

“IT ISN’T A STATE PROBLEM”: THE MINAS CONGA MINE CONTROVERSY AND THE NEED FOR BINDING INTERNATIONAL OBLIGATIONS ON CORPORATE ACTORS

CINDY S. WOODS*

ABSTRACT

After years of implacable neoliberal globalization, multinational corporations have moved from the periphery to the center of the international legal agenda. Human rights advocates have long called for greater corporate accountability in the international arena. The creation of the Global Compact in 2000, while aimed at fostering greater corporate respect for human rights, did not silence these calls. After multiple unsuccessful attempts to adopt a set of norms relating to the human rights responsibilities of transnational corporations, the United Nations succeeded in 2008 with the Guiding Principles on Business and Human Rights (Guiding Principles). The Guiding Principles, praised by some within the international human rights community for their recognition of an individual corporate responsibility to respect human rights, have not escaped their share of criticism. Many view the Guiding Principles to be toothless, failing to directly impose obligations upon corporations, and call for binding international obligations on corporate entities. After decades of attempting to promulgate human rights obligations for multinational corporations, the existing legal frameworks in place fall short of protecting individuals from the human rights abuses of multinational corporations. The Global Compact and Guiding Principles are proof of the United Nations’ unwillingness to impose international legal obligations on corporate actors. In June 2014, the Human Rights Council adopted a resolution to draft international legally binding human rights norms for business entities; however, key players in the international arena have already announced they will not cooperate with such efforts. This Note, through an overview of the existing corporate accountability frameworks and a study of Newmont Mining’s Minas Conga project in Peru, argues that binding international human rights obligations on corporations are necessary to fully protect human rights. Where states refuse to or simply cannot uphold their duty to

* J.D., Georgetown University Law Center, expected May 2015; M.Phil., University of Cambridge; B.A., University of Oklahoma. The author would like to express her gratitude to Katie Shay and Amol Mehra for encouraging and supporting her interest in the business and human rights field. The author would also like to thank the editors and staff of the Georgetown Journal of International Law for their time and assistance, and most importantly, her family and friends for their unwavering support. © 2014, Cindy S. Woods.

protect individuals from transnational businesses' human rights transgressions, there must exist mechanisms to pursue justice directly against the multinational corporation.

I.	INTRODUCTION	631
II.	EVOLUTION OF THE MULTINATIONAL CORPORATION	634
III.	HISTORY OF THE U.N. CORPORATE ACCOUNTABILITY MOVEMENT	635
IV.	THE CURRENT CORPORATE ACCOUNTABILITY LANDSCAPE	639
	A. <i>The U.N. Global Compact</i>	639
	1. The Ten Principles.	640
	2. The Communication on Progress (COP) Report	641
	3. Criticism.	642
	a. <i>Disappointment</i>	642
	b. <i>Distrust</i>	643
	c. <i>Demand for Accountability</i>	644
	B. <i>The Guiding Principles</i>	645
	1. Protect	646
	2. Respect.	647
	3. Remedy	648
	4. Criticism.	648
	a. <i>No Corporate Obligation to Respect Human Rights</i>	649
	b. <i>Host State Governance Gaps</i>	650
	c. <i>Insufficient Home State Regulation</i>	650
	i. Corporate Criminal Liability	651
	ii. Corporate Civil Liability.	652
	iii. International Law Responsibility	653
V.	CASE STUDY: MINAS CONGA	654
	A. <i>Neoliberalism and the Proliferation of Mining in Peru</i>	655
	B. <i>The Minas Conga Controversy</i>	657
	C. <i>The Anti-Mining Movement and State and Corporate Responses</i>	660
	D. <i>Exemplifying the Need for Binding International Human Rights Obligations for Corporations</i>	663
	1. The Global Compact and Minas Conga.	664
	2. The Guiding Principles and Minas Conga.	667
	a. <i>State Duty to Protect</i>	667
	b. <i>Corporate Responsibility to Respect</i>	670
	c. <i>Greater Access to Remedy</i>	671
	i. Corporate Criminal Liability in the United States	672

“IT ISN’T A STATE PROBLEM”

ii.	Corporate Civil Liability for International Law Violations in the United States	672
iii.	Corporate Civil Liability for Domestic Law Violations in the United States	674
	(a). <i>Statute of Limitations</i>	675
	(b). <i>Forum Non Conveniens</i>	675
	(i). Delaware	676
	(ii). Colorado	677
	(c). <i>Independent Corporate Personality</i>	679
3.	Lessons from the Minas Conga Controversy	680
VI.	CONCLUSION	681

I. INTRODUCTION

In June 2014, the United Nations Human Rights Council (UNHRC) adopted a proposal to negotiate a legally binding treaty to prevent human rights violations by transnational corporations.¹ For decades, sectors of the international community have entreated the U.N. to promulgate compulsory norms and codes of conduct aimed at regulating multinational corporations (MNCs)² and their actions in host countries. While the passage of this groundbreaking resolution is the first step in what will be an assuredly long process to answer these calls, some nations—the United States and the twenty-eight-member European Union included—have already avowed non-cooperation with any working group tasked with the undertaking. Through an analysis of the Minas Conga mining controversy, this Note aims to illustrate why the creation of a binding international treaty that obliges MNCs to uphold certain human rights standards is necessary to fully protect individuals against transnational corporate human rights abuses.

1. Human Rights Council Res. 26/9, Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, 26th Sess., June 10–27, 2014, U.N. Doc. A/HRC/26/L.22/Rev.1 (June 25, 2014).

2. Borrowing from Surya Deva, the term MNC, for the purposes of this Note, is used to signify “an economic entity (whether called a company, corporation or enterprise) that owns, controls or manages operations, either alone or in conjunction with other entities, in two or more countries.” In this context, it can be used interchangeably with other terms, such as transnational corporations and multinational enterprises. SURYA DEVA, REGULATING CORPORATE HUMAN RIGHTS VIOLATIONS: HUMANIZING BUSINESS 21 (2012).

Since the 1970s, sections of the international community have called on the U.N. to draft binding norms applicable to MNC conduct.³ After decades of working group meetings, reports, and draft codes of conduct, no such binding mechanism exists. In its place, the U.N. has established the Global Compact,⁴ a voluntary corporate governance scheme aimed at collaboration and monitoring, and the Guiding Principles,⁵ a framework of business and human rights principles, which continues to propagate the dichotomy between state duties and corporate respect, not obligation.

While the international community has largely viewed the Global Compact as a non-starter in resolving the issue of corporate involvement with and impunity in human rights abuses, many hoped that the Guiding Principles would provide the much-needed solution to this business and human rights problem. Not surprisingly, many state governments and corporate entities welcomed the Guiding Principles, which, in effect, had very little consequence on the institutionalized state of play.⁶ While the Guiding Principles' impact on the field of business and human rights should not be downplayed, this framework cannot be the end, or the "end of the beginning" of the business and human rights discussion.⁷ The historic lack of U.N. commitment to affect real change in the business and human rights relationship and contentment to rest on the laurels of the Guiding Principles will continue to foster widespread corporate impunity for human rights abuses, especially in situations where the state cannot or will not uphold its duty to protect.

In 2010, the Peruvian government gave Newmont Mining Corporation (Newmont) the green light for its multi-billion dollar Minas Conga

3. See *infra* notes 19-20 and accompanying text.

4. *Overview of the UN Global Compact*, UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org/AboutTheGC/index.html> (last visited Nov. 6, 2014).

5. Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Annex, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie) [hereinafter *Guiding Principles*].

6. See, e.g., Gina-Marie Cheeseman, *UN Human Rights Council Endorses Guiding Principles on Business and Human Rights*, TRIPLEPUNDIT (June 24, 2011), http://www.triplepundit.com/2011/06/human-rights-council-endorses-guiding-principles-business-human-rights/?doing_wp_cron=1415303679.8943059444427490234375.

7. *Guiding Principles*, *supra* note 5, ¶ 13.

gold mine project.⁸ The government approved the company’s Environment Impact Assessment (EIA) despite grave mischaracterizations in the report and the admittedly severe possible and probable negative impacts of the project on the local communities’ water supply.⁹ Community protests, condemnation from the regional government, and international criticism led to an international review of the EIA and subsequent recommendations for further mitigating the negative effects of the project. Newmont, despite lacking the social license to operate in the region,¹⁰ has begun work on the project, with the federal government’s support. Local resistance continues to protest against the mine, calling on the government to protect Peruvian citizens’ human rights. Peruvian president Ollanta Humala’s response: “It is a mistake to think that Conga is a problem of the state.”¹¹

This Note contends that a binding international treaty regarding the human rights obligations of multinational corporations is necessary to fully ensure corporate respect for human rights. Section II traces the evolution of the multinational corporation, from its nascent beginnings to its expanding political and economic power in the global arena. Section III surveys the history of U.N. attempts at creating both binding and nonbinding human rights norms in relation to corporations. Section IV provides a general overview of the existing business and human rights legal framework, discussing criticisms and highlighting the shortcomings of the current state of play. Section V then presents the Minas Conga mining controversy as an emblematic case, analyzing how current frameworks fail to protect victims of corporate human rights abuse and illustrating the need for a binding set of human rights duties for transnational corporations.

8. RESOLUCIÓN DIRECTORAL, NO. 351-2010-MEM, MINISTERIO DE ENERGÍA Y MINAS, (Oct. 27, 2010) (Peru), <http://www.yanacocha.com.pe/wp-content/uploads/Resoluci%C3%B3n-Directoral-No.-351-2010-MEM-AAM-Aprobaci%C3%B3n-EIA-Conga..pdf>.

9. See *infra* notes 142-143 and accompanying text.

10. The “social license to operate” is a term used mainly in the extractives industry to refer to “the level of acceptance or approval by local communities and stakeholders.” *What is the Social License to Operate (SLO)?* MINING FACTS, <http://www.miningfacts.org/Communities/What-is-the-social-licence-to-operate/> (last visited July 13, 2014). MNCs are said to lack a social license to operate when not enough of the affected population approves of a project. *Id.*

11. Ollanta Humala: “Es un error creer que Conga es un problema del Estado,” *GESTIÓN* (Oct. 2, 2013, 4:10 PM), <http://gestion.pe/economia/ollanta-humala-error-creer-que-conga-problema-estado-2077649>. [hereinafter *Ollanta Humala*].

II. EVOLUTION OF THE MULTINATIONAL CORPORATION

Businesses have long conducted cross-border dealings. Transnational corporations, in their earliest form, have been traced back thousands of years by classical scholars.¹² European businesses involved in an array of sectors, such as mining, have conducted cross-border operations since the beginning of the thirteenth century.¹³ However, the modern MNC, existing and operating within the overarching nation-state structure as we know it today, emerged in the seventeenth century, taking the shape of large transnational business ventures such as the British and Dutch East India companies.¹⁴ By the mid-twentieth century, MNCs had begun to play increasingly larger roles in both the global marketplace and international political arena.

With advancements in technology, manufacturing, transportation, and management methods, the modern MNC has experienced considerable growth in size, wealth, and political power over the decades. Recent statistics indicate that corporations represent forty of the world's hundred largest economic entities.¹⁵ Some economists attempt to downplay the general increase in economic power of multinationals by arguing that their growth is slower than the overall growth of the world's GDP, while others continue to debate the suitability of comparing corporate sales with national GDPs in compiling these statistics;¹⁶ however, even if the global GDP may as a whole be growing slightly faster than the fifty largest multinationals, by many different measures "the economic magnitude of the world's largest firms is increasing relative to the rest of the economy," fundamentally altering the traditional power balance in the international arena.¹⁷ Additionally, these comparisons fail to capture the overwhelming power imbalances of the most economically powerful MNCs operating within the economies of some of the world's poorest countries.

12. KARL MOORE & DAVID A. LEWIS, *BIRTH OF THE MULTINATIONAL: 2000 YEARS OF ANCIENT BUSINESS HISTORY—FROM ASHUR TO AUGUSTUS* 27 (1999).

13. Emeka Duruigo, *Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges*, 6 NW. J. INT'L HUM. RTS. 222, 230 (2008).

14. Bruce Mazlish, *A Tour of Globalization*, 7 IND. J. GLOBAL LEGAL STUD. 5, 11 (1999).

15. TRACEY S. KEYS ET AL., *GLOBAL TRENDS, CORPORATE CLOUT 2013: TIME FOR RESPONSIBLE CAPITALISM* 2 (2013).

16. Tim Worstall, *GDP for a Country Is Not the Same Thing as Turnover for a Business*, FORBES (June 28, 2011, 11:37 AM), <http://www.forbes.com/sites/timworstall/2011/06/28/gdp-for-a-country-is-not-the-same-thing-as-turnover-for-a-business/>; Paul De Grauwe & Filip Camerman, *Are Multinationals Really Bigger than Nations?* 4 WORLD ECON. 23 (2003).

17. BRIAN ROACH, *CORPORATE POWER IN A GLOBAL ECONOMY* 4 (2007).

“IT ISN’T A STATE PROBLEM”

MNCs have begun to dominate the world market, profiting off the mass proliferation in recent years of bilateral and multilateral free trade agreements.¹⁸ As developing countries continue to open their economies, vying for foreign direct investment in a race to the bottom,¹⁹ they become dependent upon MNCs for market stability.²⁰ Once embedded in the national economy, MNCs wield considerable political power.²¹ As these corporations have increased their influence and control in certain domestic markets, host states have turned a blind eye to the legal transgressions of multinationals, creating an environment of impunity. This pattern is clearly illustrated in the Minas Conga case study in Section V, where Peru’s economic dependency upon the billions of dollars of investment from Newmont Mining Company has deterred the country from upholding its sovereign duty to protect its citizens against corporate abuse.

III. HISTORY OF THE U.N. CORPORATE ACCOUNTABILITY MOVEMENT

International attempts to regulate MNCs have occurred in differing forms with varying success since the 1970s. The first calls for an international code of conduct for multinational businesses came at the Third U.N. Conference on Trade and Development (UNCTAD III), in Santiago de Chile, as a response to accusations by the Chilean government that corporations were increasingly and flagrantly intervening in the internal affairs of host countries.²² In recognition of this governance gap, in July 1972, the U.N. Secretary-General appointed a Group of Eminent Persons to study the role and impact of MNCs on an

18. Bilateral and multilateral trade agreements generally lower tariffs, increasing profit margins for multinational corporations. See, e.g., Kazunobu Hayakawa & Fukunari Kimura, *How Do Free Trade Agreements Reduce Tariff Rates and Non-tariff Barriers?* (Institute of Developing Economies Discussion Paper No. 446, 2014); Andrew Leonard, *Free Trade’s Multinational Corporate Bonanza*, SALON, http://www.salon.com/2011/10/21/free_trades_multinational_corporate_bonanza/ (last visited Oct. 21, 2011).

19. For more information on the race to the bottom theory, see, e.g., NITA RUDRA, *GLOBALIZATION AND THE RACE TO THE BOTTOM IN DEVELOPING COUNTRIES: WHO REALLY GETS HURT?* (2008).

20. H. Jeffrey Leonard, *Multinational Corporations and Politics in Developing Countries*, 32 *WORLD POLITICS* 454 (1980).

21. *Id.*

22. Address Delivered by Salvador Allende Gossens, President of Chile, at the inaugural ceremony on 13 April 1973, United Nations Conference on Trade and Development, *Proceedings of the United Nations Conference on Trade and Development*, Apr. 13-May 21, 1972, ¶ 62, U.N. Doc. TD/180 (Vol. 1), Annex VIII (1973).

international level.²³ Concerned with the group's findings, the U.N. then established the now defunct Commission on Transnational Corporations and the U.N. Centre on Transnational Corporations (UNCTC).²⁴

In 1977, an Intergovernmental Working Group created by the UNCTC began drafting an international code of conduct aimed at creating a "set of fundamental rules of conduct" applicable to both transnational corporations and states.²⁵ However, this undertaking proved unwieldy in size, and by the early 1980s there were more than thirty codes of conduct covering diverse corporate sectors under consideration by various U.N. bodies; ultimately, only four were adopted.²⁶ As neoliberal economic theory burgeoned in the 1980s, strong political and corporate pressure effectively killed further attempts to promulgate a binding code of conduct.²⁷

However, by the 1990s, criticism of neoliberal globalization was again gaining steam in the international arena.²⁸ In 2000, efforts at tempering corporate human rights abuse were reincarnated in a radically different form, from the top down, with the Global Compact.²⁹ In a pragmatic effort to take control of the growing controversy surrounding the regulation of multinational corporations in a rapidly globalizing marketplace, the Global Compact was launched as a U.N.-Secretariat-driven initiative, with very little initial input from state actors.³⁰ Instead of attempting to police MNCs, the U.N. proposed partnering with companies to work toward mutually beneficial ends. In exchange for the U.N.'s help in "mak[ing] the case for and maintain[ing] an

23. U.N. Secretary-General, *The Impact of Multinational Corporations on the Development Process and on International Relations: Rep. of the Secretary-General*, ¶ 1, U.N. Doc. E/5500 (June 14, 1974).

24. *UNCTC Origins*, U.N. CONFERENCE ON TRADE AND DEV., July 4, 2014, <http://unctc.unctad.org/asp/UNCTCOrgins.aspx>.

25. U.N. ESCOR, Comm'n on Transnational Corps., *Possible Methods of Work Related to the Drafting of a Code of Conduct: Note by the Secretariat*, ¶ 6-7, U.N. Doc. E/C.10/10 (Jan. 19, 1976).

26. These four are the 1977 Tripartite Declaration of the Principles Concerning Multinational Enterprises and Social Policy of the International Labor Organization; the 1981 International Code of Marketing of Breastmilk Substitutes; the 1985 Guidelines for Consumer Protection; and the 1985 International Code of Conduct on the Distribution and Use of Pesticides of the Food and Agriculture Organization. See Jens Martens, *Corporate Influence on the Business and Human Rights Agenda of the United Nations* 6 (Global Policy Forum, Working Paper, 2014).

27. *Id.* at 8.

28. *Id.* at 8-9.

29. Press Release, Secretary-General, Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, in Address to World Economic Forum in Davos, U.N. Press Release SG/SM/6881 (Jan. 31, 1999).

30. Andreas Rasche et al., *The United National Global Compact: Retrospect and Prospect*, 52 *BUS. & Soc'y* 1, 14 (2013).

environment which favours trade and open markets,” MNCs agreed to voluntarily engage with the U.N. and civil society to establish best practices in the areas of human rights, labor, the environment, and anti-corruption.³¹

The Global Compact, steered by its ten guiding principles,³² is, in its own words, a “practical framework for the development, implementation and disclosure of sustainability policies and practices.”³³ However, its voluntary nature, along with its lack of monitoring and enforcement mechanisms, lead many to view the Global Compact as a toothless, “bluewashing” public relations tool, ineffective in responding to the business and human rights crisis.³⁴

Not silenced by the establishment of the Global Compact, calls for binding norms on MNCs continued from the 1990s throughout the 2000s. In 1998, the Sub-Commission on Prevention of Discrimination and Protection of Human Rights, a subsidiary body of the U.N. Commission on Human Rights (UNCHR), established a working group to draft a code of conduct for MNCs based on human rights obligations.³⁵ The norms, approved by the Sub-Commission in 2003, outlined in twenty-three articles the human rights obligations of both states and MNCs, notably providing for direct human rights obligations on the part of corporations.³⁶ However, in 2004, the UNCHR refused to adopt the norms, stressing that they “ha[d] not been requested by the Commis-

31. See SCOTT T. YOUNG & K. KATHY DHANDA, *SUSTAINABILITY: ESSENTIALS FOR BUSINESS* 268 (2013); see also Rasche et al., *supra* note 30, at 14.

32. *The Ten Principles*, UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (last visited Nov. 6, 2014).

33. *Overview of the UN Global Compact*, *supra* note 4.

34. See, e.g., Joint Inspection Unit, *United Nations Corporate Partnership: The Role and Functioning of the Global Compact*, U.N. Doc. JIU/REP/2010/9 (2010); Jon Entine, *UN Global Compact: Ten Years of Greenwashing?*, ETHICAL CORPORATION (2010); Nina Bandi, *United National Global Compact: Impact and Its Critics*, COVALENCE ETHICAL QUOTATION SYSTEM, ANALYST PAPERS (2007).

35. Sub-Comm’n on Prevention of Discrimination and Protection of Minorities Res. 1998/8, *The Relationship between the Enjoyment of Economic, Social and Cultural Rights and the Right to Development, and the Working Methods and Activities of Transnational Corporations*, U.N. Doc. E/CN.4/SUB.2/RES/1998/8 (Aug. 20, 1998).

36. Comm’n on Human Rights, Sub-Comm’n on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 55th Sess., July 28-Aug. 15, 2003, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev. 2 (Aug. 26, 2003); Comm’n on Human Rights, Sub-Comm’n on the Promotion and Protection of Human Rights Res. 2003/16, *Rep. of the Sub-Comm’n on the Promotion and Protection of Human Rights on its 55th Session*, 55th Sess., July 28-Aug. 15, 2003, U.N. Doc. E/CN.4/Sub.2/2003/43 (Oct. 20, 2003).

sion and, as a draft proposal, ha[d] no legal standing.”³⁷ The UNCHR instead called on the Secretary-General to appoint a special representative on the issue of human rights and multinational corporations.³⁸

In 2005, John Ruggie, Harvard professor and former U.N. Assistant Secretary-General was appointed Special Representative for Business and Human Rights. Ruggie was instrumental in the establishment of the Global Compact and maintained his pro-business, cooperative stance towards MNC governance throughout his time as Special Representative, as reflected in his mandate’s final product. Over the course of six years, Ruggie and his team conducted hundreds of consultations, multiple site visits, and copious amounts of research, with inputs from all stakeholders involved.³⁹ In 2008, Ruggie proposed the three-pillared “Protect, Respect and Remedy” approach to MNC governance, comprised of “(1) the State duty to protect against human rights abuses by third parties; (2) the corporate responsibility to respect human rights; and (3) greater access by victims to effective remedy, judicial and non-judicial.”⁴⁰ Three years later, in March 2011, the UNHRC unanimously adopted Ruggie’s report and the recommendations outlined within it.⁴¹ The report’s thirty-one principles detail the fundamental, universally accepted obligations and responsibilities of states and corporations, with suggestions as to their future operationalization.⁴² While the Guiding Principles were generally met with enthusiasm by governments, corporations, and some sectors of civil society, they have not escaped their share of criticism.⁴³ The Guiding Principles retain the U.N.’s preference for non-binding norms on corporations, much to the chagrin of human rights activists.

The enduring calls for binding corporate human rights obligations were finally recognized in June 2014, when the UNHRC adopted a resolution providing for the establishment of an open-ended intergov-

37. Comm’n on Human Rights, Rep. on the 60th Sess. 60th Sess., Mar. 15-Apr. 23, 2004, U.N. Doc. E/CN.4/2004/127 (Apr. 22, 2004).

38. Comm’n on Human Rights Res. 2005/69, Rights and Transnational Corporations and Other Business Enterprises, U.N. Doc. E/CN.4/RES/2005/69, ¶ 1 (Apr. 20, 2005).

39. JOHN GERARD RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS, xx (2013).

40. U.N. Special Representative of the Secretary-General, *Business and Human Rights: Towards Operationalizing the “Protect, Respect and Remedy” Framework: Rep. of the Special Representative of the Secretary-General on the Issue of Human Rts. and Transnat’l Corp. and Other Bus. Enterprises with Regard to Human Rights*, ¶ 2, U.N. Doc. A/HRC/11/13 (Apr. 22, 2009).

41. *Guiding Principles*, supra note 5.

42. *Id.*

43. See *infra* notes 98-100 and accompanying text.

“IT ISN’T A STATE PROBLEM”

ernmental working group to elaborate a legally binding treaty, in international human rights law, to regulate multinational corporations.⁴⁴ Unlike the process that produced the rejected U.N. Norms of 2003, the new mandate was promulgated by the UNHRC General Assembly, inspiring hope that this call for binding international obligations on MNCs may come to fruition.⁴⁵ However, immediately following adoption of the resolution, the United States and twenty-eight member countries of the European Union declared that they would not cooperate with any efforts to draft such a treaty, citing, among other things, the adequacy of existing mechanisms to prevent corporate human rights abuses.⁴⁶

IV. THE CURRENT CORPORATE ACCOUNTABILITY LANDSCAPE

After decades of attempting to adopt both binding and nonbinding mechanisms to regulate multinationals in the international arena, the U.N. has promulgated two nonbinding systems: the Global Compact and the Guiding Principles. This Section will discuss each mechanism in turn, describing first its intended effect on corporate behavior followed by an analysis of prevailing criticisms.

A. *The U.N. Global Compact*

Launched in 2000, the Global Compact is a “strategic policy initiative for businesses” committed to operating in a sustainable and socially responsible manner.⁴⁷ The Global Compact is not a code of conduct, but an attempt at collaboration between business, civil society, labor, and the United Nations.⁴⁸ It is “not now and does not aspire to become

44. Human Rights Council Res. 26/9, Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, 26th Sess., June 10-27, 2014, U.N. Doc. A/HRC/26/L.22/Rev.1 (June 25, 2014).

45. The U.N. Commission on Human Rights found the U.N. Norms to have no legal standing because the Commission did not request their promulgation; however, the Guiding Principles were drafted upon a Commission mandate, obviating the fear of non-legality. U.N. Office of the High Commissioner for Human Rights, *Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights*, ¶ 3, U.N. Doc. E/CN.4/2004/127. (Apr. 23, 2004).

46. Thalif Deen, *After Losing Vote, US-EU Threaten to Undermine Treaty*, HELSINKI TIMES (July 3, 2014), <http://www.helsinki.fi/world-int/world-news/international-news/11077-after-losing-vote-us-eu-threaten-to-undermine-treaty.html>.

47. *Overview of the UN Global Compact*, *supra* note 4.

48. *Id.*

a compliance based initiative.”⁴⁹ It encourages businesses to adopt socially responsible and sustainable practices, report on their implementation, and share best practices with other members.⁵⁰ Since its creation, the Global Compact has grown into the “world’s largest corporate citizenship and sustainability initiative,” with more than 12,000 participants, including more than 8,000 businesses from 145 countries.⁵¹ However, this is hardly representative of the approximately 65,000 transnational businesses worldwide.⁵²

1. The Ten Principles

The Global Compact asks corporations to “embrace, support and enact, within their sphere of influence” a set of core human rights, labor, environment, and anti-corruption values, espoused in ten principles:

Human Rights: (1) Business should support and respect the protection of internationally proclaimed human rights; and (2) make sure that they are not complicit in human rights abuses.

Labor: (3) Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining; (4) the elimination of all forms of forced and compulsory labor; (5) the effective abolition of child labor; and (6) the elimination of discrimination in respect to employment and occupation.

Environment: (7) Businesses should support a precautionary approach to environmental challenges; (8) undertake initiatives to promote greater environmental responsibility; and (9) encourage the development and diffusion of environmentally friendly technologies.

Anti-Corruption: (10) Business should work against corruption in all its forms, including extortion and bribery.⁵³

49. *Integrity Measures*, UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org/AboutTheGC/IntegrityMeasures/index.html> (last visited July 8, 2014).

50. *The Ten Principles*, *supra* note 32.

51. *UN Global Compact Participants*, UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html> (last visited July 8, 2014).

52. Peter Utting, *The Global Compact: Why All the Fuss?*, 1 UN CHRONICLE (2003).

53. *Id.*; *The Ten Principles*, *supra* note 32.

2. The Communication on Progress (COP) Report

Business members of the Global Compact are required to submit an annual Communication on Progress (COP).⁵⁴ As a public disclosure tool, the COP aims to serve four main purposes: “(1) advance[] transparency and accountability; (2) drive[] continuous performance improvement; (3) safeguard[] the integrity of the UN Global Compact and the United Nations; and (4) help[] build a growing repository of corporate practices to promote dialogue and learning.”⁵⁵ The COP is the main driver of the Global Compact—the component that aims to lend credibility to the organization’s mission by allowing for shareholder oversight. According to the Global Compact:

The public availability of COP information promotes transparency and disclosure, allowing stakeholders to ensure companies live up to their commitment to the Global Compact Principles. It also provides stakeholders with material information to make informed choices about the companies they interact with, whether as consumers, investors or employees. Stakeholder vetting is a cornerstone of the Global Compact’s mission to promote transparency and disclosure as a means of driving performance.⁵⁶

There are three main requirements for a COP. The report must contain: (1) a statement by the chief executive expressing continued support for the Global Compact; (2) a description of practical action taken by the company to implement the ten principles; and (3) a measurement of outcomes of these actions.⁵⁷ COPs are classified in one of three categories: GC Learner, GC Active, and GC Advanced.⁵⁸ While GC Learner status is a one-year grace period for submitting an incomplete COP, corporations may choose to be GC Active or GC Advanced.⁵⁹ GC Active businesses fulfill all minimum requirements listed

54. *What is a COP?*, UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org/COP/index.html> (last visited July 8, 2014).

55. *Id.*

56. *How are COPs Used?*, UNITED NATIONS GLOBAL COMPACT, http://www.unglobalcompact.org/COP/analyzing_progress/index.html (last visited July 8, 2014).

57. *What is Required?*, UNITED NATIONS GLOBAL COMPACT, http://www.unglobalcompact.org/COP/communicating_progress/cop_policy.html (last visited July 8, 2014).

58. *COP Levels*, UNITED NATIONS GLOBAL COMPACT, http://www.unglobalcompact.org/COP/communicating_progress/cop_policy/cop_levels.html (last visited July 8, 2014).

59. *Id.*

above, while GC Advanced businesses must also provide information on (1) implementing the ten principles into strategies and operations; (2) taking action in support of broader U.N. goals and issues; and (3) corporate sustainability, governance, and leadership.⁶⁰

If a participant fails to submit a COP by its deadline, it is listed as “non-communicating.”⁶¹ If that participant fails the following year to submit a COP, the organization is expelled from the Global Compact; however, they may apply to rejoin the Compact with the submission of a completed COP.⁶²

3. Criticism

Criticisms of the Global Compact are widespread and generally fall within three categories: (1) disappointment; (2) distrust; and (3) demand for accountability.

a. *Disappointment*

Many critics denounce the Global Compact as a “regrettable ideological shift on the part of the UN” regarding international regulation of business entities.⁶³ Prior to the Compact, attempts at tempering human rights abuses by business entities were aimed at regulation; however, the Compact, with its collaborative and non-mandatory structure, is voluntary—“both in the sociological sense that individual actions and values trump structural change and empowerment as the key to development and social justice, and, in the more literal sense, that voluntary initiatives and corporate self-regulation trump stronger forms of regulation involving government or multilateral organizations.”⁶⁴ The Global Compact represents to many the creation of an unacceptable relationship between the U.N. and global neoliberal corporate forces that threatens to undermine U.N. neutrality and commitment to promoting human rights regardless of associated business costs.⁶⁵ Since the Global Compact’s formation, the U.N.’s general approach toward business involvement in human rights abuses has shifted away from adversarial

60. *Id.*

61. *Integrity Measures*, *supra* note 49.

62. *Id.*

63. Jean-Philippe Thérien & Vincent Pouliot, *The Global Compact: Shifting the Politics of International Development?*, 12 GLOBAL GOVERNANCE 55, 66-67 (2006).

64. Utting, *supra* note 52.

65. Martens, *supra* note 26, at 8-9.

to collaborative, a move which troubles many in the international arena.⁶⁶

b. *Distrust*

A second prevailing criticism of the Global Compact is that it serves as a “bluewashing” tool for businesses, allowing them to figuratively drape themselves in the U.N. flag to detract attention from their transgressions.⁶⁷ The Global Compact, as a “free PR ride,” allows companies to use this U.N. seal of approval—the Global Compact signet is strikingly similar to the U.N. logo—to improve their public image, without actually making corresponding tangible changes to their human rights, labor, and environmental policies.⁶⁸ To critics, the Global Compact presents an “overwhelming incentive to hypocrisy,” leading businesses first to sign on to the Compact for public relations benefits and then “defect[] by carrying on with business as usual.”⁶⁹ Indeed, the Compact’s 2011 Annual Review noted that while the majority of companies are putting policies relating to the Global Compact principles in place, “related actions to support implementation is conducted at significantly lower levels—showing a gap in moving from policy to action for all issue areas.”⁷⁰ Ruggie, one of the key players in establishing the Global Compact, had this to say about his own initiative: “the fact that the G[lobal] C[ompact] recognises and promotes a company’s ‘good practice’ provides no guarantee that the same company does not engage in ‘bad practice’ elsewhere. Indeed, it may even invite a measure of strategic behaviour.”⁷¹ Put in harsher

66. *Id.*

67. See, e.g., Daniel Berliner & Aseem Prakash, *From Norms to Programs: The United Nations Global Compact and Global Governance*, 6 REGULATION & GOVERNANCE 149, 151 (2012); Graham Knight & Jackie Smith, *The Global Compact and Its Critics: Activism, Power Relations, and Corporate Social Responsibility*, in DISCIPLINE AND PUNISHMENT IN GLOBAL POLITICS: ILLUSIONS OF CONTROL 191, 193 (Janie Leatherman, ed., 2008); Andrew Kuper, *Harnessing Corporate Power: Lessons from the UN Global Compact*, 47 DEV. 9, 11 (2004).

68. Thérien & Pouliot, *supra* note 63, at 68; *Toothless UN Website on Global Compact with TNCs*, 6 CORPORATE EUROPE OBSERVER ¶ 1 (2000).

69. Kuper, *supra* note 67, at 11 (citing S. PRAKASH SETHI, *SETTING GLOBAL STANDARDS: GUIDELINES FOR CREATING CODES OF CONDUCT IN MULTINATIONAL CORPORATIONS* (2003)).

70. ANNUAL REVIEW OF BUSINESS POLICIES & ACTIONS TO ADVANCE SUSTAINABILITY: 2011 GLOBAL COMPACT IMPLEMENTATION SURVEY, UNITED NATIONS GLOBAL COMPACT (2012), available at http://www.unglobalcompact.org/docs/news_events/8.1/2011_Global_Compact_Implementation_Survey.pdf [hereinafter ANNUAL REVIEW].

71. John Gerard Ruggie, *The Theory and Practice of Learning Networks*, 2002 J. OF CORP. CITIZENSHIP 27, 33 (2002).

terms, the Compact “provides a venue for opportunistic companies to make grandiose statements of corporate citizenship without worrying about being called to account for their actions.”⁷² This critique is tellingly demonstrated by the fact that multiple U.S. companies refused to join the Global Compact until they were legally protected from suit based on claims of failure to uphold the Compact.⁷³

c. *Demand for Accountability*

The most prolific critique of the Global Compact is that it does not engender accountability.⁷⁴ The Global Compact makes no attempt to monitor or verify corporate behavior; instead, it relies on “members of the public or civil society to highlight cases of poor performance or disingenuous reporting.”⁷⁵ As such, accountability, according to the Global Compact, is “the ability of . . . participants to be answerable to their stakeholders for their implementation actions” and rests on the mandatory requirement to submit an annual COP.⁷⁶ However, COP reporting has proven lackluster, both in quantity and quality. In 2011, 963 companies were expelled from the Compact for failure to disclose their progress, bringing the total number of companies expelled from the Compact since its inception to over 3,000.⁷⁷ In addition, not all Global Compact principles are covered with the same level of detail in individual company COPs. There is a “wide disparity with regard to information available per principle” and “reported information is not comprehensive, with [the majority of] COPs focusing more on commitments and management systems than on materiality, performance and achievements.”⁷⁸ In effect, corporations can pick and choose what to highlight. As a group of prominent scholars and NGO leaders warned the U.N. at the outset of the Global Compact, “[w]ithout monitoring,

72. *Global Compact is Another Exercise in Futility*, THE FIN. EXPRESS (Sept. 7, 2003), <http://www.financialexpress.com/news/-global-compact-is-another-exercise-in-futility-/91447/0>.

73. *See Corporate Social Responsibility: Bluewashed and Boilerplated*, THE ECONOMIST (June 17, 2004), <http://www.economist.com/node/2771522> [hereinafter *Bluewashed and Boilerplated*].

74. Andreas Rasche, “A Necessary Supplement”: *What the United Nations Global Compact Is and Is Not*, 48 BUS. & SOC’Y 511, 524 (2009).

75. Berliner & Prakash, *supra* note 67, at 152.

76. Rasche et al., *supra* note 30, at 13.

77. ANNUAL REVIEW, *supra* note 70; *see also*, Jo Confino, *Cleaning up the Global Compact: Dealing with Corporate Freeriders*, THE GUARDIAN (Mar. 26, 2012, 12:47 AM), <http://www.theguardian.com/sustainable-business/cleaning-up-un-global-compact-green-wash>.

78. Carrie Hall, UNITED NATIONS GLOBAL COMPACT ANNUAL REVIEW 2008 56 (2009).

the public will be no better able to assess the behavior, as opposed to the rhetoric, of corporations.”⁷⁹

The Global Compact, as a voluntary, non-monitored, non-enforceable corporate social responsibility mechanism, fails to protect those harmed by its members’ human rights abuses. Conceived of as a “safe space in which to learn what corporate responsibility is all about,” the Global Compact unacceptably coddles MNCs, instead of attempting to hold them accountable for their actions.⁸⁰ Not only is its system of stakeholder monitoring rendered ineffective by weak or nonexistent reporting, victims of corporate human rights abuses are also not clearly conceptualized as stakeholders in the Global Compact’s vision of oversight.⁸¹ Local communities or individuals harmed by Global Compact members receive no recourse from the Global Compact system for the impingement of their rights, even if these transgressions were to be reported in a company’s COP.⁸² The COP is an opportunity for corporations to highlight the positive and conceal the negative—to display the Global Compact seal on their webpage and reap the benefits of the organization’s credibility. As the U.N. Secretary-General stated four years after the Compact’s inception, the Global Compact “can only be a pragmatic *interim* solution” contributing to increased and improved national and global public governance.⁸³

B. *The Guiding Principles*

The Guiding Principles, unanimously adopted by the UNHRC in 2011, are an elaboration of Ruggie’s “Protect, Respect and Remedy” framework. This framework is often referred to as “the three pillars,” with each pillar being “an essential component in an inter-related and dynamic system of preventative and remedial measures.”⁸⁴ The pillars

79. Oliver F. Williams, *The U.N. Global Compact: The Challenge and the Promise*, 14 BUS. ETHICS QUARTERLY 755, 759 (2004) (quoting letter from nineteen distinguished academics and NGO directors, to Kofi Annan, U.N. Secretary-General, June 20, 2000, available at <http://www.corpwatch.org/article.php?id=961>).

80. *Business and Human Rights: Together at Last? A Conversation with John Ruggie*, 35.2 THE FLETCHER FORUM OF WORLD AFFAIRS 117, 120 (2011).

81. The U.N. Global Compact refers to stakeholders as “consumers, investors or employees,” but makes no mention of local communities or individuals who may be affected by a corporation’s operations. *How are COPs Used?*, *supra* note 56.

82. See, e.g., *Bluewashed and Boilerplated*, *supra* note 73.

83. Press Release, Secretary-General, Global Compact Participants Travellers on ‘Common Historic Journey’ to Fairer, More Stable World Says Secretary-General at UN Summit, U.N. Press Release SG/SM/9383, ECO/69 (June 24, 2004) (emphasis added).

84. *Guiding Principles*, *supra* note 5, ¶ 6.

represent the core components of promoting human rights in the business context, recognizing the need to:

Protect: The State duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation and adjudication;

Respect: The 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 to address adverse impacts with which they are involved;

Remedy: The need for greater access by victims to effective judicial and non-judicial remedy.⁸⁵

The Guiding Principles are a set of thirty-one principles, expounding upon the duties, obligations, and expectations encompassed in each pillar. The Principles apply to all businesses, both domestic and transnational, irrespective of size, sector, corporate form, location, or ownership, but do not create new international legal obligations.⁸⁶ The Guiding Principles' normative contribution lies in their elaboration of the "implications of existing standards and practices for States and business entities; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved."⁸⁷ However, the Principles are not a "plug-and-play" one-size-fits-all toolkit; rather, they must be implemented in consideration of the size and location of states and corporations.⁸⁸ While it is not within the scope of this Section to discuss each Guiding Principle in turn, the following is a summary of principles within each pillar applicable to the analysis of this Note, followed by an overall critique of the system.

1. Protect

Under international law, the state has a duty to protect against human rights abuses within its territory, including protecting against abuses caused by third parties—such as MNCs.⁸⁹ States can breach this

85. *Id.*

86. *Id.* gen. princ.

87. *Id.* ¶ 14.

88. *Id.*; Robert C. Blitt, *Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embrasive Approach to Corporate Human Rights Compliance*, 48 TEX. INT'L. L.J. 33, 43 (2012).

89. *Guiding Principles*, *supra* note 5, princ. 1.

obligation where human rights abuses are attributable to them or where they fail to prevent, investigate, or redress a private actors’ abuse.⁹⁰ States do not have the obligation under international law to ensure that businesses domiciled in their territory respect human rights abroad; however, they should set out clearly the expectation that these businesses respect human rights throughout their operations.⁹¹ When host states may be unable to protect human rights due to lack of effective control, where transnational corporations are involved, home states “have roles to play in assisting both those corporations and host States to ensure that businesses are not involved with human rights abuse.”⁹²

2. Respect

The corporate responsibility to respect human rights is “a global standard of expected conduct for all business enterprises wherever they operate.”⁹³ This responsibility refers to internationally recognized human rights, including those expressed in the International Bill of Human Rights, consisting of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.⁹⁴ It exists “independently of States’ abilities and/or willingness to fulfill their own human rights obligations, and does not diminish those obligations.”⁹⁵ In addition, it exists beyond compliance with home and host state laws and regulations protecting human rights.⁹⁶ The responsibility requires that businesses

(a) avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; and (b) seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.⁹⁷

90. *Id.* princ. 1 cmt.

91. *Id.* princ. 2.

92. *Id.* princ. 7 cmt.

93. *Id.* princ. 11 cmt.

94. *Id.* princ. 12 cmt.

95. *Id.* princ. 11 cmt.

96. *Id.*

97. *Id.* princ. 13.

In order to uphold their responsibility, businesses should carry out human rights due diligence, including assessing actual and potential human rights impacts and integrating and acting upon the findings.⁹⁸ In gauging these human rights risks, businesses should refer to internal or independent external human rights experts, potentially affected persons, and other relevant stakeholders in a meaningful way.⁹⁹ Corporations should “treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate,” even if this is not the case in actuality.¹⁰⁰

3. Remedy

As part of a state’s duty to protect against human rights abuses, it must ensure that those affected by corporate human rights abuses within its jurisdiction have access to effective remedy, through either judicial, administrative, legislative or other appropriate means.¹⁰¹ Along these lines, a state should ensure the effectiveness of its domestic judicial mechanisms, “including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.”¹⁰² States also must ensure that they do not erect barriers to prevent legitimate cases from being brought before the court system and that “the provision of justice is not prevented by corruption of the judicial process, that courts are independent of economic or political pressures from other State agents and from business actors, and that legitimate and peaceful activities of human rights defenders are not obstructed.”¹⁰³

4. Criticism

After being unanimously adopted by the UNHRC, the Guiding Principles have been widely endorsed by a number of states, corporations, and international organizations; however, they have also faced strong criticism from the NGO community. Human Rights Watch, one of the Guiding Principles’ harshest critics, succinctly critiques the Guiding Principles as such:

98. *Id.* princ. 17.

99. *Id.* princ. 18.

100. *Id.* princ. 23.

101. *Id.* princ. 25.

102. *Id.* princ. 26.

103. *Id.* princ. 26 cmt.

“IT ISN’T A STATE PROBLEM”

Most important, while the principles provide some useful guidance to businesses interested in behaving responsibly they also represent a woefully inadequate approach to business and human rights issues. That is because without any mechanism to ensure compliance or to measure implementation, they cannot actually require companies to do anything at all. Companies can reject the principles altogether without consequence—or publicly embrace them while doing absolutely nothing to put them into practice. The principles do not explicitly insist that governments regulate companies with the requisite scope and rigor; they also fail to push governments hard enough to ensure that companies respect human rights.¹⁰⁴

Major criticisms of the Guiding Principles are three-fold: they (1) “endorse[] the status quo: a world where companies are encouraged, but are not obliged, to respect human rights”;¹⁰⁵ (2) fail to ensure the right to an effective domestic remedy; and (3) fail to ensure the existence of home state measures to prevent abuses committed by companies overseas.¹⁰⁶

a. *No Corporate Obligation to Respect Human Rights*

The corporate “responsibility to respect” is not an attempt to convey legal duties upon MNCs. It is “distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions.”¹⁰⁷ Therefore, respecting human rights is not an obligation under international human rights law imposed directly upon companies, “although elements of it may be reflected in domestic laws.”¹⁰⁸ The Guiding Principles are yet another codification of the voluntary nature of corporate regard for human rights, failing to affect real reform within the institutionalized state of play of the business and

104. Chris Albin-Lackey, *Without Rules: A Failed Approach to Corporate Accountability*, in WORLD REPORT 2013: EVENTS OF 2012 29, 32 (Human Rights Watch ed., 2013).

105. *UN Human Rights Council: Weak Stance on Business Standards: Global Rules Needed, Not Just Guidance*, HUMAN RIGHTS WATCH (June 16, 2011), <http://www.hrw.org/news/2011/06/16/un-human-rights-council-weak-stance-business-standards>.

106. See, e.g., Blitt, *supra* note 88, at 52-53.

107. *Guiding Principles*, *supra* note 5, princ. 12 cmt.

108. U.N. Special Representative of the Secretary-General, Business and Human Rights: Further Steps Towards the Operationalization of the “Protect, Respect and Remedy” Framework: Rep. of the Secretary-General on the Issue of Human Rts. and Transnat’l Corp. and Other Bus. Enterprises, John Ruggie, ¶ 55, U.N. Doc. A/HRC/14/27 (Apr. 9, 2010).

human rights realm.

b. *Host State Governance Gaps*

Governance gaps in domestic laws continue to foster high levels of corporate impunity. Host states are under the duty to protect against human rights abuses within their territory, including taking appropriate steps to investigate, punish, and redress such abuse through effective policies, legislation, regulation, and adjudication.¹⁰⁹ However, in the context of many host states, access to judicial remedy is secondary to economic advancement. As discussed in Section II, with the advancement of neoliberal globalization, MNCs have gravitated toward investing in developing countries with less stringent regulations (i.e., weak governance zones). In many cases of grave corporate human rights abuse, the state itself either perpetrates the abuse on behalf of or in conjunction with the corporation, or is unwilling to stop corporate transgressions.¹¹⁰ In addition, a recent UNHRC-commissioned report found that legal proceedings are “only rarely” brought in the jurisdiction where the abuse is alleged to have occurred because “claimants are so pessimistic about their chances of obtaining remedy in their home courts.”¹¹¹ This study demonstrates the extent of the domestic governance gap and its effect on propagating corporate impunity.

c. *Insufficient Home State Regulation*

The Guiding Principles, while recognizing that home states have no duty under international law to regulate the extraterritorial activities of businesses domiciled in their jurisdiction, ask that they identify and address governance gaps caused by weak host states, and attempt to redress the corporate human rights abuses of their corporations occurring abroad.¹¹² In taking the appropriate steps to address these gaps, states should explore “civil, administrative or criminal liability.”¹¹³

109. *Id.* princ. 1.

110. Jena Martin Amerson, “*The End of the Beginning?*”: A Comprehensive Look at the U.N.’s Business and Human Rights Agenda from a Bystander Perspective, 17 *FORDHAM J. CORP. & FIN. L.* 871, 875 (2012).

111. JENNIFER ZERK, CORPORATE LIABILITY FOR GROSS HUMAN RIGHTS ABUSES: TOWARDS A FAIRER AND MORE EFFECTIVE SYSTEM OF DOMESTIC LAW REMEDIES, A REPORT PREPARED FOR THE OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS 92-93 (2004), available at <http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf>.

112. *Guiding Principles*, *supra* note 5, princ. 2 cmt.

113. *Id.* princ. 7 cmt.

However, a review of domestic recourse for extraterritorial human rights abuses reveals “(a) many and varied barriers to justice for claimants in most (if not all) jurisdictions and (b) differences in legal standards and approaches at domestic level [sic] which lead to inequalities between different groups of affected individuals and communities in terms of their ability to seek remedies for harm.”¹¹⁴

Corporate involvement in gross human rights abuses is sanctioned by both criminal and civil liability in varying degrees in the majority of domestic jurisdictions.¹¹⁵ For example, in the civil law context, available torts vary and are restricted by short statutes of limitations and *forum non conveniens* issues.¹¹⁶ Additionally, national differences in the extent to which domestic courts are willing to take jurisdiction over foreign subsidiaries and commercial partners complicate the issue further.¹¹⁷ These state-to-state differences complicate the sole reliance on domestic courts for human rights redress.

i. Corporate Criminal Liability

Corporate criminal responsibility varies greatly within the domestic sphere. Most jurisdictions recognize the possibility of corporate criminal responsibility, either as a general concept or in relation to specific offenses or types of offenses.¹¹⁸ However, some countries, such as Germany and Italy, do not.¹¹⁹ In addition, within those countries that recognize corporate criminal responsibility either generally or on an opt-in or opt-out approach, requirements for establishing corporate culpability also vary greatly.¹²⁰ Rules for establishing liability and complicity also run the gamut.¹²¹

In recent years, with the implementation of the Rome Statute, increased cross-border litigation, and the development of parent company liability theories and rules permitting the exercise of extraterritorial jurisdiction, corporations have become subject to an expanding

114. ZERK, *supra* note 111, at 105.

115. *See id.*

116. *Id.* at 64.

117. *Id.* at 14.

118. *See id.* at 32.

119. *Id.* at 32-33.

120. *Id.* at 33-35.

121. *Id.* at 35.

web of liability in relation to gross corporate human rights abuses.¹²² Nonetheless, individuals seeking domestic redress are left wanting. In most jurisdictions, prosecutors have wide discretion regarding whether or not to pursue a case. A number of factors play into the decision: not only availability of resources, but also difficulty in investigating extraterritorial crimes, the need for practical support from the other affected states, and politics. While many states have established the legal principles and rules to prosecute businesses for causing or being complicit in gross human rights abuses, for reasons like those enumerated above, “few criminal prosecutions have materialised so far.”¹²³

ii. Corporate Civil Liability

Victims of human rights abuses may also seek private law claims against corporations in most jurisdictions—not for human rights violations per se, but based on wrongful behavior doctrines, such as assault, battery, or intentional infliction of emotional distress. A number of issues arise when victims attempt to bring private law claims against an MNC. First, the definition of what constitutes “wrongful behavior” varies greatly between states, as does the standard of intent to be applied.¹²⁴ A major barrier in civil litigation is the need in most instances to establish either negligence or intent on behalf of the corporate actor, and establishing “who knew what and when in a corporate structure” proves to be a “significant obstacle” in this type of litigation.¹²⁵ The doctrine of independent corporate personality is also a tremendous barrier to domestic civil litigation; whether and under what circumstances a domestic court will “pierce the corporate veil” is unclear, even in jurisdictions where this action has a long jurisprudential history.¹²⁶ Additional substantive barriers to domestic civil suit include issues of jurisdiction, choice of law, state immunity, and

122. See ANITA RAMASASTRY & ROBERT C. THOMPSON, FAFO, COMMERCE, CRIME AND CONFLICT: LEGAL REMEDIES FOR PRIVATE SECTOR LIABILITY FOR GRAVE BREACHES OF INTERNATIONAL LAW, EXECUTIVE SUMMARY, FAFO (2006).

123. ZERK, *supra* note 111, at 40.

124. *Id.* at 33-38, 43-44.

125. *Id.* at 44.

126. *Id.* at 49-50; see also Franklin A. Gevurtz, *Piercing: An Attempt to Lift the Veil of Confusion Surrounding the Doctrine of Piercing the Corporate Veil*, 76 OR. L. REV. 853 (1997); Jonathan R. Macey & Joshua Mitts, *Finding Order in the Morass: The Three Justification for Piercing the Corporate Veil*, JOHN M. OLIN CTR. 11-14 (Yale Program for Studies in Law, Econ. & Pub. Policy, Research Paper Series, Research Paper No. 488, 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2398033.

non-justiciable political questions.¹²⁷

Furthermore, while framing gross human rights abuses as torts is not necessarily conceptually difficult, there are a number of gross human rights abuses that cannot be fully captured by their civil law analogs (e.g., apartheid).¹²⁸ There is also a question of inherent dignity: one should not be forced to minimize one’s maltreatment or persecution in order to receive legal redress. Fitting gross human rights abuses under tort labels such as assault and battery fail to convey the gravity of the crime and requisite level of condemnation. Along these lines, many jurisdictions do not provide for punitive damages in private tort-based claims, further inhibiting an individual’s ability to access justice.¹²⁹

iii. International Law Responsibility

Lastly, while it is widely recognized that “particular attention” must be paid to gross violations of human rights and fundamental freedoms, “under international law, the violation of any human right gives rise to a right of reparation for the victims.”¹³⁰ Restricting legal recourse for human rights violations to the domestic sphere limits the number of human rights abuses remediable to only those most grave, such as torture, slavery, and forced disappearances, which have been codified into domestic private rights of action. This propagates the corporate accountability governance gap by allowing other human rights violations—for example, violating an individual’s right to water, health, or culture—to go unpunished. While it is possible that in some jurisdictions, such as the Netherlands, Japan, and South Africa, an act that amounts to a violation of international law can itself provide the underlying basis on which to bring a private law claim, this proposition has not yet been tested.¹³¹

While the Guiding Principles obligate host states to protect and remedy domestic corporate human rights abuses and challenge home states to identify and fill governance gaps in relation to extraterritorial

127. ZERK, *supra* note 111, at 48-51.

128. *Id.* at 45.

129. *Id.* at 45.

130. *Id.* at 26; Comm’n on Human Rights, Sub-Comm’n. on the Prevention of Discrimination and Protection of Minorities, Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final report submitted by Mr. Theo Van Boven, Special Rapporteur, UN Doc. E/CN.4/Sub.2/1993/8, at 56 (July 2, 1993); *see also*, G.A. Res. 60/147, Annex, U.N. GAOR, 69th Sess., U.N. Doc. A/RES/60/147 (Mar. 21, 2006).

131. ZERK, *supra* note 111, at 45.

human rights abuses of corporations domiciled in their territory, little has been done to address difficulties in access to remedy. The majority of cases against corporate human rights abusers are not brought in the host state due to concerns of feasibility, safety, fairness, and financial resources.¹³² Moreover, there exists an array of barriers to judicial remedy in home state jurisdictions. In the domestic criminal law context, while most states adopt some form of criminal corporate liability, prosecutorial discretion has stymied development of case law in this area. In the domestic civil law context, jurisdictional, choice of law, and corporate personality issues keep many cases out of home state courts. By relegating corporate accountability into the domestic law sphere, the Guiding Principles propagate the governance gap they aim to fill.

V. CASE STUDY: MINAS CONGA

The controversy surrounding Newmont Mining Corporation's Minas Conga mine is an illustrative case of the business and human rights problem. Ruggie himself recognized the emblematic nature of the situation, arranging a site visit in 2006 at the start of his special mandate in order to "gain a more granular understanding" of the business and human rights issues in the mining sector.¹³³ At the outset of this Section, it must be acknowledged that the Minas Conga case study is not an attempt to represent any overarching, general trend in the response of host governments to MNC power, but instead is used as an example of a situation where binding international human rights obligations for corporations are needed to protect individuals and defend against impunity—a situation where the Global Compact and the Guiding Principles fail to do enough to protect against human rights abuses.¹³⁴ This Section provides: (1) a history of the rise of neoliberalism and international mining operations in Peru; (2) an overview of the Minas Conga controversy; (3) a discussion of anti-mining protests in the region and the state and corporate responses; (4) an overview of the human rights implications of Minas Conga; and (5) an analysis of how the current business and human rights frame-

132. *Id.* at 92-93.

133. RUGGIE, *supra* note 39, at xxxvi.

134. This is in response to Ruggie's statement that "a Peruvian mining operation is not a representative sample of the universe of global business and human rights challenges that [his] mandate was to address"; while true, this does not mean that the Guiding Principles can acceptably fail to recognize the need to resolve "enormously complex" business and human rights situations, like Minas Conga. *Id.* at xlii.

works fail to adequately protect those affected by the project.

A. *Neoliberalism and the Proliferation of Mining in Peru*

As discussed in Section II, for many developing countries, foreign direct investment has become a main, if not the primary, source of national capital. Peru, as one of the world’s leading producers of a number of minerals, including copper, silver, gold, tin, zinc, and mercury, has increasingly become reliant on the foreign direct investment of multinational mining companies.¹³⁵ Since the 1990s, the Peruvian government has aggressively pursued foreign investment through economic liberalization.

The election of Alberto Fujimori (1990-2001) brought about a dramatic implementation of neoliberal economic reforms. Aptly termed “Fujishock,” Fujimori’s “Draconian program” of neoliberal reforms included foreign exchange rate unification and liberalization, state employment cuts, tax and banking reform, flexibilization of labor relations, the elimination of wage indexation and employment security laws, the dismantling of agrarian codes, and aggressive privatization.¹³⁶ By the end of the Fujimori regime, Peru was one of the most open and liberal economies, not only in Latin America, but the world over.¹³⁷

With the implementation of neoliberal reforms, the mining industry has gained increasing importance in the country’s export-led economy. In 1995, the *Ley de Tierras* privatized land markets by revoking the inviolability of communal lands and eliminating landholding limitations.¹³⁸ This, coupled with the 1996 *Ley del Catastro Minero Nacional*, which guaranteed foreign mining firms’ control of the land resources necessary for operations, including transport and beneficiation concessions, opened Peru to an onslaught of mining investment and

135. FEI HAN ET AL., INTERNATIONAL MONETARY FUND, PERU: IMF COUNTRY REPORT 6 (2014). Peru is the largest producer of zinc, tin, lead and gold in Latin America; it is the third largest producer of zinc, tin, copper, and silver, fourth largest producer of lead and mercury, and sixth largest producer of gold in the world. ANUARIO MINERO 2012, MINISTERIO DE ENERGÍA Y MINAS 1, 22 (2013) (Peru).

136. EDUARDO SILVA, CHALLENGING NEOLIBERALISM IN LATIN AMERICA 237-40 (2009).

137. Jeffrey Bury, *Livelihoods in Transition: Transnational Gold Mining Operations and Local Change in Cajamarca, Peru*, 170 THE GEOGRAPHICAL J. 78, 80 (2004).

138. Ley No. 26505, 17 July 1995, *Ley de la Inversión Privada en el Desarrollo de las Actividades Económicas en las Tierras del Territorio Nacional y de las Comunidades Campesinas y Nativas* [Law of Private Investment in the Development of Economic Activities in the Lands of Peasant and Indigenous Communities], 18 July 1995 (Peru).

operations.¹³⁹

The facts are in the figures: between 1992 and 2001, mining products composed an average of 45.4% of national exports—the country’s biggest export—and mining investment rose from US\$387 million in 1996 to more than US\$1.5 billion in 2000.¹⁴⁰ Subsequent administrations have adhered to and advanced the neoliberal trajectory of Peru. Alan García (2006-2011), perhaps in an attempt to rectify the disastrous economic policies of his first term (1985-1990), surpassed the neoliberal footsteps of his predecessors, placing multinational mining companies at the center of his new economic development plan and signing numerous free trade agreements, including with the United States, Canada, and China.¹⁴¹ However, García went even further, pushing numerous extractive industry related decrees through Congress during his presidency, some of which unconstitutionally opened up exploratory land and suspended environmental regulations in order to promote investment.¹⁴²

Not surprisingly, Peru’s lax environmental and economic regulations have resulted in an inundation of investment and revenues from multinational mining ventures. By the end of the García administration, the Peruvian economy was outperforming the majority of its Latin American neighbors.¹⁴³ In 2011, mineral exports composed 59% of

139. Ley No. 26615, 25 May 1996, *Ley del Catastro Minero Nacional* [Law of the National Mining Registry], 25 May 1996 (Peru). Beneficiation is the process of separating ore into mineral and gangue. Flotation beneficiation, used in the extraction of gold and copper, is water intensive and requires much holding space for toxic tailing.

140. JAIME RAUL QUIJANDRIA SALMON ET AL., MINISTERIO DE ENERGÍA Y MINAS. ANUARIO MINERO 2001 [MINING YEARBOOK 2001] (2001) (Peru), available at <http://www.minem.gob.pe/minem/archivos/file/Mineria/PUBLICACIONES/ANUARIOS/2001/ANUARIO2001.pdf>; GLODOMIRO SANCHEZ MEJIA ET AL., MINISTERIO DE ENERGÍA Y MINAS. ANUARIO MINERO 2004 [MINING YEARBOOK 2004] (2004) (Peru), available at http://www.minem.gob.pe/minem/archivos/file/Mineria/PUBLICACIONES/ANUARIOS/2004/ANUARIO_2004.pdf.

141. *Trade Agreement Information on Peru*, FOREIGN TRADE INFORMATION SYSTEM, ORGANIZATION OF AMERICAN STATES, http://www.sice.oas.org/ctyindex/PER/PERAgreements_e.asp (last visited Nov. 6, 2014).

142. During his second term, García passed 374 emergency decrees and 142 legislative decrees through Congress, causing much of the public to view the Peruvian state’s interaction with multinational extractive industry corporations as corrupt. See, e.g., *En la mira 374 decretos de urgencia del gobierno de Alan García*, LA REPÚBLICA (Sept. 11, 2011, 8:56 AM), <http://www.larepublica.pe/11-09-2011/en-la-mira-374-decretos-de-urgencia-del-gobierno-de-alan-garcia>; Aldo Blume Rocha, *Los Decretos de Urgencia e Alan García: El Abuso y la Usurpación de la Facultad Normativa por parte del Poder Ejecutivo* (Instituto de Defensa Legal—Justicia Viva Working Paper No. 54, 2011), available at http://www.justiciaviva.org.pe/webpanel/doc_trabajo/doc14092011-140008.pdf.

143. Guillaume Corpart, *Colombia and Peru: The Rising Stars of Latin America*, AMERICAS MARKET INTELLIGENCE (Dec. 2012), http://americasmi.com/archivos/pdf/Article_-_Colombia_and_Peru_-_

national exports and mining investment surpassed US\$7 billion.¹⁴⁴ Current president Ollanta Humala has continued in his predecessors’ footsteps. Although running on a liberal ticket, Humala quickly changed his stance toward the mining industry once in office.¹⁴⁵ As of April 2013, minerals composed over 62% of national exports, and Peru expects a record US\$14 billion in mining investments in 2014.¹⁴⁶

With the need for increased exploratory and extractive investment to fuel the economy, Peru has promoted industry at the expense of the environment and the rural populations who depend upon it. The country is a prime example of a national government willing to shirk its duty to protect individuals in order to promote the economic prosperity of the country as a whole; as long as mineral rents continue to support and uplift the Peruvian economy, the state appears ready to continue to support mining MNCs in the face of social unrest and environmental and human degradation.

B. *The Minas Conga Controversy*

The department of Cajamarca, located among the Andean highlands of northern Peru, is a center of mining exploration and exploitation. It historically receives the most mining investment of any department—with 2012 investments totaling approximately US\$1.3 billion, or around 15% of national mining investment.¹⁴⁷ These high

20121108.pdf; *Las Cinco Economía Protagonistas en América Latina en el 2012*, EL PAÍS (Dec. 3, 2012), <http://www.elpais.com.co/elpais/economia/noticias/cinco-economias-protagonistas-america-latina-2012>.

144. JORGE MERINO TAFUR, ET AL., MINISTERIO DE ENERGÍA Y MINAS, ANUARIO MINERO 2011 [Mining Yearbook 2011] (2012) (Peru), available at <http://www.minem.gob.pe/descripcion.php?idSector=1&idTitular=4771>.

145. For an ironic example of this about face, compare Torres Malo, *Ollanta Humala dice: CONGA NO VA, ¿Qué es más importante, el agua o el oro?*, YOUTUBE (Dec. 12, 2011), <http://www.youtube.com/watch?v=lsloKzTEpE> (showing then presidential candidate Humala in traditional *campesino* garb promising to respect the local communities decisions regarding mining in the region and reiterating the importance of water to the region), with Panamericana Televisión, *President Ollanta Humala: “Conga si va”*, YOUTUBE (Apr. 20, 2012), <http://www.youtube.com/watch?v=uIjVWfxXK7I> (showing President Humala’s public statement regarding the continue development of the Conga Project despite local protest against mining in the region, promising only that their local water substitute will be of adequate quality and quantity).

146. BOLETÍN ESTADÍSTICO DE MINERÍA, MEM, NO. 02-2013, MINISTERIO DE ENERGÍA Y MINAS (Apr. 2013) (Peru), available at <http://www.minem.gob.pe/minem/archivos/file/Mineria/PUBLICACIONES/VARIABLES/2013/MAYO.pdf>; *Presidente Humala Anuncia Nuevas Inversiones Mineras para el 2014*, RPP NOTICIAS (Dec. 29, 2013), http://www.rpp.com.pe/2013-12-29-presidente-humala-anuncia-nuevas-inversiones-mineras-para-el-2014-noticia_658274.html.

147. ANUARIO MINERO 2012, *supra* note 135, at 84.

investment levels are due, in large part, to the mega-mining complex Minera Yanacocha, South America (MYSA), which includes Mina Yanacocha, the largest gold mine in South America. The Minas Conga mining project is an outgrowth of Newmont's operations in the region. Minas Conga, similar to the Mina Yanacocha, is owned and operated by Newmont (51.4%), Minas Buenaventura (43.6%), and the International Finance Corporation (5%).¹⁴⁸ Minera Yanacocha operates the project, which is also majority owned by Newmont Mining.¹⁴⁹ The mine is estimated to hold approximately 6.1 million attributable ounces of gold reserves and 1.7 billion attributable pounds of copper reserves.¹⁵⁰ With an initial planned investment of US\$4.8 billion, this large-scale gold and copper mine is expected to generate upwards of 8,000 jobs and more than US\$2 billion in taxes for the Peruvian government over its nineteen-year lifespan and to introduce more than US\$1.3 billion into the regional economy.¹⁵¹

Cajamarca's regional economy relies heavily on cattle and dairy production.¹⁵² As such, the rural economy is dependent on natural capital—usually land and water resources—which either directly or indirectly constitutes the majority of household livelihood activities in pastoral Cajamarca.¹⁵³ However, since the proliferation of mining, most specifically the founding of the Yanacocha mine in the region, rural access to natural capital has been greatly affected, both in terms of access to and price of land and access to unpolluted natural resources. Between 1992 and 2000, MYSA purchased over 11,000 hectares of land in the region, consequently raising the price of private land in the surrounding regions and “shuffling . . . the sociospatial distribution of rights to use land.”¹⁵⁴ Households participating in traditional vertical production techniques, which involve utilizing differing regional ecological zones for agriculture or grazing, have been relegated to lower, less fertile ecological zones, as mining operations function most often at the highest elevations of the region.¹⁵⁵ In

148. *Conga Project—Fact Sheet*, NEWMONT MINING CORPORATION (2012), <http://www.newmont.com/node/4937>.

149. *Conga Project*, INFOMINE: COMPANY & PROPERTY MINING INTELLIGENCE, <http://www.infomine.com/companies-properties/reports/propertyreport.aspx?pid=51491> (last visited July 18, 2014).

150. *Id.*

151. *Id.*

152. *See generally*, Bury, *supra* note 137.

153. *Id.* at 81.

154. Jeffrey Bury, *Mining Mountains: Neoliberalism, Land Tenure, Livelihoods, and the new Peruvian Mining Industry in Cajamarca*, 37 ENV'T & PLANNING 221, 233 (2005).

155. *Id.* at 233-34.

addition, the techniques utilized in the Yanacocha venture, which will also be employed in the Minas Conga project—open-pit mining and cyanide heap leaching—are highly environmentally straining, requiring the removal of entire mountain tops, extensive water use, and the introduction of dangerous chemicals into the environment.¹⁵⁶

In order to access the large amounts of gold and mineral deposits in the area, Newmont planned to completely drain four lakes, constituting the region’s main water supply, within the operational region.¹⁵⁷ While the loss of these four lakes was to be offset by the construction of four reservoirs, local communities, dependent on these bodies of water for their livelihood, were concerned by the consequences of such ecologically disruptive operations in their local environments.¹⁵⁸ Newmont’s Environmental Impact Assessment of the project, approved by the Peruvian government in October 2010, was a main source of controversy surrounding the Minas Conga. The EIA expressly states that the project “has the potential to generate impacts on the environment,” not only with regard to water, but also in relation to air and soil quality and plant and wildlife degradation and destruction; however, the EIA relies on mitigation techniques to control these negative consequences and ensure “adequate environmental protection.”¹⁵⁹ Having witnessed for decades the destructive nature of open-pit gold mining from the neighboring Yanacocha mine complex, local community members were wary of promises of “adequate mitigation”—a term of broad interpretation.¹⁶⁰

In 2011, a report by then Minister of the Environment Ricardo Giesecke outlining the irrevocable damage that could result from the Conga project as planned was leaked to the public. According to Giesecke, the Conga project would transform:

de manera significativa e irreversible la cabecera de cuenca, desapareciendo varios ecosistemas y fragmentando los restantes, de tal manera que los procesos, funciones, interacciones y servicios ambientales serán afectados de manera irreversible. [the basin head in a significant

156. *Id.* at 230.

157. *Conga Project Environmental Impact Assessment (EIA) Fact Sheet—Water*, NEWMONT MINING CORP. (Dec. 7, 2011), <http://www.newmont.com/sites/default/files/u87/Conga%20Project%20Water%20Fact%20Sheet%20Final.pdf>.

158. *Id.*

159. KNIGHT PIÉSOLD CONSULTORES S.A., MINERA YANACOCHA S.R.L., CONGA PROJECT, ENVIRONMENTAL IMPACT STUDY—EXECUTIVE SUMMARY ¶ 6.1.6 (2010).

160. *Id.* ¶ 7.5.1.2.

and irreversible manner, eliminating several ecosystems and fragmenting those remaining, in such a way that the processes, functions, interactions and environmental services will be irreversibly affected].¹⁶¹

The report also revealed that the removal of two of the lakes was non-integral to the mining project; the drained basins would be used only as depositories—demonstrating Newmont’s apparent lack of respect for the local environment.¹⁶²

C. *The Anti-Mining Movement and State and Corporate Responses*

Protests against the mining project began in October 2011.¹⁶³ On November 24, the same day as the EIA assessment report leak, community members from throughout the region began a coordinated, ten-day, region-wide strike against the project.¹⁶⁴ On the sixth day of the strike, protestors were confronted by the Peruvian National Police (PNP) and dispelled by tear gas and bullets, resulting in more than twenty wounded and one dead.¹⁶⁵ The increasing violence led to the suspension of the Minas Conga project.¹⁶⁶ An international third-party assessment of the EIA was established in December of that year to resolve the assessment’s discrepancies;¹⁶⁷ however, local protestors were not satisfied with this solution. During the EIA review period, community mobilizations in the form of protests and marches per-

161. Gustavo Gorriti, *De lagunas a desmontes*, IDL-REPORTEROS (Nov. 25, 2011), <http://idl-reporteros.pe/2011/11/25/de-lagunas-a-desmontes/>.

162. *Id.*

163. *Los últimos meses: Una Cronología del caso Conga*, LAMULA.PE (April 18, 2012), <https://lamula.pe/2012/04/18/los-ultimos-meses-una-cronologia-del-caso-conga/jimenard/>.

164. *Definirán medidas de protesta para defender lagunas y bofedales en zona de intervención del proyecto Conga*, GOBIERNO REGIONAL CAJAMARCA (Nov. 21, 2011), <http://www.regioncajamarca.gob.pe/noticias/definir-n-medidas-de-protesta-para-defender-lagunas-y-bofedales-en-zona-de-intervencion-del>.

165. Frank Bajak & Carla Salazar, *Newmont Mining Corp. Suspends \$4.8 Billion Peru Gold Mine Operation After Violent Peasant Protests Over Water Supply*, HUFFINGTON POST (Nov. 29, 2011), http://www.huffingtonpost.com/2011/11/30/newmont-mining-corp-suspe_n_1121915.html.

166. *Id.*

167. *Perú: Gobierno y autoridades de Cajamarca llegan a acuerdos sobre el peritaje de Conga*, INFOLATAM (Dec. 27, 2011), <http://www.infolatam.com/2011/12/28/peru-gobierno-y-autoridades-de-cajamarca-llegan-a-acuerdos-sobre-el-peritaje-de-conga/>.

sisted¹⁶⁸ and the regional government unsuccessfully attempted to declare, via regional ordinance, the Conga project unviable.¹⁶⁹

With the publication of the EIA review, the government has continued to support the project; however, it has done so with the supplementation of environmental safeguards and social spending and attempts to appease protestors with promises of more mining-revenue patronage.¹⁷⁰ The report, which analyzes the environmental viability of the Conga project in relation to water resources, recommends, inter alia, the preservation of two of the four lakes, the augmentation of water levels in the reservoirs, and more secure storage of wastewater.¹⁷¹ In April 2012, President Humala declared that the Conga project would be viable after the following amendments: (1) a four-fold or greater increase in the capacity of the reservoirs; (2) the creation of a social fund; (3) the construction of schools and healthcare centers, potable water sources, permanent irrigation systems, and forestation and reforestation projects; (4) the creation of more than 10,000 local jobs; and (5) an attempt to find alternatives to the drainage of two of the four lakes.¹⁷² In June 2012, Newmont announced plans to adopt the government’s amendments and continue with the project on a “water first” approach, first constructing the reservoirs before building infrastructure and production facilities.¹⁷³

168. See, e.g., *Peruanos inician gran marcha por el agua y contra la minería*, EL CIUDADANO (Feb. 1, 2012), <http://www.elciudadano.cl/2012/02/01/47775/peruanos-inician-gran-marcha-por-el-agua-y-contra-la-mineria/>; Mesías Guevara, *Paro contra el proyecto Conga*, LA REPÚBLICA, (Apr. 11, 2012), <http://www.larepublica.pe/columnistas/punto-de-vista/paro-contra-el-proyecto-conga-11-04-2012>.

169. Ordenanza Regional No. 036-2011-GR. CAJ-CR, GOBIERNO REGIONAL CAJAMARCA—CONSEJO REGIONAL (Dec. 5, 2011) (Peru), <http://www.regioncajamarca.gob.pe/sites/default/files/consejo/documentos/ordenanzas/ordenanza%20036%20II%20corregida.pdf>. In April 2012, Peru’s highest court, the Tribunal Constitucional del Perú, found the city’s declaration of the project’s unviability unconstitutional, holding the regional government lacked authority to regulate mining. *Tribunal Constitucional declaró inconstitucional ordenanza de Cajamarca contra Conga*, EL COMERCIO (Apr. 17, 2012), <http://elcomercio.pe/politica/gobierno/tribunal-constitucional-declaro-inconstitucional-ordenanza-cajamarca-contra-conga-noticia-1402895>.

170. *Yanacocha acepta nuevas condiciones para explotar Conga*, LA REPUBLICA (June 20, 2012), <http://www.larepublica.pe/20-06-2012/yanacocha-acepta-nuevas-condiciones-para-explotar-conga>.

171. FERNÁNDEZ RUBIO ET AL., *DICTAMEN PERICIAL INTERNACIONAL: COMPONENTE HIDRICO DEL ESTUDIO DE IMPACTO AMBIENTAL DEL PROYECTO MINERO CONGA (CAJAMARCA-PERU)* (2012).

172. Panamericana Televisión, *President Ollanta Humala: “Conga si va”*, YOUTUBE (Apr. 20, 2012), <http://www.youtube.com/watch?v=u1jVWfxXK7I>.

173. *Newmont Remains Committed to “Water First” Approach at Conga*, NEWMONT: OUR BUSINESS (Aug. 27, 2012), <http://www.newmont.com/our-voice/post/newmont-remains-committed-%E2%80%9Cwater-first%E2%80%9D-approach-conga>.

Mobilizers against the Minas Conga mine stand categorically opposed to the project and vow to continue protests, strikes, and other forms of social mobilizing until the project has been canceled, despite the increasing criminalization of and violence toward protesters.¹⁷⁴ The PNP, along with Yanacocha's private security forces,¹⁷⁵ has taken to violently repressing protesters with bullets and tear gas, resulting in numerous injuries and deaths; some movement leaders have been jailed, while others have fallen victim to death threats and other forms of intimidation.¹⁷⁶ The threat of human rights abuse has reached such high levels that in May 2014, the Inter-American Commission on Human Rights issued a precautionary measure calling on the Peruvian State to protect the lives of the community leader activists involved in the Minas Conga protests.¹⁷⁷

In addition, a 2013 report revealed that Newmont was contracting with the PNP to provide for additional police security.¹⁷⁸ This agreement, allowed for under a 2009 presidential decree, allows mining

174. See, e.g., Lynda Sullivan, *Peru's Conga Mine Conflict: Cajamarca Won't Capitulate*, TRUTHOUT (May 12, 2014), <http://truth-out.org/news/item/23638-perus-conga-mine-conflict-cajamarca-wont-capitulate>; *Antimineros Bloquearon Vías en Marcha Contra Proyecto Conga*, EL COMERCIO (Mar. 19, 2014), <http://elcomercio.pe/peru/cajamarca/antimineros-bloquearon-vias-marcha-contra-proyecto-conga-noticia-1716906>; *Dirigentes antimineros marchan por las calles de Cajamarca*, EL COMERCIO (Jan. 24, 2014), <http://elcomercio.pe/peru/cajamarca/dirigentes-antimineros-marchan-calles-cajamarca-noticia-1704948>.

175. Private Yanacocha mining security has been implicated in the repression of protests. Líderes y lideresas de Comunidades Campesinas y Rondas Campesinas de Cajamarca respecto de la República de Perú, Medida Cautelar No. 452-11, Inter-Am. Comm'n H.R., Resolución 9/2014 (May 5, 2014) [hereinafter IACHR Precautionary Measure].

176. See, e.g., U.N. Human Rights Council, *The Right to Water in Peru and the Criminalization of Protest: Human Rights are Not Respected when Facing the Mining Industry*, Joint written statement submitted by Centre Europe—Tiers Monde—Europe-Third World Center, non-governmental organization in general consultative status, France Libertés: Fondation Danielle Mitterrand, non-governmental organization in special consultative status, Indian Council of South America (CISA), International Educational Development, Inc. Mouvement contre le racisme et pour l'amitié entre les peuples, non-governmental organizations on the roster, H.R.C. 25th Sess., U.N. Doc. A/HRC/25/NGO/31 (Feb. 21, 2014); Luis Manuel Claps, *Police Repression Legalized as Mining Protests Grow in Peru*, NORTH AM. CONG. ON LATIN AM. (Feb. 13, 2014), <https://nacla.org/blog/2014/2/13/police-repression-legalized-mining-protests-grow-peru>; Ángel Páez, *Peru: UN Mission Probes Private Security Groups*, INTER PRESS SERVICE (Feb. 7, 2014), <http://www.ipsnews.net/2007/02/peru-un-mission-probes-private-security-groups/>; IACHR Precautionary Measure, *supra* note 175.

177. IACHR Precautionary Measure, *supra* note 175.

178. HUMAN RIGHTS WITHOUT FRONTIERS ET AL., POLICE IN THE PAY OF MINING COMPANIES: THE RESPONSIBILITY OF SWITZERLAND AND PERU FOR HUMAN RIGHTS VIOLATIONS IN MINING DISPUTES (2013), available at https://ia601903.us.archive.org/14/items/InformeSobreConveniosEntreLaPnpYLasEmpresasMineras_441/Inf_ConvPNP_eng.pdf.

companies to request additional services from the PNP, including “rapid deployment of larger units on the occasion of social protests” and routine police patrols on behalf of the company to “prevent, detect and neutralize” threats.¹⁷⁹ In some instances, companies provide full financial and logistical support.¹⁸⁰ The decree also allows for “institutional extraordinary additional services,” which provide for off-duty police officers to be hired and remunerated directly by companies as security; these officers continue to wear their PNP uniforms and use their state-issued weapons, making it unclear whether they are acting on behalf of the government or the corporation.¹⁸¹

As Newmont continues its attempts to gain the social license required to operate, it expects “the state and local government to help,” and for the “communities to understand that it is a private company.”¹⁸² However, the state has a different conceptualization. According to President Humala, “the state has already met all the requirements requested by the private sector,” by being “a zealous guardian of contractual compliance”; thus, he argues, Minas Conga is “not a problem of the state.”¹⁸³

D. *Exemplifying the Need for Binding International Human Rights Obligations for Corporations*

Numerous human rights abuses are implicated in the Minas Conga case, both by state and corporation actions. By continuing to develop the project despite local community resistance and environmental concern, Newmont is encroaching upon the affected communities’

179. ENVIRONMENTAL RIGHTS DEFENDERS AT RISK IN PERU, FRONT LINE DEFENDERS 3 (2014), available at http://www.frontlinedefenders.org/files/fld_report_peru_final.pdf#sthash.sZYrsz19.dpuf [hereinafter FRONT LINE DEFENDERS]; Decreto Supremo No. 044-2009-IN, 15 julio 2009, Decreto Supremo que aprueba el Reglamento de Prestación de Servicios Extraordinarios Complementarios a la Función Policial, MINISTERIO DEL INTERIOR (2009) (Peru), available at http://www.mininter.gob.pe/admin/archivos/legales/13122009213704_decreto_n_004_2009.pdf.

180. Luis Manual Claps, *Peru: Police Abuse in the Pay of Mining Companies*, NORTH AM. CONG. ON LATIN AM. (Dec. 16, 2013), <https://nacla.org/blog/2013/12/16/peru-police-abuse-pay-mining-companies>; HUMAN RIGHTS WITHOUT FRONTIERS ET AL., *supra* note 178, at 12 (providing photographic evidence of PNP forces being loaded into a Yanacocha bus to be transported to protest site).

181. *See* Claps, *supra* note 180; HUMAN RIGHTS WITHOUT FRONTIERS ET AL., *supra* note 178, at 12.

182. Richard Manrique Torres, *Roque Benavides sobre Conga: “Ni Newmont ni Buenaventura están dispuestos a perder plata”*, GESTIÓN (July 26, 2013), <http://gestion.pe/empresas/roque-benavides-decision-sobre-conga-no-depende-proximas-elecciones-regionales-2072048>.

183. *Ollanta Humala*, *supra* note 11.

right to free, prior informed consent¹⁸⁴ and to a standard of living adequate for health and wellbeing.¹⁸⁵ The right to an adequate standard of living includes the rights to water and food.¹⁸⁶ In addition, the corporation's collaboration with the PNP in repressing protestors implicates the company in violations of the community activists' rights to life,¹⁸⁷ to liberty and security,¹⁸⁸ to freedom of assembly,¹⁸⁹ and to freedom from arbitrary arrest¹⁹⁰ and arbitrary interference with private life.¹⁹¹ The following is an analysis of the possible recourse to be had under the existing business and human rights frameworks.

1. The Global Compact and Minas Conga

The Global Compact fails to protect against corporate human rights abuses in the Minas Conga case. Newmont Mining has been a participant in the Global Compact since 2004¹⁹² and remains in good standing;¹⁹³ however, the company's actions fail to demonstrate a commitment to the Compact's ten principles, and its COP report does nothing to alert interested stakeholders of the human rights implications of the Minas Conga project.

184. The right to free, prior informed consent is arguably customary international law. *See, e.g.*, U.N. Dep't of Econ. & Social Affairs, *Workshop on Free, Prior and Informed Consent*, Jan. 17-19, 2005, U.N. Doc. PFII/2004/WS.2/8; Tara Ward, *The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law*, 10 NW. U. J. INT'L HUM. RTS. 54 (2011); UN-REDD, GUIDELINES ON FREE, PRIOR AND INFORMED CONSENT (2013), available at http://www.un-redd.org/Launch_of_FPIC_Guidelines/tabid/105976/Default.aspx.

185. Universal Declaration of Human Rights art. 25, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR]; International Covenant on Economic, Social and Cultural Rights art. 12, G.A. Res. 2200 (XXI) A, U.N. GAOR Supp. No. 16, U.N. Doc. A/6316 at 49, opened for signature, Dec. 19, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

186. UDHR, *supra* note 185, art. 25; The Human Right to Water and Sanitation, G.A. Res. 64/292, U.N. Doc. A/RES/64/292 (Aug. 3, 2000).

187. UDHR, *supra* note 185, art. 3; International Covenant on Civil and Political Rights art. 6, opened for signature Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

188. UDHR, *supra* note 185, art. 3; ICCPR, *supra* note 187, art. 9.

189. UDHR, *supra* note 185, art. 20; ICCPR, *supra* note 187, art. 21.

190. UDHR, *supra* note 185, art. 9; ICCPR, *supra* note 187, art. 9.

191. UDHR, *supra* note 185, art. 12; ICCPR, *supra* note 187, art. 17.

192. Newmont joined the Global Compact only once a document shielding it from legal liability for failure to uphold the Compact was negotiated. *Bluewashed and Boilerplated*, *supra* note 73.

193. *Newmont Mining Corp—2013 Communication on Progress*, UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org/COPs/detail/70711> (last visited July 19, 2014).

Business members of the Global Compact should seek to “embrace, support and enact” the Compact’s ten principles.¹⁹⁴ Half of the ten principles of the Global Compact bear directly upon Newmont’s relations with the local community in the Conga case. According to the human rights principles: businesses “should support and respect the protection of internationally proclaimed human rights” and “make sure that they are not complicit in human rights abuses.”¹⁹⁵ However, as illustrated above, Newmont Mining is implicated in abusing a number of internationally proclaimed human rights, both individually and in conjunction with the Peruvian state. The argument that Newmont is unaware of its probable complicity in human rights abuses towards local protestors carries little weight, given both the precautionary measure issued by the Inter-American Commission and a pending action in U.S. federal court regarding the corporation’s involvement in the violent repression of the November 2011 protest.¹⁹⁶ Despite this knowledge, protestors continue to be threatened, harassed, and violently repressed as the project moves forward.

Within the environmental principles, “[b]usiness should support a precautionary approach to environmental challenges; undertake initiatives to promote greater environmental responsibility; and encourage the development and diffusion of environmentally friendly technology.”¹⁹⁷ While Newmont has reinstated the Minas Conga project on a “water first” basis, as it boasts in its COP,¹⁹⁸ this was not an approach undertaken by the company’s own initiative, but rather by international condemnation spurred by social protests and as a result of the international review of its EIA.¹⁹⁹ These environmental impact studies, as initially conceived, are tools to ensure environmental responsibility

194. *The Ten Principles*, *supra* note 32.

195. *Id.*

196. In January 2014, EarthRights International, on behalf of a paralyzed Minas Conga protestor, Elmer Eduardo Campos Álvarez, filed a federal court motion under 28 U.S.C. § 1782, for information held by Newmont, including “photographic and video evidence, reports of Yanacocha security or employees, records of communications with the police and internal company communications” regarding the events of the November 2011 protest violence. *Factsheet: Campos-Alvarez v. Newmont Mining Corp.*, EARTHRIGHTS INT’L, <http://dg5vd3ocj3r4t.cloudfront.net/sites/default/files/documents/Factsheet-Campos-Alvarez-v-Newmont.pdf> (last visited July 19, 2014); *Campos -Alvarez v. Newmont Mining Corporation et al.*, No. 1:14CV00208, (D. Colo. filed Jan. 24, 2014).

197. *The Ten Principles*, *supra* note 32.

198. NEWMONT MINING, BEYOND THE MINE (2013), available at <http://www.unglobalcompact.org/system/attachments/76061/original/BTM-2013-full.pdf?1397842024>.

199. See *supra* Section V.B.-C.

and, when done properly, can uphold the environmental principles the Global Compact espouses. However, critics of the Minas Conga EIA cite the omission of inconvenient details, half-truths, and wrongly interpreted opinions to support the environmental stability of the Conga project.²⁰⁰ Produced by companies who have a financial interest in the successful implementation of the project, the EIA is viewed by many as “basically a public relations document, intended to promote the acquisition of permits” under the guise of sustainability and corporate social responsibility.²⁰¹ In fact, Newmont’s initial plan, hidden within its more than 9,000 page EIA,²⁰² was to drain two of the local lakes for waste storage alone, the antithesis of environmentally friendly actions.²⁰³

In addition to asking corporations to respect and promote the ten principles, the Global Compact requires annual COPs as a form of transparency and stakeholder vetting. However, Newmont’s COP report does not provide any substantive detail about the challenges faced during the reporting year with regard to the Minas Conga project. Newmont’s well-developed 2013 COP report qualified for the “advanced level.”²⁰⁴ It is a glossy, stylized booklet, with no shortage of inspirational photographs; however, it lacks substantive human rights information.²⁰⁵ Newmont’s COP features Minas Conga in two case studies: one about increasing communication between the corporation and local communities and another regarding the new “water first” approach to the project.²⁰⁶ Social protests and lack of community consent are only mentioned in passing, in a reference to the November 2011 protests that resulted in the international review of the EIA.²⁰⁷

200. ROBERT E. MORAN, THE CONGA MINE, PERU: COMMENTS ON THE ENVIRONMENTAL IMPACT ASSESSMENT (EIA) AND RELATED ISSUES ¶ 2, (2012), *available at* <http://denjustpeace.org/2012/03/the-conga-mine-peru-report-by-robert-e-moran-phd-4/>. For the company’s response to Dr. Moran’s accusations, see NEWMONT MINING, DOCUMENT ON ANSWERS TO OPINIONS GIVEN BY DR. MORAN ABOUT THE CONGA PROJECT (n.d.), *available at* http://www.newmont.com/files/doc_downloads/south_america/conga/response/Newmont-Responses-to-Moran-Comments-English-Version-041212.pdf.

201. MORAN, *supra* note 200.

202. For the full Minas Conga EIA, see *Final Conga Project EIA Documents*, NEWMONT MINING CORP., <http://www.newmont.com/operations-and-projects/south-america/conga-peru/reports/default.aspx> (last visited July 19, 2014).

203. *See supra* notes 161-162 and accompanying text.

204. *Newmont Mining Corp.—2013 Communication on Progress*, *supra* note 193.

205. NEWMONT MINING, *supra* note 198.

206. *Id.*

207. *Id.*

Newmont fails to mention that anti-mining protests persist, with increasing threats, violence, and death, despite its new approach. It is impossible for the Global Compact to serve its stakeholder-vetting function when reporting companies have no incentive to truthfully report about the human rights challenges they face. Without monitoring, business entities will continue to report on their positive aspects, while glazing over or completely ignoring their negative actions and subsequent repercussions.

The Global Compact fails in the Minas Conga context to promote or protect the human rights of those affected by the mining project. Not only does it have no enforcement mechanism to ensure corporations uphold and promote its ten principles, its lack of monitoring allows businesses to “bluewash” their activities, by reporting on the good whilst ignoring the bad. When all aspects of COP reporting are presented in a positive light, the stakeholders’ role of vetter and keeper of transparency is nullified.

2. The Guiding Principles and Minas Conga

The Guiding Principles similarly do not provide sufficient remedy for victims of human rights abuses in the Minas Conga case. While reiterating the state duty to protect against and provide remedy for domestic human rights abuses, the Guiding Principles have done little to compel the Peruvian government to intercede in the mining controversy on the side of promoting human rights; instead, the state has chosen to largely wash its hands of the whole issue. Similar to the shortcomings of the Global Compact’s rhetoric, the Guiding Principles do nothing to enforce the corporate duty to respect human rights. Lastly, the Guiding Principles have failed to compel home state jurisdictions to make domestic remedies available for Peruvian plaintiffs seeking redress in U.S. courts.

a. *State Duty to Protect*

Under the Guiding Principles, the state has the positive obligation to protect its citizens against human rights violations caused by third parties.²⁰⁸ Despite the government’s knowledge of the irreparable harm the Conga project would cause to the ecosystems and water supply that local communities depend upon,²⁰⁹ the government ap-

208. *Guiding Principles*, *supra* note 5, princ. 1.

209. *See* Gorriti, *supra* note 161.

proved the project and thereby failed to protect individuals' right to life and to an adequate standard of living. The government only began to more diligently investigate the project's negative effects after information regarding the irreparable harm to be produced by the project was released and large-scale mobilization, resulting in violence and international condemnation, occurred. However, since endorsing the international EIA review board's recommendations, the Peruvian government has walked away from any further positive responsibilities.

Peru is shirking its obligation under the Guiding Principles to take the appropriate steps to prevent human rights abuses by multinational businesses within its territory. The Minas Conga project violates the local community's right to free, prior informed consent, and rights to life, health, and water. Instead of addressing or attempting to mediate these issues, the Peruvian government has decidedly left it up to the company. While widespread protests persist against the project, President Humala declared that it is the company's job to gain the acceptance of the affected communities.²¹⁰ According to Humala, the state is fulfilling its role of "being zealous guards of contractual compliance, the rule of law, and public order"; however, the continuing conflict regarding the project itself is absolutely "not a problem of the state."²¹¹ Those affected by the Minas Conga project disagree, and have appealed to both the Peruvian Constitutional Court and multiple supranational bodies, including the Latin-American Water Tribunal and the Inter-American Commission on Human Rights, in an attempt to force Peru to protect their rights; however, such attempts at recourse have failed to influence the state.²¹² That a government can simply declare that mining protests, large-scale repression, and human rights

210. "Es tarea de la empresa buscar fortalecer el entorno positivo. Trabajar de la mano con los alcaldes, cumplir con los compromisos que los ha venido haciendo con la comunidad. De esta manera, este proyecto debe ir." [It is the company's job to seek to strengthen the positive environment. To work hand in hand with the mayors, to complete the promises it has made to the community. This is the way the project should go.] *Ollanta Humala, supra* note 11.

211. *Id.*

212. *See, e.g.*, Tribunal Constitucional del Perú, expediente 3673-2013-AA (the preliminary filings of the case are not publically available) (Peru); Tribunal Latinoamericano del Agua, Caso: Amenana cierta e inminente de afectación al derecho humano al agua y al derecho al medio ambiente por el Estado Peruano y la Minera Yanacocha S.R.L, por la ejecución del proyecto minero Conga, en las provincias de Celedin y Cajamarca, República del Perú, VI Audiencia Pública TLA (Nov. 7, 2012); *CIDH rechaza demanda para cancelar proyecto Conga*, GESTIÓN (May 8, 2014), <http://gestion.pe/empresas/cidh-rechaza-demanda-cancelar-proyecto-minas-conga-peru-2096686>; IACHR Precautionary Measure, *supra* note 175.

abuses are not a state problem exemplifies the shortcomings of the Guiding Principles’ first pillar.

In addition, in fulfilling its role as “guardian of the rule of law and public order,” the Peruvian State itself has begun systematically violating the human rights of anti-mining protestors in favor of corporate actors. As social protests against mining projects escalate throughout Peru, the government has, in recent years, promulgated laws tending to limit the rights of social protesters and grant greater power to police and military forces,²¹³ including allowing them to work in the service of multinational mining companies.²¹⁴ Protesters have been prosecuted on charges such as “rebellion, terrorism, violence, usurpation, trespassing, disobedience for resistance to an official order, obstructing public officers, abduction, outrage to national symbols, criminal damage, causing injury, coercion, disturbance, or other public order offenses, including obstructing roads.”²¹⁵ Over the past two years, more than 300 people, 90% of whom are social leaders or local authorities critical of the Conga project, have been charged with these and other alleged crimes.²¹⁶ As already mentioned, the IACHR recently issued a precautionary measure to protect protest leaders against such repression, calling on the state to adopt the necessary measures to ensure respect for the leaders’ right to life and personal integrity.²¹⁷ Not only has the state failed to protect its citizens from certain human rights abuses by allowing the project to move forward, it has also begun to violate the human rights of the same citizens it is failing to protect in order to advance corporate goals.

213. Possibly the most controversial law, Decree 1095 of September 2010, permits the intervention of armed forces during social protests without a prior declaration of a state of emergency; this, coupled with Decree 982, which safeguards police and military forces from criminal liability for causing injury or death in the line of duty, has created an environment of impunity for forces suppressing protests. APRODEV ET AL., *THE CRIMINALIZATION OF HUMAN RIGHTS DEFENDERS IN LATIN AMERICA: AN ASSESSMENT FROM INTERNATIONAL ORGANIZATIONS AND EUROPEAN NETWORKS* (June 2012), available at http://www.ohchr.org/Documents/Issues/Defenders/Answers/NGOs/Americas/Latin%20America_FIAN.pdf.

214. See *supra* notes 181-184 and accompanying text.

215. FRONT LINE DEFENDERS, *supra* note 179.

216. Lynda Sullivan, *Peru’s Conga Mine Conflict: Cajamarca Won’t Capitulate*, UPSIDE DOWN WORLD (May 2, 2014), <https://congaconflict.wordpress.com/tag/chadin-2/>. For example, Milton Sanchez Cubas, secretary-general of the *Plataforma Interinstitucional Celendina* (a local province in Cajamarca), has been faced with approximately fifty court proceedings. See, e.g., FRONT LINE DEFENDERS, *supra* note 179.

217. See *supra* note 175 and accompanying text.

b. *Corporate Responsibility to Respect*

The corporate responsibility to respect human rights exists independent of a state's willingness or ability to uphold its own human rights obligations; it also exists "over and above" compliance with national laws and regulations.²¹⁸ While Peru has endorsed the Minas Conga project with its post-EIA international review adaptations, this does not mean that the company is free to carry out the project without further regard to its human rights implications. In addition, regardless of the legal status of the PNP's use of force against protestors, the corporation cannot be either complicit in or in command of such violence.

The Guiding Principles call upon corporations to both hold "meaningful consultation[s] with potentially affected groups" and "treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue."²¹⁹ Reports from the ground state that consultations have been far from meaningful; according to a listening study of the city of Cajamarca performed by the Centre for Social Responsibility in Mining, most interviewees perceive the company as suffering from "an inability to listen effectively to the community."²²⁰ Said one Cajamarquino, "I have participated in four or five internal assessments like this from Newmont and Yanacocha. You wait for the result and a change in the relationships with Cajamarca. Then things continue the same."²²¹ Numerous studies, some commissioned by Newmont, others readily available to it, have re-iterated the same message.²²² Newmont, which does not have the full support of the local community, has initiated a "water-first" development plan with the hopes of assuaging the affected communities. However, merely replacing the water drained from local natural water sources does not address the broader human rights issues implicated by the project. The project presents many environmental risks that could greatly affect the agriculturally dependent local population: the draining of these lakes will destroy local ecosystems, agricultural production, and the culturally significant daily life of rural Cajamarquinos.²²³

Newmont's continuance with the Conga project, in the face of continued protest, demonstrates its lack of concern for legal repercus-

218. *Guiding Principles*, *supra* note 5, princ. 11 cmt.

219. *Id.* princs. 18 & 23.

220. DEANNA KEMP ET AL., SMI CENTRE FOR SOCIAL RESPONSIBILITY IN MINING, LISTENING TO THE CITY OF CAJAMARCA: A STUDY COMMISSIONED BY MINERA YANACOCCHA 10 (2013).

221. *Id.*

222. *Id.*

223. *See* Gorriti, *supra* note 161.

sions, real or abstract. Despite lacking the need to comply with host-state provisions,²²⁴ Newmont’s human rights obligations remain. By not conducting meaningful consultations with the affected communities and carrying on with the project, albeit on a “water first” basis, Newmont scoffs in the face of possible legal repercussions for its continued implementation of the Minas Conga project. Similar to the Global Compact’s effects on corporations, the Guiding Principles, lacking in any enforcement mechanism, create non-binding, ignorable responsibilities that corporations continue to treat as such.

c. *Greater Access to Remedy*

Under the Guiding Principles, both host and home states are responsible for ensuring greater access to judicial remedy.²²⁵ To date, no case has been brought in the United States against Newmont for its actions in the Minas Conga controversy. While at least one action has been brought in Peru against the state for its role in the violent repression of protesters, the majority of pending legal actions regarding the Minas Conga protests in Peru are criminal cases against protesters.²²⁶ As discussed above, the majority of corporate human rights victims maintain such little confidence in their domestic judicial system that they often prefer the challenges of foreign litigation to domestic remedy.²²⁷ As protestors continue to be harassed and jailed by the Peruvian police, their hope for fair judicial recourse in the domestic system assuredly dwindles.

Because no actions have been brought against Newmont in U.S. courts regarding Minas Conga, it is difficult to say with complete assurance that a U.S. court would not be a viable forum for judicial remedy; however, history advises that such recourse is likely untenable. Individuals seeking redress for Newmont’s alleged human rights abuses regarding the violent repression and intimidation of protestors can attempt to bring (1) criminal charges; (2) civil claims for violation of

224. The Peruvian government has taken the position that the fate of the project is entirely in the company’s hands and has amended laws enabling the national police to collaborate with the company to repress Minas Conga protestors. See *supra* notes 181-184 and accompanying text.

225. *Guiding Principles*, *supra* note 5, Part III.

226. See Ministerio Público Fiscalía de la Nación [Ministry Public Prosecutor’s Office], 3 septiembre 2012, “Elmer Eduardo Campos Álvarez vc. Ollanta Moisés Humla Tasso y Oscar Eduardo Valdés Dancuart,” Denuncia No. 029-2012, Ministerio Público Fiscalía de la Nación (Sept. 3, 2012).

227. See ZERK, *supra* note 111, at 92-93 and accompanying text.

international law; or (3) civil claims for violation of state law. All three avenues are, however, likely unviable.

i. Corporate Criminal Liability in the United States

The United States has a number of federal statutes regarding human rights violations that can be applied extraterritorially to corporations for their direct action or for conspiring to conduct such action. These include torture,²²⁸ genocide,²²⁹ war crimes,²³⁰ and forced recruitment of child soldiers.²³¹ The United States Department of Justice Human Rights and Special Prosecutions Section (DOJ HRSP) is charged with prosecuting these crimes.²³² However, as noted earlier, prosecutorial discretion largely precludes criminal charges as a means of judicial recourse. This statement is true in the case of the United States. Advocates have pressured DOJ HRSP to investigate businesses for their participation in human rights abuses abroad, but to no avail.²³³ In fact, DOJ HRSP has only convicted one individual for violating a human rights statute.²³⁴ Given the U.S. government's historic failure to prosecute individuals, much less corporations, for their criminal involvement in human rights abuses, this avenue for judicial recourse is likely a dead-end for victims of Newmont's alleged human rights abuses in the Minas Conga controversy.

ii. Corporate Civil Liability for International Law Violations in the United States

Claims alleging harm as a result of a violation of international law can proceed in U.S. federal court under both the Torture Victims Protection Act (TVPA) and Alien Tort Statute (ATS). However, a claim under either statute in the context of the Minas Conga case would likely fail.

228. 18 U.S.C. § 2340A (2014).

229. 18 U.S.C. § 1091 (2014).

230. 18 U.S.C. § 2441 (2014).

231. 18 U.S.C. § 2442 (2014).

232. *Human Rights Violators*, U.S. DEP'T OF JUSTICE, HUMAN RIGHTS AND SPECIAL PROSECUTIONS SECTION, <http://www.justice.gov/criminal/hrsp/statutes/human-rights.html> (last visited July 20, 2014).

233. GWYNNE SKINNER ET AL., THE INTERNATIONAL CORPORATE ACCOUNTABILITY ROUNDTABLE, CORE, & THE EUROPEAN COALITION FOR CORPORATE JUSTICE, THE THIRD PILLAR: ACCESS TO JUDICIAL REMEDIES FOR HUMAN RIGHTS VIOLATIONS BY TRANSNATIONAL BUSINESS, 40 (2013).

234. The only conviction under the aforementioned human rights statutes was that of Charles Taylor for torture. *United States v. Belfast*, 611 F.3d 783 (11th Cir. 2010).

The TVPA provides that “an individual who, under actual or apparent authority, or color of law, of any foreign nation—(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual”²³⁵ A claim against Newmont, as a corporate entity, under the TVPA would likely fail given the Supreme Court’s interpretation of the term “individual.” Unlike the term “person,” which is often interpreted to include corporate legal personality, “individual” as used in the TVPA connotes natural persons only.²³⁶ Therefore, a TVPA claim against Newmont would likely not survive a motion to dismiss for failure to state a claim.

A similar claim under the ATS would also likely fail. The ATS provides federal courts with jurisdiction over tort claims made by non-citizens for violations of international and customary international law.²³⁷ While most cases brought against corporations for violations of international human rights law have been brought under the ATS, the U.S. Supreme Court’s landmark decision in *Kiobel v. Royal Dutch Shell Petroleum, Co.* (*Kiobel*) largely hinders future attempts to bring an ATS claim for actions occurring abroad.²³⁸ In *Kiobel*, the Court held that the presumption against the extraterritorial application of U.S. law applies to the ATS, restricting its extraterritoriality only to instances that “touch and concern” U.S. territory with “sufficient force” to rebut this presumption.²³⁹

While the lower courts continue to grapple with what this holding means, a few preliminary observations inform an analysis of what would likely happen if Peruvian victims of the Minas Conga controversy attempted to bring suit against U.S.-based Newmont under the ATS for crimes occurring in Peru. *Kiobel* only prohibited the bringing of an F-cubed case under the ATS—that is, a claim where there is a foreign plaintiff, foreign defendant, and foreign situs of the occurrences that ground the claim.²⁴⁰ Because our hypothetical case is only F-squared (foreign plaintiff and foreign situs), this ATS claim is not immediately dead in the water, but still unlikely to survive.

235. The Torture Victim Protection Act of 1991, 28 U.S.C. §1350, n.2.

236. *Mohamed v. Palestinian Authority*, 132 S.Ct. 1702, 1707 (2012).

237. 28 U.S.C. §1350; *Sosa v. Alvarez-Machain*, 542 U.S. 692, 693-95 (2004) (confirming federal court jurisdiction under the ATS for claims of violations of customary international law).

238. See, e.g., EARTHRIGHTS INT’L, *OUT OF BOUNDS: ACCOUNTABILITY FOR CORPORATE HUMAN RIGHTS ABUSE AFTER KIOBEL* (2013).

239. *Kiobel v. Royal Dutch Shell Petroleum*, 133 S.Ct. 1659, 1669 (2013).

240. See, e.g., Matteo M. Winkler, *What Remains of the Alien Tort Statute After Kiobel?* 30 N.C. J. INT’L L. & COM. REG. 171, 186-87 (2013).

The majority of lower courts addressing ATS claims post-*Kiobel* have continuously interpreted the Court's extraterritorial ban as closing the door for claims implicating foreign conduct, despite the defendant being a U.S.-based corporation.²⁴¹ Even if it could be argued that carrying out the human rights abuse against Minas Conga protesters was planned in part in the United States, this is likely insufficient to overcome a *Kiobel* dismissal. In the cases where partial action occurred in the United States, other contributing factors existed to overcome the presumption against extraterritoriality beyond simply planning part of the abuse domestically.²⁴² The current legal landscape of ATS cases post-*Kiobel* casts grave doubt on the proposition that a case brought by victims of corporate abuse in the Minas Conga controversy would survive a motion to dismiss.

iii. Corporate Civil Liability for Domestic Law Violations in the United States

Claims brought by Minas Conga protesters against Newmont for the violation of state law, such as assault and battery, would also likely be dismissed. Transitory tort claims, such as the ones that could to be brought by Conga protester-victims, are typically brought against defendants in a court that has personal jurisdiction over the defendant.²⁴³ In this hypothetical case, civil tort claims could most likely be brought in either Delaware, the company's state of incorporation, or Colorado,

241. See, e.g., *Al Shimari v. CACI Int'l*, 951 F. Supp. 2d 857, 858 (E.D. Va. 2013) (holding that despite human rights abuses having been perpetrated by a U.S. military contractor, because the injury occurred against foreign plaintiffs on foreign soil, *Kiobel* precluded jurisdiction); *Giraldo v. Drummond Co., Inc.*, No. 2:09-CV-1041-RDP, slip op. at 1-2 (N.D. Ala. July 25, 2013) (holding that *Kiobel* precluded an ATS claim against U.S. defendants for funding Colombian rebels, which resulted in human rights violations in Colombia, despite petitioner's claim that decisions were made from the United States and stating that *Kiobel* has caused a "seismic shift" in ATS jurisprudence).

242. See *Giraldo*, No. 2:09-CV-1041-RDP; *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304, 321-22 (D. Mass. 2003) (holding that an ATS claim against a U.S. citizen for inciting anti-gay violence against Ugandan citizens survived *Kiobel* because the defendant's actions were undertaken in the United States for seven years); *Mwani v. Laden*, 947 F. Supp. 2d 1, 5 (D.D.C. 2013) (holding that alleged human rights violations committed by foreign terrorist organizations against Kenyan plaintiffs in Kenya "touch[ed] and concern[ed]" the United States with sufficient force because the attack was aimed at the U.S. Embassy in Nairobi).

243. See generally Chimène I. Keitner, *State Courts and Transitory Torts in Transnational Human Rights Cases*, 3 UC IRVINE L. REV. 81 (2013).

the location of the company’s headquarters.²⁴⁴ Multiple barriers to maintaining a case in state court exist, however, including: (1) statute of limitations issues; (2) *forum non conveniens*; and (3) the doctrine of independent corporate personality.

(a) *Statute of Limitations*

Under international law, there is no statute of limitations for serious human rights violations, such as torture and extrajudicial killings;²⁴⁵ however, in forcing victims of human rights abuse to re-categorize such abuse in the context of domestic torts, prohibitive statutes of limitations apply. For example, in Delaware, possible domestic tort claims such as assault, battery, false imprisonment, wrongful death, and intentional infliction of emotional distress are subject to a two-year statute of limitations.²⁴⁶ While in Colorado, tort actions of intentional infliction of emotional distress and wrongful death are also subject to a two-year statute of limitations, victims must bring actions of assault, battery, and false imprisonment within one year of their occurrence in order to have a chance at judicial recourse.²⁴⁷

For allegations against Newmont for its role in the November 2011 protest violence, absent equitable tolling, legal recourse is no longer available in these jurisdictions. While subsequent allegations may still be brought within the appropriate timeframe required by the respective state law statute of limitation, this need to re-characterize human rights violations as domestic torts imposes unacceptably prohibitive time limitations on an individual’s right to judicial recourse for serious human rights abuses.

(b) *Forum Non Conveniens*

One of the largest possible barriers to accessing remedy for transitory torts in the United States is the doctrine of *forum non conveniens* (FNC), which is governed individually by states. While this doctrine was not a

244. In order to have personal jurisdiction over a defendant, the defendant must have sufficient minimum—“systematic and continuous”—contacts with the state in which the court sits such that maintenance of the suit does not offend “traditional notions of fair play and substantial justice.” *International Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945). Courts generally assume a corporation is a citizen of both its state of incorporation and the state of its principle place of business; for the purposes of federal diversity jurisdiction (which is almost always invoked in transitory torts by foreign nationals against corporations) this assumption is law. 28 U.S.C. §1332(c)(1) (2006).

245. Press Release, U.N. High Commissioner for Human Rights, Navi Pillay, UN Human Rights Chief Offers Haitian Authorities Assistance in Duvalier Case (Feb. 1, 2011), available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10696&LangID=E>.

246. DEL. CODE ANN. tit. 10, §§ 8119, 8107 (2013).

247. COLO. REV. STAT. ANN. §§ 13-80-103, 13-80-102 (West 2013).

substantial barrier to human rights litigation under the ATS, as more victims of human rights abuses are forced to file under domestic tort law post-*Kiobel*, FNC claims will likely begin to play a larger role in denying victims access to a remedy.²⁴⁸ A number of states have in recent years bolstered their FNC doctrine, including both Delaware and Colorado.²⁴⁹

(i) Delaware

Delaware FNC jurisprudence has traditionally been viewed as liberal, “consistently uphold[ing] a plaintiff’s choice of forum except in rare cases.”²⁵⁰ In analyzing FNC, Delaware courts balance the plaintiff’s choice of forum (the *Cryo-Maid* factors²⁵¹) against the burden the choice imposes upon the defendant.²⁵² In order to prevail on an FNC motion, the defendant must establish “that her case is one of the rare cases where the drastic relief of dismissal is warranted based on a strong showing that the burden of litigating in this forum is so severe as to result in manifest hardship to the defendant.”²⁵³

Historically, “overwhelming hardship” has been difficult to prove. For example, in *Taylor v. LSI Logic Corp.*, a case brought by a Canadian plaintiff applying Canadian law against a Canadian subsidiary of a Delaware corporation, the Delaware Supreme Court held that although the Canadian courts had greater interest in the outcome of the case, and should resolve the application of Canadian law to a Canadian corporation, these factors did not merit “overwhelming hardship” because Delaware courts “are accustomed to deciding controversies in which the parties are non-residents of Delaware and where none of the events occurred in Delaware.”²⁵⁴

However, the Delaware Supreme Court’s 2014 decision in *Martinez v. E.I. DuPont de Nemours & Co.* “rewrites decades of precedent.”²⁵⁵ In *Martinez*, the wife of a deceased Argentine textile worker filed an asbestos suit against DuPont, the parent company of the Argentine

248. See SKINNER ET AL., *supra* note 233, at 26.

249. Texas and Florida also have extended their *forum non conveniens* doctrine in recent years. See *id.*

250. *Taylor v. LSI Logic Corp.*, 689 A.2d 1196, 1197-98 (Del. 1997) (stating that availability of a “more appropriate forum” is not an element of Delaware’s *forum non conveniens* analysis).

251. *General Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681, 683-84 (Del. 1964).

252. See *Chrysler First Bus. Credit Corp. v. 1500 Locust Ltd. P’ship*, 669 A.2d 104, 106 (Del. 1995).

253. *Ison v. E.I. DuPont de Nemours & Co.*, 729 A.2d 832, 835, 838, 842 (Del. 1999).

254. *LSI Logic Corp.*, 689 A.2d at 1200.

255. *Martinez v. E.I. DuPont de Nemours & Co.*, 86 A.3d 1102, 1115 (Del. 2014).

“IT ISN’T A STATE PROBLEM”

corporation where the decedent was employed.²⁵⁶ Not only would Argentine law apply, but also a novel issue of law would need to be addressed—when a parent corporation can be held liable for the actions of its subsidiary.²⁵⁷ The Delaware Supreme Court upheld an FNC dismissal based on overwhelming hardship, noting that “a Delaware court was being asked to decide complex and unsettled issues of Argentine tort law, based on expert testimony extrapolating from sources of law expressed in a foreign language” where “the Plaintiff is not a resident of Delaware, was not injured in Delaware, and . . . the Defendant’s state of incorporation has no rational connection to the cause of action.”²⁵⁸ The court went on to create a bright-line test for this type of fact pattern:

[W]here, as here, the plaintiff in the case is a citizen of a foreign state whose law is at issue, and where, as here, the injury in the case occurred in that foreign state, and the case turns on unsettled issues of foreign law, a trial court may permissibly exercise its discretion under *Cryo–Maid* to weigh appropriately the defendant’s interest in obtaining an authoritative ruling from the relevant foreign courts on the legal issue on which its liability hinges, as distinguished from a predictive, non authoritative ruling by our courts.²⁵⁹

This recent decision has made it harder for foreign plaintiffs to access a remedy in a home state jurisdiction—the antithesis of what is required by the Guiding Principles. Moreover, it likely forecloses a possible case brought by Minas Conga victims, where, as in *Martinez*, plaintiffs are citizens of a foreign state whose law likely applies and are claiming an injury that occurred abroad, in a case that turns on an unsettled issue of foreign law (Peru has also not yet clarified its veil piercing jurisprudence²⁶⁰).

(ii) Colorado

In 2004, the Colorado General Assembly, in finding that “[c]ases filed by nonresidents of Colorado and having no meaningful relationship to [the] state are clogging the dockets of the courts and causing

256. *Id.* at 1103.

257. *Id.* at 1107.

258. *Id.* at 1008-09.

259. *Id.* at 1110-11.

260. Sandra Orihuela, *Peru*, LATIN LAWYER: THE BUSINESS LAW RESOURCE FOR LATIN AMERICA (Apr. 24, 2014), <http://latinlawyer.com/reference/topics/46/jurisdictions/19/peru/>.

delays in cases filed by residents,” adopted the Colorado Citizens’ Access to Colorado Courts Act in 2004.²⁶¹ The Act mandates FNC dismissals when: (1) the claimant is not a Colorado resident; (2) an alternative forum exists; (3) the injury alleged occurred outside of Colorado; (4) a substantial portion of the witnesses and evidence is outside Colorado; *and* (5) there is significant possibility that Colorado law will not apply to some or all of the claims.²⁶² In addition, FNC may be granted if (1) the claimant is not a Colorado resident; (2) at least one of the remaining factors listed above are present; and (3) based upon such factors, it is in the interest of judicial economy or convenience of the parties that the claim be heard in a forum outside of Colorado.²⁶³

Neither the Colorado Supreme Court nor Court of Appeals has decided an FNC case based upon the 2004 statutory scheme.²⁶⁴ However, it is likely that our hypothetical case would fulfill the requirements for mandatory dismissal, as: (1) the claimants are not residents of Colorado; (2) Peru likely exists as an alternative forum; (3) the injury/damage was suffered outside of Colorado; (4) the majority, if not all of the likely witnesses are located in Peru; and (5) there is a significant possibility that Peruvian law would apply.²⁶⁵ While arguments could be made that Peru is an inadequate alternative forum, or that there is not a significant possibility that Peruvian law will apply, these arguments are tenuous. Furthermore, even if FNC dismissal is not required, a Colorado court could permissively dismiss on FNC grounds—a likely possibility given Colorado’s strong desire to unclog its courts’ dockets of foreign claimants.

261. Colo. Rev. Stat. Ann. § 13-20-1002 (West 2013).

262. *Id.*

263. *Id.*

264. Colorado District Courts have only addressed the new statutory scheme three times in ten years; none of these instances is instructive. *See* Order Denying Motions to Dismiss, *Greenacre v. BHP Billiton Petroleum Great Britain, Ltd.*, No. 2012-CV-1543 (Colo. Dist. Ct. Jan. 10, 2013) (denying motion to dismiss because one member of a class action was a Colorado citizen); Order, *McMullen v. Union Pac. R.R. Co.*, No. 2012-CV-6322 (Colo. Dist. Ct. Aug. 20, 2013) (denying a *forum non conveniens* motion to dismiss when filed “scarcely 10 weeks before commencement of trial and well after the commencement of discovery and other pre-trial activities”); Court Order, *New Ventures Mktg., LLC v. MQ Enter.*, No. 08CV10244 (Colo. Dist. Ct. Feb. 17, 2010) (holding that judicial economy does not favor a *forum non conveniens* dismissal because extensive discovery and motions practice had already been conducted).

265. In Colorado, choice of law for a tort action is also determined by the ‘most significant relationship’ test. *See* *AE, Inc. v. Goodyear Tire & Rubber Co.*, 168 P.3d 507, 510 (Colo. 2007). It is likely Peruvian law would prevail in a choice of law analysis. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).

(c) *Independent Corporate Personality*

The doctrine of separate corporate personality is a significant barrier to judicial remedy for foreign plaintiffs seeking recourse against a parent company for the actions of its subsidiaries abroad. In the United States, corporate law, including limited liability provisions, is regulated by each state individually. Claimants can seek to overcome limited liability provisions by either proving the active involvement of the parent company in the alleged violation or by seeking to pierce the corporate veil and hold the parent accountable for the subsidiary’s actions under the “alter ego” theory.²⁶⁶ While human rights practitioners have had some success in piercing the corporate veil in domestic tort litigation, it has been minimal.²⁶⁷

Delaware, arguably the most well-known corporate capital, is “generally hostile” to piercing the corporate veil.²⁶⁸ In order to prevail under the alter ego theory, Delaware “effectively [requires that] the corporation must be a sham and exist for no other purpose than as a vehicle for fraud.”²⁶⁹ Similarly, alter ego liability exists in Colorado,

where the corporate form has been abused; the corporate entity has been used as a subterfuge and to observe it would work an injustice; the party sought to be held liable has dominance and control over the corporation and uses the corporate entity as a mere instrumentality for the transaction of that party’s own affairs.²⁷⁰

While Delaware and Colorado both allow sparingly for corporate veil piercing upon a showing of fraud, much more information is needed regarding Newmont’s corporate structure in order to meaningfully analyze the likelihood of prevailing on an argument that Newmont should equitably be held liable for the actions of its Peruvian subsidiary. Such information would likely be accessible only as the result of months of hard-pressed discovery actions. Woefully, the most likely

266. See Elizabeth S. Fenton, *Trends in Piercing the Corporate Veil*, AMERICAN BAR ASSOCIATION (July 31, 2014), <http://apps.americanbar.org/litigation/committees/businessstorts/articles/summer2013-0713-trends-in-jurisprudence-piercing-the-corporate-veil.html>.

267. SKINNER ET AL., *supra* note 233, at 61.

268. Fenton, *supra* note 266.

269. Wallace *ex rel.* v. Cencom Cable Income Partners II, 752 A.2d 1175, 1118 (Del. Ch. 1999); see also Crosse v. BCBSD, Inc., 836 A.2d 492 (Del. 2003).

270. McCallum Family LLC v. Winger, 221 P.3d 69, 75 (Colo. Ct. App. 2009); see also *In re Phillips*, 139 P.3d 639, 644-45 (Colo. 2006).

outcome of a possible case against Newmont for its actions regarding the Minas Conga controversy is that the question of whether or not to pierce the corporate veil would never be reached, as the courts need not speak to this argument before analyzing any FNC motion.²⁷¹

3. Lessons from the Minas Conga Controversy

Years of neoliberal reform have left the Peruvian State dependent upon the multimillion-dollar investments of multinational mining corporations. As such, Peru has begun to shirk its duty to protect against human rights abuses by third parties in order to bolster its national economy. Not only did the government approve the Minas Conga project in spite of its knowledge of the endeavor's drastic and irreversible effects on the local ecosystem, but it has since washed its hands of any further responsibility to protect the population against possibly drastic negative environmental repercussions that threaten to violate Peruvian citizens' fundamental human rights. In addition, Peru has begun to criminalize human rights protesting. With the Peruvian judicial system being used as a tool of suppression, victims have no additional domestic recourse. Affected populations opposed to the mining project have appealed to supranational actors in order to pressure the government to stop the Minas Conga project and protect their rights. However, these efforts have been to no avail. Thus, the first Guiding Principle pillar crumbles.

Victims' only other source of recourse is to bring suit against the corporate actor in the corporation's home jurisdiction. However, existing barriers in the U.S. judicial system drastically weaken any means of seeking recourse against Newmont in U.S. state or federal courts. The United States has maintained these barriers and has recently erected additional obstacles for victims of international corporate human rights abuses seeking remedy in U.S. courts. Not only has the Justice Department continued its pattern of not investigating corporate human rights abuses, but the Supreme Court has also, with its 2013 *Kiobel* decision, severely limited the Alien Tort Statute as a means of recourse for foreign plaintiffs seeking relief for foreign actions in U.S. courts. Additionally, individual states have increased barriers to justice in the form of stricter *forum non conveniens* statutes

271. As an example, see *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in December 1984, 809 F.2d 195 (2d Cir. 1987), where the court dismissed claims brought by victims of the 1987 Bhopal disaster on the grounds of *forum non conveniens* before India was allowed to argue on the merits that Union Carbide's corporate veil should be pierced.

and case law, while simultaneously maintaining other barriers, such as prohibitive statutes of limitations and a strict veil-piercing doctrine. The U.S. government has failed in all respects to investigate and prosecute corporate human rights abuses, and restrictive doctrines such as *forum non conveniens*, separate corporate personality, the presumption against extraterritoriality, and statutes of limitations effectively proscribe home-state recourse. Accordingly, the second Guiding Principle pillar crumbles.

Corporate respect for human rights thus precariously rests on the non-binding corporate duty to respect—the pillar built on sand. Newmont’s commitments as an active member of the Global Compact have done little to constrict the corporation’s actions. By failing to meaningfully report on the human rights implications of its project, the company has deprived the Compact of any use as a shareholder vetting mechanism. By continuing with the project, albeit on a slightly altered strategy, in spite of continued and significant social protest and environmental cost, the corporation acts with impunity. The Guiding Principles do nothing to remedy this situation. While companies have a responsibility to respect human rights and should act with due diligence to ensure their protection, there are no means of monitoring or enforcement to ensure that a corporation adheres to this responsibility; thus, binding international human rights obligations on corporations are needed to protect individuals against corporate abuse.

VI. CONCLUSION

Many argue that the Global Compact and Guiding Principles are sufficient to regulate corporate abuse of human rights; however, as exemplified in the Minas Conga mining controversy, neither mechanism adequately protects against or provides remedies for corporate human rights abuse.

The existing frameworks for protecting individuals against human rights transgressions of corporations are inadequate. In situations where the state is willing to shirk its duty to protect, there must exist means of direct recourse against the offending third party. In this regard, domestic litigation in the home state of multinational corporations is currently insufficient, given existing and increasing barriers to access to justice. In addition, neither the Global Compact nor the Guiding Principles obligate corporations to respect human rights.

After decades of calls for binding international human rights obligations on corporations, the international community has responded by mandating an open-ended intergovernmental working group tasked with promulgating such a treaty. As the soon-to-be-appointed working

group begins its mandate, it faces a steep uphill battle. There exist a surfeit of legal, practical, and political challenges in promulgating this needed mechanism to ensure human rights.²⁷² In addition, key players like the United States and the twenty-eight Member States of the European Union have avowed noncooperation in the process.²⁷³

Opponents contend that the new mandate will draw attention away from the Guiding Principles, a project still in its nascent stages. The argument goes that the creation of what some see as a “competing initiative” will cause companies to withdraw or entirely fail to invest “significant time and money in implementing the Guiding Principles,” especially “if they see divisive discussion . . . in Geneva.”²⁷⁴ However, this argument flies in the face of both logic and the Guiding Principles’ own directive.

First, the Guiding Principles do not assume to be the end of the business and human rights debate. Their normative contribution—“identifying where the current regime falls short and how it should be improved”—should not be minimized, but it also must not be aggrandized.²⁷⁵ The Guiding Principles, in and of themselves, are not sufficient to prevent human rights abuses; the framework is built under the assumption that additional steps need to be taken where the current system falls short. Second, if corporations see binding human rights obligations looming in the near future, they are more likely to continue or perhaps ramp up efforts to comply with their existing duties in order to avoid any future liability.

Proponents of a binding international treaty see it as complementary to the implementation of the Guiding Principles, but also necessary “to ensure [that] glaring gaps in protection are addressed.”²⁷⁶ Indeed, the Guiding Principles will continue to play an important role in protecting individuals against corporate human rights abuses, as the promulga-

272. For a brief discussion of some of the major challenges, see John G. Ruggie, *A UN Business and Human Rights Treaty?* HARVARD KENNEDY SCHOOL (Jan. 28, 2014), <http://www.hks.harvard.edu/m-rcbg/CSRI/UNBusinessandHumanRightsTreaty.pdf>.

273. See Deen, *supra* note 46.

274. Carey L. Biron, *Contentious Start for UN Process Toward Business and Human Rights Treaty*, MINT PRESS NEWS (July 10, 2014), <http://www.mintpressnews.com/contentious-start-u-n-process-toward-business-human-rights-treaty/193731/>.

275. *Guiding Principles*, *supra* note 5, ¶ 6.

276. Press Release, Treaty Alliance, Resolution on Binding Human Rights Standards Passes in Human Rights Council (June 27, 2014), *available at* <https://www.globalpolicy.org/component/content/article/221-transnational-corporations/52651-treaty-alliance-press-release-on-resolution-on-binding-human-rights-standards.html>.

"IT ISN'T A STATE PROBLEM"

tion of a binding treaty could likely take more than a decade to implement.

As the Minas Conga case study indicates, binding human rights obligations on corporations are necessary to ensure protection of individual human rights in relation to MNCs. As such, the full support of the international community is crucial to produce the paradigmatic shift in international law necessary to afford individuals the full protection of their fundamental human rights.