Ultimately, the challenge of business and human rights involves nothing less than the workings of the global political economy together with the structure of the world political and legal orders. That the UN would establish a single “Special Procedure” to address these issues indicates how underdeveloped this area was, intellectually and institutionally. As I set out on my journey, I recalled the advice the taciturn highlander Scot was said to have given when asked for directions by a hiker from the city: “I wouldn’t start from here if I were you.”

Chapter Two

NO SILVER BULLET

A knowledgeable observer at the 2005 annual conference of Business for Social Responsibility summed up the impasse in which I seemed trapped at the start of my mandate: “On the one hand, you have NGOs with ambitious agendas for a ‘treaty’ on corporate responsibility and human rights. On the other hand, you have companies saying ‘no, anything but that!’ Cooler heads are not prevailing and in fact are hard to find at all.” This debate had raged on since 2003, when an expert subsidiary body of the UN Commission on Human Rights presented a treaty-like text it had drafted, called the “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.” As noted in the Introduction, the Commission, the intergovernmental parent body, declined to act on the proposed Norms and established my mandate instead.

The same impasse dominated the first consultation I convened later in 2005, in Geneva, focused on human rights challenges in the extractive sector. The refrain from the two sets of protagonists was that I must/must not support the Norms; and that I must/must not support voluntary initiatives. Business often resists binding regulations, and this particular instrument
was seen to transfer to companies responsibilities for human rights that business believed belonged to governments. Many advocacy groups discount voluntary initiatives because they believe they provide little more than whitewash for companies—or bluewash for those who want to work the UN color into the criticism—and some hold that they divert attention from the need for legal accountability. The only questions anyone wanted me to answer at the consultation were: Which way do I lean? Which side will I end up supporting? I responded that I intended to conduct an evidence-based mandate, and that I would subject the alternatives to as rigorous an assessment as time and circumstances permitted. After doing so, I found both positions wanting.

These debates still provide an invaluable point of entry to understanding the core conceptual, policy, and legal issues involved in adapting the international human rights regime to provide more effective protection against corporate-related human rights harm. Therefore, I draw on them to frame my own approach to this challenge. For context, I begin by describing briefly the current structure of international law as it concerns business and human rights. Next, I summarize the analysis of the Norms I undertook at the outset of my mandate, and explain why I rejected the idea of building on that particular instrument. Then I address why I decided against devoting the mandate to advocating my own version of an overarching business and human rights treaty. Next, I assess both the achievements but also the limits of voluntary initiatives in business and human rights. Finally, I draw key lessons from the analysis that became building blocks for the more heterodox approach I developed.

I. THE CURRENT STRUCTURE

International law does not ignore the fact that multinational corporations and other business enterprises abuse human rights. But with few exceptions, it does not impose duties directly on them to refrain from such abuses, nor does it currently possess the means that could enforce such provisions. Instead, international law generally imposes duties on states to ensure that nonstate actors within their jurisdiction, including companies, do not abuse recognized rights by means of appropriate policies, legislation, regulations, and adjudication. This structure is reflected in United Nations declarations, human rights treaties, and in the commentaries of the treaty bodies charged with providing authoritative interpretations. The one partial exception concerns the most egregious conduct, including involvement in genocide, war crimes, and some crimes against humanity, where customary international law standards may apply directly to corporate entities under certain circumstances, though enforcement occurs through domestic courts. A brief summary follows.

The Universal Declaration

The Universal Declaration of Human Rights (UDHR) occupies a unique place in the international normative order. Its preamble proclaims that “every individual and every organ of society . . . shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance.” In Columbia Law School
Professor Louis Henkin's oft-cited words: "Every individual includes juridical persons. Every individual and every organ of society excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all." Henkin surely is correct that the Declaration's aspirations and moral claims are addressed, and apply, to all humanity—and as we shall see below, many companies themselves invoke it in their own human rights policies. But that does not equate to legally binding effect.

As a Declaration, the UDHR was not intended to be legally binding. Its drafters expected that legal duties subsequently would be elaborated in treaties, as the two UN Covenants—on Civil and Political Rights (ICCPR), and on Economic, Social and Cultural Rights (ICESCR)—ultimately did. Whatever UDHR provisions may be said to have entered customary international law, they would not include the call in its preamble to "every organ of society" because preambles, even to binding international instruments, are not themselves legally binding.

The UN Treaties

The early generation of UN human rights treaties, such as the International Convention on the Elimination of All Forms of Racial Discrimination and the two Covenants, do not specifically address state duties regarding business. They impose generalized obligations on states parties to ensure the enjoyment of rights and prevent nonstate abuse. For example, the convention on racial discrimination requires each state party to prohibit such discrimination by "any persons, group or organization."

Some treaties recognize rights that are particularly relevant in business contexts, including rights related to employment, health, and indigenous communities, but the correlative duties invariably are assigned to states.

Beginning with the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), adopted in 1979, UN human rights treaties began to address business more directly. CEDAW, for instance, requires states parties to take all appropriate measures to eliminate discrimination against women by, among other entities, any "enterprise" and, in even greater detail, including in the context of "bank loans, mortgages and other forms of financial credit." But the duty to ensure that these rights are enjoyed is assigned to the state. The treaties generally give states discretion regarding the modalities for regulating and adjudicating nonstate abuses, but emphasize legislation and judicial remedies.

Because the treaties say that states have a duty to "ensure the enjoyment" of rights, some commentators have argued that this implies a direct legal obligation for all social actors, including corporations, to respect those rights in the first place. How can this claim be tested? One means is by examining the treaty bodies' commentaries and concluding observations—which I did for each treaty body, sampling them over a ten-year period. The claim is not borne out. A General Comment on the right to work by the treaty body monitoring the ICESCR is typical: it recognizes that various private actors, including multinational enterprises, "have a particular role to play in job creation, hiring policies and non-discriminatory access to work." But it then goes on to say that business enterprises are "not bound" by the Covenant. Similarly, the committee on civil and political rights has said that the treaty obligations "do not . . . have direct hori-
zontal effect as a matter of international law—that is, they take effect between nonstate actors only under domestic law.6

**International Labor Conventions**

On purely logical grounds one might expect that direct corporate responsibilities would feature more strongly under the International Labour Organization's conventions. The ILO is a tripartite organization, comprising representatives of governments, business associations, and workers organizations. The conventions address all types of employers, including corporations; business enterprises generally acknowledge greater responsibility for their employees than for other stakeholders; and the ILO's supervisory mechanism and complaints procedure specify roles for employer organizations and trade unions. But logic alone does not make law, and corporations' legal responsibilities under the ILO conventions remain indirect, while states remain the direct duty bearer.

**Egregious Conduct**

The United Nations General Assembly has recognized the category of “gross” violations of international human rights law and “serious” violations of international humanitarian law, also known as the law of armed conflict.7 The acts in question are commonly described as “egregious.” While no all-inclusive definition exists, it is generally agreed that they include genocide, war crimes, and such crimes against humanity as torture, extrajudicial killings, forced disappearances, enslavement, slavery-like practices, and apartheid. Few legitimate businesses may ever commit such acts, but there is greater risk of their facing allegations of complicity—aiding and abetting—in their commission by, for example, security forces protecting company assets and facilities, as in the case of Shell and the Nigerian military or Chiquita Brands and the paramilitary in Colombia. The enforcement of the duty of companies not to commit such acts is left to national courts, but in some instances they have drawn on international standards in doing so.

The main legal mechanism under which this incorporation has occurred is the already-discussed U.S. Alien Tort Statute (ATS), under which foreign plaintiffs have brought civil claims (monetary compensation for harms) against companies with a business presence in the United States for human rights violations abroad. Under the statute, U.S. courts have looked to international standards—both treaty-based and customary law standards as developed by the international criminal tribunals for the former Yugoslavia and Rwanda, for example—to inform their own deliberation whether “the law of nations” was breached. The presumption has been that, provided they meet certain criteria, such standards developed for natural persons also apply to legal persons. But in September 2010, the U.S. 2nd Circuit Court of Appeals, the first ever in modern times to uphold a ruling permitting a case to be brought against an individual under the ATS, decided that the statute did not apply to corporations as legal persons.8 Subsequent rulings by other circuit courts in different cases contradicted this view. The question is currently under review by the Supreme Court, and I take it up in chapter 5.

A second route through which international standards could enter domestic legal systems and be applied to corporate entities involves the International Criminal Court's Rome Statute. The ICC itself does not have jurisdiction over business entities—the
issue was discussed in the drafting stage, but agreement could not be reached because a number of countries do not recognize criminal liability of corporations. Nevertheless, where a country has ratified the statute and incorporated its standards for individual criminal liability into its domestic criminal law, and where the national legal system does provide for criminal punishment of companies, it is possible that the standards for natural persons may get extended to corporate entities as legal persons. No actual case has yet been brought against a company under this scenario, but there have been reports of preliminary investigations by authorities in Australia and Canada.

**Extraterritoriality**

Through combinations of unilateral and multilateral measures, the extension of national jurisdiction abroad has evolved in a number of international policy domains—antiterrorism, money laundering, anticorruption, aspects of environmental protection, and child sex tourism, for example. But with the partial exception of the types of egregious conduct discussed above, it remains limited in other areas of human rights.

The various UN human rights treaties differ in their possible extraterritorial implications. The Genocide Convention, for example, includes no jurisdictional limit, therefore in principle none apply. In contrast, state duties to respect and ensure the enjoyment of rights under the Covenant on Civil and Political Rights are explicitly limited to individuals “within its territory and subject to its jurisdiction.” Finally, the ICESCR includes a provision that each state party “take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means”—which governments generally view as a call to provide financial and other forms of assistance to developing countries.

The UN treaty bodies traditionally paid relatively little attention to business-related issues. Their general guidance suggested that the treaties do not require states to exercise extraterritorial jurisdiction over business abuse, but that they are not generally prohibited from doing so either, provided there is a recognized jurisdictional basis: for example, where the actor or victim is a national, where the acts have substantial adverse effects on the state, or where specific international crimes are involved. More recently, the committee monitoring the economic, social, and cultural rights covenant began to recommend that states parties “should” take steps to “prevent their own citizens and companies” from violating rights in other countries, particularly in relation to the rights to food, water, and health. For the most part, states do not consider the treaty bodies to constitute a source of law. But the committees’ increased attention to the question of extraterritorial obligations signals a growing concern with the inadequacy of the status quo.

**Soft Law**

States have addressed the human rights responsibilities of business enterprises most directly in soft-law instruments. Soft law is “soft” in the sense that it does not by itself create legally binding obligations. It derives its normative force through recognition of social expectations by states and other key actors. States may turn to soft law for several reasons: to chart possible future
directions for, and fill gaps in, the international legal order when they are not yet able or willing to take firmer measures; where they conclude that legally binding mechanisms are not the best tool to address a particular issue; or to avoid having more binding measures gain political momentum.

Apart from the foundational Universal Declaration, the most prominent soft-law instruments in the business and human rights space originate with the International Labour Organization (ILO) and the Organization for Economic Cooperation and Development (OECD). The ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, first adopted in 1977, was endorsed by states as well as global employers' and workers’ organizations, through the ILO's tripartite decision-making system. It proclaims that all parties, including multinational enterprises, “should respect the Universal Declaration of Human Rights and the corresponding international Covenants.” The ILO Declaration on Fundamental Principles and Rights at Work was adopted by the International Labour Conference (the ILO's tripartite assembly) in 1998. It commits its member states to respect and promote principles and rights in four categories, whether or not they have ratified the relevant ILO conventions: freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced or compulsory labor, the abolition of child labor, and the elimination of discrimination in respect to employment and occupation.

The OECD Guidelines for Multinational Enterprises were first adopted in 1976 and revised in 2000 (their 2011 update is discussed in chapters 3 and 4). The 2000 text recommended as a general principle that firms “respect the human rights of those affected by their activities consistent with the host government’s obligations and commitments,” which ruled out international standards the host state did not recognize. The Guidelines also require the adhering states to establish a government office called the National Contact Point to which anyone can bring a “specific instance” (i.e., complaint) of noncompliance by a multinational corporation domiciled or operating in an adhering country, although negative findings have no automatic official consequences.

To sum up, the structure of current international law is such that human rights duties for the most part are imposed on states, not on companies directly. Of course, the human rights treaties apply only to states that have ratified them. The most consequential hard-law development in recent years has been the gradual extension of potential liability to companies for egregious acts that may amount to international crimes, under domestic law but reflecting international standards. But this trend is largely an unanticipated by-product of states’ strengthening the legal regime for natural persons, not legal persons, and its actual operation reflects wide variations in national practice. There have also been a handful of cases in the United Kingdom, The Netherlands, and Canada in which charges have been brought against a parent company under national law for its contribution to or negligence in permitting harmful acts by overseas affiliates, sometimes described as “direct foreign liability” cases. But overall, in terms of the law, a large governance gap exists in business and human rights. The central question is how most effectively to narrow or bridge it.

II. THE NORMS

The Norms were the first international effort to develop legally binding international human rights standards for companies. The Commission on Human Rights had not requested the
Sub-Commission (a group of experts nominated by governments but acting in their personal capacity) to produce a draft, and only the Commission had the authority to adopt the product, which it declined to do.

The case for the Norms went like this. The Universal Declaration is addressed to all organs of society. Multinational corporations, being among those organs, have greater power than many states to affect the realization of rights, and “with power should come responsibility.” Therefore, these corporations must bear responsibility for the human rights affected by business activities. And because some states are unwilling or unable to make them do so under domestic law, international law must impose uniform standards not only on states, as in the existing human rights regime, but on corporations directly. To determine violations, the Norms recommended that companies be monitored by the UN human rights machinery even before further legalization and, where abuses were found, that reparations be made.

It would be surprising if governments and businesses did not react negatively to the Norms, based at least in part on their perceived interests. Those interests were not my primary concern, however. If the proposal was sound, I was prepared to back it. My assessment of the Norms focused on five questions: Which human rights did the Norms include? What human rights duties did they attribute to business enterprises? On what basis were they attributed? With what consequences? And with what legal justification? I found the effort flawed on every count.

The Norms enumerated rights that their authors believed to be particularly relevant for business, including nondiscrimination, the security of the person, labor standards, and indigenous peoples’ rights. But they also would have imposed on companies responsibilities for rights that states had not yet recognized at the global level, including a “living wage,” consumer protection, and the precautionary principle for environmental impacts. Moreover, the text stated that not all internationally recognized rights pertained to business, but it provided no principled basis for determining what was in and what was out. In response to criticism that the list was overly inclusive, some Norms’ advocates suggested a shorter list of “core” rights said to enjoy the most widespread support and which business could easily grasp. But that idea triggered the riposte that the concept of core rights is “a very significant departure from the insistence within the international human rights regime on the equal importance of all human rights.” In any event, we saw in chapter 1 that business can affect virtually the entire spectrum of internationally recognized rights, therefore any delimited list of rights in what purports to be a comprehensive and foundational legal framework will provide inadequate guidance in practice.

A far more serious problem concerned the Norms’ proposed formula for attributing duties to corporations. After acknowledging that states are the primary duty-bearers under international human rights law, the General Obligations article added: “Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect” nationally and internationally recognized human rights. But these are exactly the same duties states have. The distinction between primary and secondary duty-holders was not defined. And as a basis for attributing legal duties to companies, “spheres of influence” proved problematic.

The UN Global Compact had introduced the concept of “corporate spheres of influence” as a spatial metaphor to help companies think about their effects on human rights beyond the workplace and to identify opportunities for them to support
human rights, which is the Compact's objective. The Office of
the High Commissioner for Human Rights subsequently pub-
lished a paper graphically depicting the “sphere” as a set of con-
centric circles: company operations at the core, moving outward
to suppliers, the community, and society as a whole—premised
on the logic that as a company's influence declines from one cir-
cle to the next, so too, by implication, would its responsibility.16

In a legal context, there are three problems with the
sphere-of-influence concept. First, the emphasis on proximity
can be seriously misleading. Of course companies should be con-
cerned with their impact on workers and surrounding commu-
nities. But their activities can equally affect the rights of people
far away from the source—as, for example, violations of the right
to privacy by Internet service providers can endanger dispersed
customers. Interestingly, the Norms did not specifically enumer-
ate this right; the Yahoo case, described in chapter 1, had not yet
occurred.

Second, attributing responsibility for human rights to compa-

nies based on their influence requires the assumption, in moral
philosophy terms, that “can implies ought.” But companies should
not be held responsible for the human rights impacts of every
entity in society over which they have influence because this
would include sources of harm to which they are entirely unre-
lated. At the same time, such an attribution could absolve com-
panies from responsibility for adverse impacts when they could
show they lacked influence even if they were connected to the
harm. It is one thing to ask companies to support human rights
voluntarily where they have influence, as the Global Compact
does; but attributing legal obligations to them on that basis for
meeting the full range of human rights duties is quite another.

Third, “influence” is a relational term and thus is subject to
strategic gaming. By this I mean that a government can delib-
erately fail to perform its duties—as we saw in the discussions
of Cajamarca and Nigeria—in the hope that the company will
yield to social pressures to promote or fulfill certain rights. For
its part, a company can minimize its apparent influence by cre-
ating any number of hollow subsidiary entities, and thereby
seek to diminish or duck its responsibilities.

In short, the boundaries within which corporations' duties
would take effect under the Norms were indeterminate, and the
distinction between primary and secondary duties undefi-
dined. With scope and threshold conditions both underspeci-
fied, it seemed highly likely that corporate duties in practice
would have come to hinge on the respective capacities of states
and corporations in particular situations—so that where a state
was unable or unwilling to do its job, the pressure would be on
companies to step in. But with what consequences?

Philip Alston, a leading academic authority on human rights
law and former chair of the UN Committee on Economic,
Social and Cultural Rights, identifies one resulting dilemma:

If the only difference is that governments have a comprehen-
sive set of obligations, while those of corporations are limited to
their “spheres of influence” . . . how are the latter [obligations]
to be delineated? Does Shell’s sphere of influence in the Niger
Delta not cover everything ranging from the right to health,
through the right to free speech, to the rights to physical integ-

rity and due process?17

Alston raises the concern that this formula could undermine
corporate autonomy, risk-taking, and entrepreneurship, and
asks, “What are the consequences of saddling [corporations]
with all of the constraints, restrictions, and even positive obli-
gations which apply to governments?”18 Corporations may be
“organs of society,” in short, but they are specialized organs, established to perform specialized economic functions, and the obligations imposed on them must recognize that fact.

The impact the Norms would have had on the roles and obligations of governments is equally troubling. The international human rights regime recognizes the legitimate need of governments, within the constraint of “progressive realization,” to exercise discretion for making trade-offs and balancing decisions, and especially for determining how best to “secure the fulfillment” of, precisely those economic, social, and cultural rights on which corporations have the greatest impact. Imposing the entire range of human rights duties on multinational corporations directly under international law, including fulfilling rights, by definition reduces individual governments’ discretion in making those balancing decisions. The Norms attempted to square the circle by requiring companies also to follow national laws and policy priorities, but this merely added a layer of conflicting prescriptions for firms to follow. And it was contradicted outright by yet another requirement that firms adopt “the most protective standards” wherever those may be found. Furthermore, where governance is weak to begin with, shifting obligations onto corporations to protect and even fulfill the broad spectrum of human rights may undermine domestic political incentives to make governments more responsive and responsible to their own citizenry, which surely is the most effective way to realize human rights.

Finally, the legal claims and justifications made for the Norms were puzzling to many observers, including mainstream international lawyers, further fueling controversy. Their chief author described the Norms as “a restatement of international legal principles applicable to companies.” Yet they would have imposed the full range of human rights duties on companies, including fulfilling rights, and done so directly under international law. Moreover, they would have required a significant restructuring of domestic corporate law regimes, in effect replacing the “shareholder” model of fiduciary duties that is dominant in many countries in favor of a broad “stakeholder” model. Whatever the intrinsic merits of those moves, they would have amounted to fundamental revolutions in existing law, not a mere restatement. As law professor John Knox later wrote, “the proponents of the Norms sometimes seemed oblivious to the size of the revolution in international law that they were seeking to realize.”

Similarly, the Norms were described as the first such initiative at the international level that was “non-voluntary” in nature, and thus in some sense automatically binding on companies. This pleased human rights NGOs but surprised governments and business because no intergovernmental body had approved them, nor had any government ratified them. It turned out subsequently that the authors merely meant that if the Norms ever took effect through treaty law or customary international law, then companies would be bound by them even if they didn’t sign up to them, as they would to a voluntary initiative. The UN Human Rights Commission resolved any possible confusion by stating in a formal resolution that the Norms had no legal standing.

Thus, even leaving aside the contentious proposal for some unknown and unspecified entity to ensure reparation to victims worldwide, and apart from the near-universal political opposition beyond NGO circles, I found the Norms to be deeply flawed. In December 2005, I signaled these reservations in a London speech and in a private meeting with human rights NGOs. Not long thereafter, having been pressured previously that I must “build on” the Norms, I received this email message
began to take seriously my claim that I would take a rigorous evidence-based approach and search for practical solutions, not be driven by doctrinal preferences. This opened the door to constructive engagement with the business community—individual companies as well as business associations. At the same time, a number of governments began to respond favorably to my requests for voluntarily funding the mandate at a level that would enable me to recruit a team of professionals, conduct the necessary research, and consult widely with affected individuals and communities, other stakeholder groups and experts.

With the Norms issue settled, the attention of my interlocutors turned to the more general question of whether I would advocate “mandatory” or “voluntary” measures. This put the cart before the horse, I explained; let’s first focus on the substance of what should be done and then address form. Nevertheless, as part of the initial mapping phase of my mandate, I turned next to an assessment of the relative feasibility and utility of my proposing a comprehensive treaty negotiation or promoting voluntary initiatives.

III. THE TREATY ROUTE

A perfectly understandable reaction to the emblematic cases described in chapter 1 is to say there ought to be a law, one international law, that binds all business enterprises everywhere under a common set of standards protecting all human rights. International standards become legally binding for adhering states when the requisite number of countries have ratified a treaty or when they become part of customary international law—established patterns of state practice based on a sense of legal obligation, not merely self-interest or etiquette. Because
custom cannot be created at will, seeking to establish binding standards for business and human rights means launching an international treaty negotiation—whether the treaty seeks to impose obligations on states or on companies directly. Advancing this paradigm is a core aim of the UN human rights system: identifying the need for new standards, drafting instruments, creating procedures intended to secure their adoption, and then providing commentary on and recommendations for state compliance. It is also a core objective of many international human rights organizations, representing both their moral and institutional commitments.

But advocacy groups made no specific proposals for an international legal instrument after the Norms’ demise. Amnesty’s new position, for example, was conveyed to me in a letter from Irene Khan, then AI’s Secretary-General. It called generically for “the creation of international legal standards and of corporate legal accountability for human rights.” Should this include some internationally recognized rights, or all? If the latter, was it plausible that uniform global legal liability standards could be created for corporate violations of every single internationally recognized human right, where the conduct in question can range from failure to pay overtime to complicity in extrajudicial killings? Or should some be prioritized? Would corporate accountability be imposed under national law or directly under international law? If the latter, would this require the creation of an international tribunal for corporations, or would it be enforced by states, not all of which have ratified all human rights treaties addressing state abuses of those same rights? Advocacy groups did not address these and related foundational questions, neither then nor throughout the rest of my mandate. I felt obliged to do so.

After assessing the prospects, I judged that the foundations for any treaty negotiations simply did not exist at that time, least of all for some comprehensive legal framework. Moreover, not only would such an effort achieve little for current victims of corporate-related human rights harm, but forcing the issue of international legalisation prematurely would set the agenda back rather than advance it. Finally, even if the highly improbable were to occur and a treaty was adopted, it would not deliver all that its advocates hoped for and expected, suggesting the need for complementary approaches from the start. I explain my reasoning in the paragraphs that follow.

**Foundations**

Human rights treaties can take a long time to negotiate and enter into force: generally, the broader their scope and the more controversial the subject, the longer the duration. This is true even of soft-law instruments focused on relatively circumscribed subjects such as the Declaration on the Rights of Indigenous Peoples which, as already noted, took twenty-six years to negotiate and yet includes only one of the scores of issues that a comprehensive business and human rights treaty would need to encompass. Thus, even if treaty negotiations were to have begun the next day, more immediate solutions would be needed to deal with existing challenges. Louise Arbour, the then UN High Commissioner for Human Rights, put it succinctly in 2008: “It would be frankly very ambitious to promote only binding norms considering how long this would take and how much damage [to victims] could be done in the meantime.”

But why not start such a treaty-making process while simultaneously taking shorter-term practical steps? Four impediments stood out when I considered this question.
First, the issue of business and human rights is still a relatively new concern for governments, and there was little agreement among them beyond “we need to consider doing something about the problem.” As a case in point, governments initially limited my mandate to two years, as opposed to the normal three. And initially they gave me the task merely of “identifying” and “clarifying” things: applicable international standards, best practices, and the meaning of key concepts such as corporate complicity in human rights abuses committed by others and corporate spheres of influence. Not much of a shared knowledge base existed, let alone consensus on desirable international responses. In the past, political coalitions might have formed around the north-south or east-west axis, although this had never yielded significant concrete results in relation to multinational corporations. But even that possibility no longer existed, thanks to the rapidly rising number of multinationals based in emerging market countries, such as Brazil, China, India, Indonesia, Malaysia, Russia, and South Africa, which are at least as protective of “their” multinationals as Western home states are of theirs. Greater shared understanding and consensus needed to be built from the bottom up.

Second, prevailing institutional arrangements and practices within governments concerning business and human rights were also a factor militating against the initiation of a business and human rights treaty process. My research, including a questionnaire sent to all UN member states, indicated that the responsibility for this issue typically is lodged in small, mid-level units, usually in foreign offices, occasionally in economics ministries. In contrast, the numerous government entities whose job it is to promote and protect business interests invariably are larger and have considerably greater institutional clout. Typically, the two exist in isolation from one another. Business and human rights issues have risen to the top of a government’s agenda only momentarily in the wake of some major event or crisis. For example, South Africa was shocked to learn that it had signed bilateral investment treaties that enabled mining interests from Italy and Luxembourg to sue the government for monetary damages under binding international arbitration because of certain provisions in the Black Economic Empowerment Act, perhaps the single most significant piece of human rights legislation adopted by the postapartheid government. An official inquiry into how the government got itself into that situation concluded that “the Executive had not been fully apprised” of the possibility—the connection between investment treaties and human rights either was not considered or was ignored. In light of such realities it seemed highly likely that a business-and-human-rights-treaty negotiating process would lock in commercial interests at the expense of human rights. Ways needed to be found to address what I called “horizontal policy incoherence” within governments around business and human rights.

Third, where states are reluctant to do much in the first place, they tend to invoke ongoing treaty negotiations as a pretext for not taking other significant steps, including changing national laws under pressure from domestic groups—arguing that they would not want to preempt the ultimate treaty outcome. Moreover, while negotiations are ongoing, proposals for other steps tend to be viewed through the lens of what they ultimately might mean for treaty-negotiating tactics and commitments, thus reducing the scope for experimentation and innovation—which is precisely what this policy domain demands. The counterargument is sometimes made that bargaining “in the shadow of the law” can yield productive outcomes, but that only works where there is a realistic prospect of meaningful legal measures being adopted.
Fourth, even some of the most progressive countries on the subject of human rights, such as Sweden, expressed concern about imposing the broad range of international human rights obligations on companies directly under international law, fearing that this would diminish states’ essential roles and duties. This suggested the need to establish a clear differentiation between the respective obligations of states and businesses, one that recognized the different social roles they play, not intermingling the two as the Norms had done. That would take considerable effort in itself.

In short, these would have been inauspicious starting points for any treaty negotiation, consuming substantial time and energy to little positive effect. But because this may not always be so, it is also important to become aware of and develop adequate responses to even more fundamental issues related to the implementation of any business and human rights treaty. I take up three below: the effectiveness of human rights treaties generally, how a business and human rights treaty would be enforced, and the need for governments to avoid, or figure out how to reconcile, conflicting obligations under different bodies of international law.

**Effectiveness**

How effective are human rights treaties at changing actual behavior? How are they effective? And can they be made more so? These are big questions, difficult to answer definitively and briefly at the same time. Here I simply summarize key findings from systematic empirical studies conducted over the past decade to assess whether and how the ratification of international human rights treaties changes the conduct of states that ratify them. These studies have focused on political, civil, and personal integrity rights (the prohibitions against genocide and torture, for example), as well as women’s rights and the rights of the child. Differences in methodology can affect the results, but the studies agree on one fact: human rights treaties are least effective in the case of those countries where they are needed most.\(^{28}\) Moreover, strong positive correlations between treaty ratification and improved state behavior are the exception, not the rule.

Statistically, the positive effects of treaty ratification tend to be associated with one or more of the following country attributes: it is at least partly democratic; has strong civil society institutions; is relatively secular; has an existing commitment to the rule of law and reasonably well-functioning domestic legal institutions; and the protection of a particular right (prohibiting child labor, for example) is promoted by some external incentive mechanism, such as development assistance or a preferential trade agreement to which the country is a party. Effects within the same category of rights can vary. For example, ratification of the relevant treaties appears to have a greater effect on women’s political rights than on their social rights, and on reducing child labor more than on improving basic health care for children. Moreover, the most recent assessment by a group of leading scholars on this subject concludes that limited capacity on the part of states to live up to their commitments “is much more widespread in the contemporary international system than is usually acknowledged.”\(^{29}\)

When all is said and done, the indirect role of treaty ratification—what it may make possible by way of mobilizing internal and external pressure against human rights violators—may be as important as the formal processes of translating commitments into compliance. In the case of multinationals this does raise the question of whether functional equivalents to
such leverage points might exist when treaty negotiations seem problematic in the first place. I sought to identify what such equivalents might be, as elaborated in later chapters.

**Enforcement**

We have already seen that UN human rights treaties lack an international enforcement mechanism as such. What additional enforcement challenges might exist in the case of business, especially transnationally operating enterprises? Few observers believe that establishing a world court for multinationals is a realistic prospect in the foreseeable future. For the time being, therefore, that leaves national enforcement by host and/or home states, UN “monitoring,” and whatever social compliance mechanisms exist.

Host states are states in which companies operate. As discussed earlier, if they have ratified existing human rights treaties, they already have obligations flowing from them to protect individuals against human rights abuses committed within their jurisdiction, not only by state agents but also by third parties, including business enterprises. A robust and widely adopted multilateral business and human rights treaty might give those states greater incentives to enforce their obligations by reducing collective action problems. But in the immediate context I found that many governments understood poorly both the substance and the extent of their existing international human rights duties vis-à-vis business, so as a first step I sought to spell them out in some detail. Of course, host states that have not ratified existing human rights treaties do not have correlative duties under those treaties—and it is not self-evident why they would sign on to a new treaty requiring them to enforce such duties. Essentially, this means that adding yet another enforcement obligation on host states could be either redundant or irrelevant.

Home states are those in which companies are “domiciled”—meaning incorporated or headquartered. To date, in the business and human rights domain, home states generally still tend to worry more about the competitive position of “their” companies, and business remains strongly opposed to extraterritorial jurisdiction. Moreover, even developing countries that express concern about the power of multinationals typically also resist interference by other countries in their domestic affairs. As discussed in later chapters, I sought to identify ways in which and circumstances under which home states could take certain actions to regulate overseas human rights harm by corporations domiciled in their jurisdiction without arousing serious host state ire. But as a general solution to the overall human rights challenges posed by multinational corporations, extraterritorial jurisdiction remains unacceptable to governments. Therefore, pushing it aggressively could backfire by reducing the already limited willingness to take steps within the currently permissible scope of such actions.

A UN business and human rights treaty presumably would establish a treaty body to monitor and guide implementation, as is the case with all such treaties. Depending on the treaty’s provisions, either the states parties would be required to report periodically to that committee on their progress in dealing with corporate-related human rights abuses within their jurisdictions, or they would have to require businesses to do so directly. In either case, the committee would issue comments and recommendations, as they do in relation to other human rights treaties. If the reporting was the duty of the states, many would lack the capacity to do so adequately, as is already the case today with reporting on their current state-related obligations.
contrary, it is meant to identify additional ways in which preventing harm and providing remedy are necessary. The same is true of one final feature of the international treaty system I want to address and which has received far too little attention in relation to human rights: a pronounced trend toward fragmentation in the international legal order itself.

Legal Fragmentation

States are simultaneously subject to numerous bodies of international law, such as investment law, trade law, and environmental law, along with human rights law. How are conflicting international legal obligations to be resolved? Human rights discourse is infused with the assumption of a rights-based hierarchy—the idea that human rights trump not only in a moral sense but, if enough international legal instruments were added, that they would do so in terms of the law as well. This belief is one driver behind the quest for additional legalization. But the current practice of international law reflects this hierarchy only in part, discussed below. More generally, the authoritative International Law Commission (ILC) and a burgeoning academic literature find that the predominant trend in international legalization in recent decades is toward the “fragmentation of international law” into separate and autonomous spheres of law. In an influential report to the UN General Assembly, the ILC concluded that “no homogenous hierarchical metasystem is realistically available” within the international legal order to resolve the problem of incompatible provisions, including when different tribunals that have overlapping jurisdictions address exactly the same set of facts and yet reach different conclusions. This outcome has been described as “regime collision.”
Illustrating the phenomenon, in the 1990s Argentina privatized the delivery of water to households and entered into a contract with a consortium of international water companies to provide the service. Subsequently, the government denied a request by the companies to increase the tariffs they could charge, made necessary, the companies said, by additional costs as well as a severe devaluation of the peso. The companies sued Argentina under binding international arbitration, as permitted by bilateral investment treaties that Argentina had signed. In the hearing, Argentina among other defenses invoked its obligation to fulfill the human right to water as justification for denying the rate increase. The international tribunal hearing the case agreed with the companies and concluded:

Argentina and the amicus curiae submissions received by the Tribunal suggest that Argentina’s human rights obligations to assure its population the right to water somehow trumps its obligations under the BITs [bilateral investment treaties] and that the existence of the human right to water also implicitly gives Argentina the authority to take actions in disregard of its BIT obligations. The Tribunal does not find a basis for such a conclusion either in the BITs or international law. Argentina is subject to both international obligations, i.e. human rights and [investment] treaty obligation, and must respect both of them equally.31

In other words, the country itself has to figure out how to reconcile its various international legal obligations—several of which may have implications for human rights.

One exception to the fragmentation challenge, conceptually if not always in practice, is the category of norms called “jus cogens,” or “peremptory.” This is the name given to norms of general international law that permit no exemption under any circumstances, and which are said to trump any contrary norm, including treaty provisions.32 No definitive list exists, but it is generally believed to include the prohibition of such egregious conduct as genocide, war crimes, and some crimes against humanity. Nevertheless, at an everyday level “jus cogens does not dispose of most ‘ordinary’ value conflicts” among different bodies of law—for example, between the promotion of free trade and the protection of the environment—because most such conflicts do not rise to that level of severity.33 Similarly, the category of jus cogens norms does not encompass the broad spectrum of “ordinary” human rights harms with which companies may be involved, and therefore it doesn’t take us far enough.

In short, at the global level no hierarchy of legal norms can be taken for granted beyond jus cogens norms. Therefore, a business and human rights treaty would not resolve the type of “regime collision” illustrated by the Argentine water case. “Legal fragmentation cannot itself be combated,” write two leading legal theorists. “At best, a weak normative compatibility of the fragments might be achieved. However, this is dependent upon the ability . . . to establish a specific network logic, which can effect a loose coupling of colliding units.”34 In other words, the heavy lifting in attempting to reconcile different state obligations under international law has to take place in the realm of practice, where objectives are defined and can be aligned so as to achieve greater “normative compatibility.” The Guiding Principles begin to address this challenge.

To sum up: International law has an important role to play in constructing a better-functioning global regime to govern business and human rights. But I did not believe that promoting some overarching global legal framework for corporate accountability was a productive objective for my mandate; the foundations were lacking, the issues too complex, and states too
conflicted; it offered no short-term benefits while posing long-term risks; and whatever the ultimate outcome might be, it would take a long time to get there. Thus, “interim” measures would be required in any event. This brings me to the polar opposite of the juridical paradigm: voluntarism.

IV. VOLUNTARY INITIATIVES

By the 1990s, corporate social responsibility (CSR) initiatives had emerged in many sectors of business. Illustrating the trend, each of the cases discussed in chapter 1—Nike, Bhopal, Shell, and Yahoo—generated campaigns and/or lawsuits against the companies involved, and they, in turn, adopted business principles or codes of conduct pledging to follow responsible practices. Moreover, as noted in the Introduction, a general policy shift in the 1990s toward greater reliance on market mechanisms provided government support for voluntary CSR initiatives rather than mandatory regulations in such areas as business and human rights.

Origins

CSR morphed out of corporate philanthropy. Philanthropy itself became more strategic over time as companies began to make social investments where they operate. Depending on industry sector, this might include building housing for workers, community health clinics, schools, and roads, or hooking up nearby towns and villages to the company’s electrical grid or fresh water supplies. Over time, this practice extended to increasing local procurement and training local suppliers. From there, two distinct strands emerge, focused on business opportunity and risk respectively. With regard to the first, social entrepreneurs began to experiment with microenterprises such as consumer lending and mobile telephones or other forms of what came to be known as “bottom of the pyramid marketing” or “socially inclusive business models.”

Most recently, Harvard business guru Michael Porter has advocated a grand strategy of “creating shared value”—companies creating economic value for themselves “in a way that also creates value for society by addressing its needs and challenges.” My mandate was meant to encompass the second and less glamorous CSR strand: the risk that companies cause or contribute to adverse social impacts.

In response to such risks, companies began to adopt voluntary standards and verification schemes. These go beyond meeting local legal requirements—and in fact they can conflict with them. The antiapartheid campaign against South Africa gave rise to a precursor. The Reverend Leon Sullivan, an African-American pastor in Philadelphia’s Zion Baptist Church and longtime civil rights advocate, was appointed to the General Motors Board in 1971. GM was the largest employer of blacks in South Africa at the time. As an alternative to the push for divestment from the country, Sullivan developed a code of conduct known as the Sullivan Principles, adopted by more than one hundred U.S. companies operating in South Africa. It demanded nonsegregation in those companies’ workplace facilities, equal treatment and equal pay for equivalent work regardless of race, training nonwhites for better jobs, and increasing their numbers in management positions.

Unilateral company codes for offshore vendors were introduced in the early 1990s; Gap and Nike adopted theirs in 1992. Internal audit teams were established to verify that contractors...
were complying, and gradually a social audit industry emerged. Unilateral efforts were soon followed by collective initiatives involving other firms in the same sector; the chemical industry moved early, largely in response to Bhopal. Multistakeholder initiatives were pioneered in the late 1990s. Prominent examples include the Fair Labor Association (FLA) to monitor and improve factory conditions in suppliers for certain premium brands in the athletic footwear and apparel industry, including Nike, Puma, Phillips Van Heusen, and Patagonia; and an accreditation system developed by Social Accountability International (SAI) that allows for compliance certification of entire facilities in any industry. Fair trade schemes promised that products were manufactured or grown in accordance with certain social and environmental standards. Companies also began to develop more systematic means for engaging external stakeholders at global and local levels, enabling them to better understand operating contexts, build trust, and avoid surprises.

Public-private initiatives came along in the early 2000s. In areas related to business and human rights, the best known are the Kimberley Process, intended to stem the flow of conflict diamonds through a certification and tamperproof packaging system; the Extractive Industry Transparency Initiative, whereby oil, gas, and mining companies agree to publish what they pay to participating host governments and those governments commit to certain transparency standards for the corresponding revenue, in the hope that this will reduce corruption; and the Voluntary Principles on Security and Human Rights, prescribing vetting, training, and reporting practices for the private and public security forces extractive companies use to protect their assets. The UN Global Compact became a leading CSR advocacy and learning forum, as well as a provider of tools for companies to manage social and environmental challenges.

Today it is rare for multinational corporations and many other businesses not to have or participate in one or more CSR initiatives. As noted at the outset of this chapter, the business community, led by the major international business associations, urged that I devote my mandate to advocating and supporting the further development of voluntary initiatives in the business and human rights area, and to identifying and disseminating best practices. In contrast, many human rights organizations were and remain skeptical of such initiatives precisely because they are voluntary, not legally binding, believing that they permit companies merely to burnish their image without changing their behavior.

**A Profile**

As I did with the treaty route, I set out as best I could to assess voluntarism as a general strategy for advancing the business and human rights agenda. The empirical literature was (and largely remains) spotty; even today no comprehensive studies exist. Therefore, I undertook three projects in 2006 and 2007. One was a questionnaire survey of the Fortune Global 500 firms (FG500); the second was a Web-based survey of actual CSR policies of a broader cross section of more than 300 firms from all regions; and the third was a Web-based survey of the policies of 25 major Chinese companies, including in Mandarin where no information in English was available. I wanted to know what if any human rights provisions companies had adopted, and what if any patterns existed across regions and industries. The surveys were hardly exhaustive and these were not “average” firms, but the results did provide useful grounding.

Very few companies at the time had what could be described
admittedly extreme case that what a company’s code described as “engaging in dialogue with employees about issues of mutual interest” was intended to be its version of freedom of association and collective bargaining. Premier initiatives such as the FLA and SAI meet or exceed ILO standards, but the number of companies participating in them is small.

Despite the proclaimed universality of human rights, the political culture of a company’s home country seemed to affect which rights it recognized. European multinationals were more likely than their American counterparts to reference the rights to health and to an adequate standard of living. They were also more likely to state that their human rights policies extended beyond the workplace to include their impact on the communities where they operate. U.S. and Japanese firms tended to recognize a narrower spectrum of rights and rights holders. The most widely cited right by Chinese companies at the time—and that was by only 5 in the sample of 25—was the right to development, which few Western governments or companies recognize. Moreover, even among companies domiciled in the same country and operating in the same sector, the particular home market segment also seemed to shape their human rights policies. For example, the FG500 survey indicated that some form of supply-chain monitoring was common. Anecdotally, it was known that premium brands like Nike, trading on cachet, tended to have more ambitious supply-chain standards and protocols than value brands such as Walmart, where price points dominate. Because it is not uncommon for the same supplier to manufacture for different brands, different workers in the same factory, say in China, Bangladesh, or Honduras, therefore might be covered by different standards.

How did these companies assess and report on their human
rights impact? One-third of the FG500 stated that they routinely included human rights criteria in their social and environmental impact assessments—although I knew of only one company at the time that had ever conducted a full-scale human rights impact assessment of a major project (BP, of a planned liquefied natural gas facility in the Indonesian province of Papua). Most FG500 respondents said they had internal reporting systems in place to track performance. Three-fourths indicated that they also reported externally; of those, fewer than half utilized a third-party medium like the Global Reporting Initiative, which provides detailed templates, or the far less demanding Global Compact Communication on Progress. The rest issued varying forms of narrative reports, often adorned with photos of smiling children, on their own company-based Web sites and periodic publications. Here, too, national differences appeared: European companies were more likely to engage in external reporting than U.S. firms; Japanese companies lagged well behind both; and there were only two references to reporting in the sample of Chinese companies.

I also inquired about stakeholder engagement. Most FG500 respondents indicated that they worked with external stakeholders in developing and implementing their human rights policies and practices. U.S. firms were somewhat less likely to do so than their European or Australian counterparts, perhaps reflecting the stronger “shareholder” model in U.S. corporate law and culture. Japanese firms lagged behind both. NGOs were the most frequently mentioned external partner, except by Chinese and Japanese firms. Industry associations also featured prominently. International institutions such as the UN were next except for U.S. firms, which ranked them last, behind labor unions and governments, reflecting the standoff-

ish posture of America’s political culture toward such institutions more generally.

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Assessment

So what did these surveys indicate about the state of play at the time? For starters, they suggested a number of encouraging trends. Most notably, such a mapping scarcely would have been possible a decade earlier because there would have been too few data points. Not only had uptake increased rapidly; the scope of initiatives was also expanding. For example, when the leading brands in the apparel industry first began supply-chain monitoring, they focused on the factories where items are cut and sewn; then they discovered the need to push further down to fabric and textile mills, and to makers of buttons and such; most recently they have begun to address working conditions on cotton farms. Voluntary initiatives also expanded into the financial sector, initially through project lending banks that demand certain assurances with regard to projects’ social and environmental impacts.

Yet another encouraging finding in the FG500 survey was that fewer than half of the firms that reported having adopted elements of a human rights policy said they had themselves experienced what the questionnaire described as “a significant human rights issue.” This suggests that norm diffusion and learning from others’ mistakes was taking place. No doubt this was facilitated by rapidly expanding CSR staffs within companies, an increase in nonprofit and for-profit service providers to advise and assist firms, the demands of socially responsible investors and large public sector pension funds, and the dis-
semination activities of entities like the Global Compact and its national networks, especially in key emerging markets.

Clearly, voluntary initiatives were a significant force to build on. But the surveys also indicated that in the area of business and human rights the overall universe of company-based initiatives fell short as a stand-alone approach. Although growing rapidly, the numbers remained small. With few exceptions, managing the risk of adverse human rights impacts was not strategic for firms; most were still in a reactive mode, responding to external developments they experienced or witnessed. Moreover, companies typically determined for themselves not only which human rights standards they would address but also how to define them, and these could reflect the preferences of home markets and market segments as much as the needs of affected people in the host country. External accountability mechanisms for ensuring adherence to voluntary standards were weak or did not exist at all. From extensive discussions with company personnel, I also found that CSR activities as a whole tended not to be well integrated with firms' core business functions. Finally, business-based initiatives rarely provided affected individuals and communities with any means of recourse.

In supply-chain contexts, the fact that different workers in the same factory could be covered by different codes is inherently odd—though each code may well exceed locally prevailing standards. It also created enormous duplication of factory audits, generating “audit fatigue” on the part of suppliers, which is one reason they engage in cheating by keeping different sets of books and coaching workers and managers how to respond to audit interviews. As I was conducting this research, groups of companies—including large retailers like Walmart, Tesco, Carrefour, and Migros—were beginning to collaborate on code consolidation as a response. But at the same time, leading initiatives like the FLA were discovering that supply-chain monitoring by itself did not appreciably improve performance on the factory floor—that greater investments in training managers in basic human resources skills, let alone human rights, would also be required. Indeed, they found that the capacity shortfall that affected shop floor performance included the need to have more and better-resourced public labor inspectors.

Moreover, the further the leading brands moved to expand their CSR scope and deepen its reach—beyond suppliers to thousands of cotton farms and millions of farmers, for example—the more daunting their task became. At minimum, this required extensive cooperation with other brands, which is never easy because the companies are competitors, and also with public authorities. At that time the extractive sector as a whole lagged well behind on the learning curve.

To sum up: Voluntary initiatives emerged relatively quickly and evolved to include aspects of human rights. Like international law, they provide an essential building block in any overall strategy for adapting the human rights regime to provide more effective protection to individuals and communities against corporate-related human rights harm. But my research also indicated that they had significant and systematic limits, and therefore were not likely by themselves to bridge business and human rights governance gaps. And yet here, too, as with the treaty route, the analysis of shortcomings provided insights on how to proceed: simply put, finding ways to drive more authoritative guidance into market practices.

In drawing my foundational considerations to a close, I advised the Human Rights Council in 2007 that “no single silver bullet can resolve the business and human rights challenge. A broad array of measures is required, by all relevant actors.” But, I added, those measures must cohere and generate cumu-
V. CONCLUSION

The debate that pitted "mandatory" approaches against "voluntary" ones had induced policy stalemate at the international level. Yet neither was capable by itself of narrowing global governance gaps in business and human rights anytime soon. Now I had an official invitation to identify a path forward. The overriding lesson I drew from the assessment of the two approaches was that a new regulatory dynamic was required under which public and private governance systems—corporate as well as civil—each come to add distinct value, compensate for one another's weaknesses, and play mutually reinforcing roles—out of which a more comprehensive and effective global regime might evolve, including specific legal measures. International relations scholars call this "polycentric governance." But practical guidance, not merely a new concept, was needed to persuade governments, the business community, and other stakeholders to move in this direction.

One reason that existing initiatives, public and private, do not add up to a more coherent system capable of truly moving markets is the lack of an authoritative focal point around which the expectations and behavior of the relevant actors can converge. Thus, my immediate objective was to develop and obtain agreement on a normative framework and corresponding policy guidance for the business and human rights domain, establishing both its parameters and its perimeters.

For starters, such a framework needed to spell out the responsibilities of states and business in relation to human rights, and equally important, what actions those responsibilities entailed. Of course, states knew that their legal duties and policy requirements under the international human rights regime extended beyond abuses by state agents. But actual state practice indicated that even the most committed had not addressed the full range of actions these implied in relation to business. For its part, business acknowledged some responsibility for human rights, if nothing else by virtue of adopting CSR initiatives. But here, too, actual practice indicated considerable divergence and shortcomings in the understanding of what those responsibilities were and implied. To avoid ambiguity and strategic gaming on the ground, it also was critical that the two sets of obligations be clearly differentiated from one another, and that they reflected the different social roles of the actors who are expected to meet those responsibilities.

In addition, the scope of the framework had to coincide with the scope of the business and human rights domain in two respects. First, because business can affect virtually all internationally recognized rights, the framework needed to encompass all such rights, not only some arbitrary subset. Second, the framework needed to reach beyond the relatively small and often weak units in governments and business enterprises that currently have responsibility for managing business and human rights: in the case of states, to include agencies that promote trade and investment, or that deal with securities regulation, to mention but a few; and in the case of businesses, to the different business functions that impact directly on workers and communities, companies' own internal oversight and compliance systems, as well as closer engagement between businesses and their internal and external stakeholders.

For similar reasons, business and human rights was far too
big for the UN’s human rights machinery alone. Many other international organizations had developed corporate responsibility standards over time, addressed to their particular missions and mandates. Ideally, the human rights dimensions of these efforts would become aligned with the UN framework, creating convergence and cumulative effects. This required establishing relationships with those organizations and constructing the framework as a platform of core norms and policy guidance that others could build on in their particular institutional contexts.

In addition, as an initial priority, I deliberately stressed preventative measures and alternative dispute resolution techniques, as a complement to, not a substitute for, judicial measures. They can be established more readily than legal regimes can be built and judicial systems reformed, and if successful they should have the effect of reducing the incidence of harm directly. Moreover, states, firms, and civil society organizations can play important roles in establishing and supporting nonjudicial grievance mechanisms even as the longer-term project of judicial reform and capacity building continues. I considered closer engagement between companies and the individuals and communities they impact to be a central element in this strategy.

There was one other requirement: to move this agenda forward, governments would have to endorse such a framework, and governments were more likely to endorse it if it enjoyed broad stakeholder buy-in.

These were the key aims behind the Protect, Respect and Remedy Framework and the Guiding Principles for its implementation, to which I turn next.

Chapter Three

PROTECT, RESPECT AND REMEDY

The international community is still in the early stages of adapting the human rights regime to provide more effective protection to individuals and communities against corporate-related human rights harm. Chapter 1 illustrated how governance gaps provide permissive environments for wrongful acts by companies, even where none may be intended, without adequate sanction or remedy. In chapter 2, I explained why neither the treaty route nor the voluntary corporate social responsibility approach by itself is likely to bridge these gaps sufficiently anytime soon. A successful way forward, I concluded, needs to recognize, better interconnect, and leverage the multiple spheres of governance that shape the conduct of multinational corporations.

The Protect, Respect and Remedy Framework (Framework) and Guiding Principles (GPs) for its implementation aim to establish a common global normative platform and authoritative policy guidance as a basis for making cumulative step-by-step, progress without foreclosing any other promising longer-term developments. The Framework addresses what should be done; the Guiding Principles how to do it. The present chapter outlines their key features, the thinking behind them, and their