, Yanacocha's general manager told a reporter that he spent 70 to 80 percent of his working hours dealing with social issues—which suggested to me that he, personally, was attempting to be the missing system. During my visits to the mine I saw that Newmont had established water treatment facilities and a lab to sample the outflow, and I was taken to a small and well-stocked fishing pond fed by recycled water. The company also supported the development of local crafts, including textiles and jewelry; helped transport teachers to rural schools; improved some roads; and hooked up a nearby part of the city to its own electrical grid. Its CSR and community relations teams were growing in numbers and expertise. But their approach seemed largely reactive to external pressure and ad hoc in nature. It lacked metrics for measuring the costs of conflicts with the community or the benefits of getting the relationship right. And the company's operations division continued

to dictate time lines based on production and cost targets. It was evident that the company did not enjoy a strong “social license to operate”—broad acceptance of the company’s operations by the community. And still, as if deliberately to reinforce that vulnerability, Roque Benavides, the CEO of Buenaventura, Newmont’s local joint venture partner, famously said in a 2005 television interview: “I hate the term social license. I do not understand what social license means . . . I expect a license from the authorities . . . I don’t expect a license from the whole community.”²²

But the authorities in some respects were part of the problem. Peru had ratified numerous UN human rights treaties, but as in many countries then and now, their relevance for business and human rights was poorly understood let alone acted upon. Moreover, a Maoist insurgency and economic mismanagement had driven out foreign investment in the 1980s, so successor governments felt obliged to extend extremely favorable terms for its return. Corruption and crony capitalism were endemic. The prevailing social structure pitted better-off Peruvians of Spanish descent against the far poorer indigenous populations in mining communities. Effective public sector capacity was lacking: I was told that the entire Cajamarca province had only three environmental inspectors, and they worked out of the Ministry of Mines. By the time of my visit a new regulation had been adopted that returned a share of mining revenues to local communities, but I saw little evidence of it. More than 60 percent of the population lived below the poverty line, infrastructure was lacking, housing dilapidated, and schooling scarce. Local authorities (I met with the mayor) seemed content for the company to be the focus of community pressure for better public services. Indeed, as recently as January 2012 the country’s Prime Minister complained that much of the resources sent to

the Cajamarca region had not been spent on programs benefiting local residents.²³

Other governmental actors were also connected to the operation. The IFC is a coinvestor and made some efforts to improve relations between the community and the mine. Following the mercury spill in 2000, the Office of the Compliance Advisor/Ombudsman (CAO), which is empowered to respond to complaints against IFC projects, offered to commission an independent health study, but it could not be carried out, according to an official report, in part “due to lack of cooperation from government authorities.”²⁴ But CAO did facilitate a five-year process intended “to improve dialogue and resolve issues of concern” between the company and community. At the time of my visit the IFC had just adopted social and environmental performance standards that it would require clients to meet, in part triggered by its experience with projects like Yanacocha, but of course they could not be imposed retroactively. For its part, the U.S. government in the 1990s had been deeply involved in persuading the Peruvian authorities to grant Newmont the majority holding in Yanacocha, from high levels in the State Department to the CIA station chief in Lima. But even today the U.S. has no policy to guide or assist American-based multinationals with managing the environmental and human rights risks of their overseas operations, nor to advise or support local governments in coping with the massive impacts of an operation such as Yanacocha.

Community resistance and protests can arise spontaneously. In Cajamarca they have also had a leader, a former Catholic priest by the name of Marco Arana, known as Father Marco to his supporters and “the red priest” to his adversaries. (He was defrocked in 2010 when he became a candidate for electoral office). Arana runs an NGO called GRUFIDES (Group

for Training and Intervention for Sustainable Development). In a long meeting with him in 2006, I asked Arana how it came to be that blocking access to the mine was such a routine practice in Cajamarca. He responded: “They don’t listen to us when we come with small problems, so we have to create big ones.” It was Arana who negotiated with Newmont to halt their plans to mine the Quilish site after the intense 2004 blockade. He later reported that his movements were being followed and his life threatened, alleging that individuals in Forza, Yanacocha’s security contractor, were involved.²⁵ I was introduced to Arana through Oxfam America, which has a local affiliate in Lima and at that time also provided funding to GRUFIDES, as did a German Catholic development NGO, Misereor. Both organizations have followed UN business and human rights discussions closely, including my mandate. Thus, in addition to providing operating support to community groups, these international NGOs serve as a bridge between the global and local levels: communicating developments in global debates to local communities, and in turn making it possible for local civil society to get its message out and connect with others on the global stage. For instance, in 2005, Oxfam arranged for Arana to attend Newmont’s annual general meeting in Denver, where he attracted the attention of shareholders and the press, and also had a brief exchange with the CEO. Misereor funded the participation of a number of civil society representatives from developing countries in several of my mandate consultations. Through such networks, civil society actors track and seek to influence the political and corporate spheres.

I have entitled chapter 2 “No Silver Bullet.” There is no single or simple way to resolve enormously complex situations such as I found in Cajamarca. Besides, a Peruvian mining operation is not a representative sample of the universe of global busi-

ness and human rights challenges that my mandate was meant to address. However, Yanacocha did bring into relief many of the elements that a systematic global effort to achieve stronger protection against corporate-related human rights harm would have to address: specifying the respective roles and responsibilities of governments and business enterprises, and how those responsibilities should be discharged; the need for greater access to effective remedy for those whose human rights are harmed by corporate conduct; and providing clear benchmarks by means of which other social actors—for example, civil society, workers’ organizations, investors, and consumers—can hold both to account. Contrary to the preferences expressed by international business at the outset of my mandate, such an effort would require the development of an authoritative international framework that could serve as a common platform for the different actors. But contrary to the aspirations expressed by the major international human rights organizations, this could not plausibly be achieved through some single overarching international legal instrument.

IV. PRINCIPLED PRAGMATISM

The successful expansion of the international human rights regime to encompass multinational corporations must activate and mobilize all of the rationales and organizational means that can affect corporate conduct. Thus, I made it clear from the outset that I would follow a course I called principled pragmatism: “an unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to business, coupled with a pragmatic attachment to what works best in creating change where it matters most—in the daily lives of

people.”²⁶ Columbia University historian Samuel Moyn’s keen insight, that “human rights are not so much an inheritance to preserve as an invention to remake,” is particularly appropriate in the business and human rights context.²⁷ I envisioned a model of widely distributed efforts and cumulative change. But for such efforts to cohere and become mutually reinforcing, they require an authoritative focal point that the relevant actors can rally around. Providing that focal point became my strategic aim.

Developing the Guiding Principles that were the mandate’s final product itself was subject to several guiding principles. I briefly flag them here; they are elaborated throughout subsequent chapters. The most fundamental was to recognize and build on a core feature of the governance of multinational corporations that we saw very clearly in the Cajamarca case. Three distinct governance systems affect their conduct in relation to human rights: the system of public law and policy; a civil governance system involving external stakeholders that are affected by or otherwise have an interest in multinationals; and corporate governance, which internalizes elements of the other two. In the academic literature this institutional feature of the global economy is described as polycentric governance.²⁸ Each governance system constitutes a complex cluster of its own. The system of public law and policy, stipulating formal rules for corporate conduct, operates at two levels: the individual home and host countries of multinationals, and the international sphere wherein states act collectively and international institutions operate. The system of civil governance, expressing social expectations of corporate conduct, operates locally in host and home countries, and it is increasingly connected transnationally. Corporate governance also comprises two dimensions. One reflects the integrated strategic vision, institutional design, and management systems that these companies

require to function as globally operating businesses, including enterprise-wide risk management. The other reflects the separate legal personality of corporate parents and their affiliates, by which they partition their assets and limit their liabilities. In order to achieve better protection for individuals and communities against corporate-related human rights harm, each of these governance systems needs to be mobilized and pull in compatible directions.

To foster that mobilization the Guiding Principles draw on the different discourses that reflect the respective social roles these governance systems play in regulating corporate conduct. For states the focus is on the legal obligations they have under the international human rights regime as well as policy rationales that are consistent with, and supportive of, those obligations. For businesses, beyond compliance with legal obligations that may vary substantially across countries in their applicability or enforcement, the framing centers on how to manage the risk of involvement in adverse human rights impacts through effective human rights due diligence and alternative dispute resolution mechanisms. For people whose human rights are harmed by corporate conduct and civil society generally, the Guiding Principles constitute a basis of further empowerment through provisions for engagement with business, and by providing authoritative benchmarks by which to judge the conduct of governments and businesses—and also by which governments and business can judge one another. Within the human rights community, this unorthodox formulation initially was the most controversial conceptual move I made because it was not considered to be fully “rights-based.” But for reasons that will become clearer as we go along, more than any other step, it accounted for the Guiding Principles’ success.

Moreover, human rights advocacy groups and lawyers

have focused their efforts on legal means to hold companies to account for human rights abuses after they have been committed, in the hope and expectation that this would serve as a deterrent to future violations. The Guiding Principles also make recommendations for strengthening judicial remedy. But I sought equally to expand the preventative side of the equation directly: identifying and developing enabling rules for states and companies alike to avoid or at least reduce the incidence of corporate-related human rights abuses. I did so for two reasons. For one, as Father Arana noted and my subsequent research confirmed, many instances of what turned out to be major corporate-related human rights crises began as lesser grievances that companies ignored and which then escalated. Better to catch those early. For another, preventative measures can be implemented more readily—in terms of time, resource requirements, and overcoming political resistance—than judicial systems can be built or reformed.

Finally, I wanted at all cost to avoid having my mandate become entrapped in or sidetracked by lengthy intergovernmental negotiations over a legal text, which I judged would be inconclusive at best and possibly even counterproductive. It was too important to get the parameters and perimeters of business and human rights locked down in authoritative policy terms, which could be acted on immediately and on which future progress could be built. Therefore, I took great care to base the mandatory elements of the Guiding Principles on the implications of existing legal standards for states and businesses; to supplement those with policy rationales intended to speak to the interests and values of both sets of actors; and in addition to Human Rights Council endorsement, I also sought to have core elements of the Guiding Principles adopted as policy requirements by other entities with the authority and responsibility

to do that. In short, I aimed for a formula that was politically authoritative, not a legally binding instrument. In a 2007 law journal article summarizing mandate work to date, I stated my expectation that legal developments would follow from such an effort, but as “precision tools” on specific matters that already enjoyed a degree of international consensus.²⁹ As we shall see, this has begun to happen.

V. THE UN MANDATE

One additional set of introductory remarks is necessary to explain the institutional and procedural conditions under which my mandate operated. To put it very simply: I had no power but persuasion, and virtually no material resources to conduct the mandate other than those I was able to raise myself. To borrow my Kennedy School colleague Joseph Nye’s celebrated term, this was “soft power” in its softest form.³⁰

“Special Procedures” is the name given to independent experts appointed by the UN Human Rights Council to examine either specific country situations or thematic issues. My mandate fell into the latter category. According to the official description, thematic mandates address “major phenomena of human rights violations worldwide.” It continues: “The Mandate-holders of the special procedures serve in their personal capacity, and do not receive salaries or any other financial compensation for their work.” What it does not say is that, beyond limited staff support and minimal allowances for travel, these mandates are provided with no resources for their implementation. I began with the part-time assistance of a professional in the Office of the High Commissioner for Human Rights and three round-trip tickets between Boston,

my home base, and Geneva, where the Human Rights Council meets and the High Commissioner is located. I then assembled a team of outstanding professionals who conducted research and managed the process—lawyers, policy analysts, an M.B.A., and two diplomats on leave from their foreign ministries. We worked with networks of volunteers in numerous countries, benefited from pro bono research provided by more than two dozen law firms, and convened extensive consultations around the world. I viewed the mandate not merely as a research and drafting exercise, but as a global campaign of sorts, to reframe a stalemated policy debate and establish global standards and authoritative policy guidance. Funding for these activities came in the form of voluntary contributions from governments structured as research grants to Harvard’s Kennedy School of Government, which administered the entire project. Chapter 4 explains how I deployed and amplified this soft-power resource base to achieve the mandate’s aim.

Such mandates are created by a Human Rights Council resolution (previously by the Commission). The Council comprises forty-seven UN member states elected on a regional basis for three-year terms; all other states may participate fully as observers but cannot vote. Resolutions require a lead sponsor from among Council members. The United Kingdom led the creation of the initial mandate, working with four other core sponsors: Argentina, India, Nigeria, and the Russian Federation. This cross-regional grouping—one core sponsor from each of the five regional groups (African, Asian, Eastern European, Latin American and Caribbean, Western European and “Others”)—reflected the importance of working across north-south and east-west political divides, which is essential to achieving progress in this field. Norway took over the lead in 2006, when the Council replaced the Commission.

My formal role was to submit annual reports to the Council for its consideration, and to the UN General Assembly for informational purposes. Reports are submitted in written form and then presented in a brief oral statement to the respective bodies. This is followed by an “interactive dialogue” in which delegations make statements and ask questions, and the mandate-holder is given a brief opportunity to respond. At Human Rights Council sessions, accredited nonstate observers, including international organizations, NGOs, and business associations, also have the opportunity to speak. The Council’s formal response to recommendations proposed by a mandate-holder also comes in the form of a resolution, negotiated by delegations.

My mandate evolved in three phases. Neither of the latter two was foreordained; each required specific Council renewal. The first, from 2005 to 2007, was the “identifying and clarifying” phase. The Council commended that work for providing a better understanding of the issues at stake and invited me to take another year to develop recommendations on how best to advance the agenda. I returned in 2008 with only one recommendation: that the Council respond favorably to the Protect, Respect and Remedy Framework I elaborated in that year’s report, on the premise that the most urgent need was not for a shopping list of items but for a foundation on which thinking and action could build. The Council unanimously “welcomed” the Framework and extended my mandate another three years, asking me to “operationalize” it: to provide concrete and practical guidance for its implementation. That is how I came to present the Guiding Principles in 2011—comprising thirty-one principles, each with a Commentary elaborating its meaning and implications. The Council endorsed the Guiding Principles, again unanimously. At that point I had reached the six-year maximum term limit for any

mandate-holder, and an expert working group was appointed to oversee the next phase.

The reader may be forgiven for thinking that this is an unusual way to advance the global protection of human rights. But that is how governments in their wisdom have structured the process. And it can have advantages. When I formally presented the Guiding Principles to the Human Rights Council and asked for its endorsement, the Algerian ambassador took the floor to say that governments could not endorse a normative text that they did not negotiate themselves. Instead, he proposed submitting the Guiding Principles to an intergovernmental process for “further examination and enrichment”—diplomat-speak for killing the initiative. I responded, with uncharacteristic passion, that I was old enough to have witnessed the collapse of repeated efforts by governments to negotiate UN codes of conduct for multinational corporations going back to the 1970s, some of which I knew the ambassador had been involved in earlier in his career. All had failed, I reminded the Council, because governments could not reach consensus. Here, I said, you have an instrument that you could never have negotiated yourselves, given the diverse and conflicting interests at stake. All stakeholder groups support it. So seize the opportunity, I urged. Endorse it, and then move on. They did.

Subsequent chapters elaborate on how and why this happened, beginning with a more detailed look at specific instances and overall patterns of business and human rights challenges that put this issue onto the international agenda in the first place.

I end this Introduction on a confessional note. The most difficult puzzle I faced at the outset of this project was existential. My task was to identify ways for getting business enterprises to address their adverse human rights impacts, especially in countries that lack the capacity or sometimes the will to stand up

to large multinational firms. But who was I to be? Was I advocate or diplomat? The independent scholar I had been before or a mediator between companies and people with grievances against them? Who were my allies, and who might the adversaries be? By what means could I overcome the predictable obstacles and perhaps even turn one or two into an advantage? There was no road map or user's manual to guide me.

One of the early consultations I convened brought together leaders of indigenous peoples groups from across Latin America. I asked them to brief me about the issues that mattered most to them. Then I shared my tentative plans for how I intended to pursue my assignment. At the end one of the participants, dressed in traditional attire, pulled me aside. She thanked me for bringing the group together and listening to their concerns. Then she added: "But you speak too much from your head, and not enough from your heart. If you want to succeed, you have to let your heart speak." It took me a few seconds to come up with a response. But when I did, my existential crisis was resolved. I said words to this effect: "I will let my heart drive my commitment to human rights. But I'll need my head to steer the heart through the very difficult global terrain on which we are traveling." That is also the spirit in which this book is written.