Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development


Author’s Note: Most footnotes have been omitted. One lettered footnote has been added.

Report:

INTRODUCTION

1. The international community is still in the early stages of adapting the human rights regime to provide more effective protection to individuals and communities against corporate-related human rights harm. This report to the Human Rights Council presents a principles-based conceptual and policy framework intended to help achieve this aim.

2. Business is the major source of investment and job creation, and markets can be highly efficient means for allocating scarce resources. … Indeed, history teaches us that markets pose the greatest risks—to society and business itself—when their scope and power far exceed the reach of the institutional underpinnings that allow them to function smoothly and ensure their political sustainability. This is such a time and escalating charges of corporate-related human rights abuses are the canary in the coal mine, signaling that all is not well.

3. The root cause of the business and human rights predicament today lies in the governance gaps created by globalization [text §1.1.B.1.]—between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge.

4. The Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises was appointed in July 2005. …

5. The business and human rights debate currently lacks an authoritative focal point. Claims and counter-claims proliferate, initiatives abound, and yet no effort reaches significant scale. Amid this confusing mix, laggards—States as well as companies—continue to fly below the radar.

6. … Briefly, business can affect virtually all internationally recognized rights. Therefore, … as economic actors, companies have unique responsibilities. If those responsibilities are entangled with State obligations, it makes it difficult if not impossible to tell who is responsible for what in practice. Hence, this report pursues the more
promising path of addressing the specific responsibilities of companies in relation to all rights they may impact.

7. There is no single silver bullet solution to the institutional misalignments in the business and human rights domain. Instead, all social actors—States, businesses, and civil society—must learn to do many things differently. But those things must cohere and become cumulative, which makes it critically important to get the foundation right.

9. The framework rests on differentiated but complementary responsibilities. It comprises three core principles: the State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies [italics added]. … [T]he State [has a] duty to protect because it lies at the very core of the international human rights regime; the corporate responsibility to respect because it is the basic expectation society has of business; and access to remedy, because even the most concerted efforts cannot prevent all abuse, while access to judicial redress is often problematic, and non-judicial means are limited in number, scope and effectiveness. The three principles form a complementary whole in that each supports the others in achieving sustainable progress.

I. PROTECT, RESPECT AND REMEDY

A. The challenge

11. … [O]ur focus should be on ways to reduce or compensate for the governance gaps created by globalization, because they permit corporate-related human rights harm to occur even where none may be intended.

12. Take the case of transnational corporations. Their legal rights have been expanded significantly over the past generation. This has encouraged investment and trade flows, but it has also created instances of imbalances between firms and States that may be detrimental to human rights. The more than 2,500 bilateral investment treaties currently in effect are a case in point. While providing legitimate protection to foreign investors, these treaties also permit those investors to take host States to binding international arbitration [text §8.1.B.], including for alleged damages resulting from implementation of legislation to improve domestic social and environmental standards—even when the [State’s] legislation applies uniformly to all businesses, foreign and domestic. A European mining company operating in South Africa recently challenged that country’s black economic empowerment laws on these grounds.

13. At the same time, the legal framework regulating transnational corporations operates much as it did long before the recent wave of globalization. A parent company and its subsidiaries continue to be construed as distinct legal entities. … Furthermore, despite the transformative changes in the global economic landscape generated by offshore sourcing, purchasing goods and services even from sole suppliers remains an unrelated party transaction. Factors such as these make it exceedingly difficult to hold the extended enterprise accountable for human rights harm.

16. And what is the result? In his 2006 report, the [U.N.] Special Representative surveyed allegations of the worst cases of corporate-related human rights harm. They occurred, predictably, where governance challenges were greatest: disproportionately in
low income countries; in countries that often had just emerged from or still were in conflict; and in countries where the rule of law was weak and levels of corruption high. A significant fraction of the allegations involved companies being complicit in the acts of governments or armed factions. …

B. The Framework

17. Therefore, more coherent and concerted approaches are required. The framework of “protect, respect, and remedy” can assist all social actors—governments, companies, and civil society—to reduce the adverse human rights consequences of these misalignments.

18. Take first the State duty to protect. It has both legal and policy dimensions. As documented in the Special Representative’s 2007 report, international law provides that States have a duty to protect against human rights abuses by non-State actors, including by business, affecting persons within their territory or jurisdiction. …

19. Experts disagree on whether international law requires home States to help prevent human rights abuses abroad by corporations based within their territory. There is greater consensus that those States are not prohibited from doing so where a recognized basis of jurisdiction exists [text §5.2.A.], and the actions of the home State meet an overall reasonableness test, which includes non-intervention in the internal affairs of other States. Indeed, there is increasing encouragement at the international level … for home States to take regulatory action to prevent abuse by their companies overseas.

22. It is often stressed that governments are the appropriate entities to make the difficult balancing decisions required to reconcile different societal needs. However, the Special Representative’s work raises questions about whether governments have got the balance right. His consultations and research, including a questionnaire survey sent to all Member States, indicate that many governments take a narrow approach to managing the business and human rights agenda. It is often segregated within its own conceptual and (typically weak) institutional box—kept apart from, or heavily discounted in, other policy domains that shape business practices, including commercial policy, investment policy, securities regulation and corporate governance. This inadequate domestic policy coherence is replicated internationally. Governments should not assume they are helping business by failing to provide adequate guidance for, or regulation of, the human rights impact of corporate activities. On the contrary, the less governments do, the more they increase reputational and other risks to business. …

23. The corporate responsibility to respect human rights is the second principle [of three]. It is recognized in such soft law instruments as the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, and the OECD {Organization for Economic and Cooperative Development} Guidelines for Multinational Enterprises. It is invoked by the largest global business organizations in their submission to the mandate, which states that companies “are expected to obey the law, even if it is not enforced, and to respect the principles of relevant international instruments where national law is absent”. … And the Special Representative’s surveys document the fact that companies worldwide increasingly claim they respect human rights.21

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24. To respect rights essentially means not to infringe on the rights of others—put simply, to do no harm. Because companies can affect virtually all internationally recognized rights, they should consider the responsibility to respect in relation to all such rights, although some may require greater attention in particular contexts. There are situations in which companies may have additional responsibilities—for example, where they perform certain public functions, or because they have undertaken additional commitments voluntarily. But the responsibility to respect is the baseline expectation for all companies in all situations.

25. Yet how do companies know they respect human rights? Do they have systems in place enabling them to support the claim with any degree of confidence? Most do not. What is required is due diligence—a process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it. The scope of human rights-related due diligence is determined by the context in which a company is operating, its activities, and the relationships associated with those activities.

26. Access to remedy is the third principle. Even where institutions operate optimally, disputes over the human rights impact of companies are likely to occur. Currently, access to formal judicial systems is often most difficult where the need is greatest. And non-judicial mechanisms are seriously underdeveloped—from the company level up through national and international levels. …

II. THE STATE DUTY TO PROTECT

27. The general nature of the duty to protect is well understood by human rights experts within governments and beyond. What seems less well internalized is the diverse array of policy domains through which States may fulfill this duty with respect to business activities, including how to foster a corporate culture respectful of human rights at home and abroad. This should be viewed as an urgent policy priority for governments—necessitated by the escalating exposure of people and communities to corporate-related abuses, and the growing exposure of companies to social risks they clearly cannot manage adequately on their own.

A. Corporate Culture

29. Governments are uniquely placed to foster corporate cultures in which respecting rights is an integral part of doing business. This would reinforce steps companies themselves are asked to take to demonstrate their respect for rights…. Two approaches are illustrated here.

30. First, governments can support and strengthen market pressures on companies to respect rights. Sustainability reporting can enable stakeholders to compare rights-related performance. Several States, subnational authorities, and stock exchanges are calling for such disclosure. Sweden requires independently assured sustainability reports using Global Reporting Initiative guidelines for its State-owned enterprises, and China recently issued an advisory opinion on this subject. Some jurisdictions have gone further by redefining fiduciary duties. The recently revised United Kingdom Companies Act requires directors to “have regard” to such matters as “the impact of the company’s operations on the community and the environment,” and regulators are increasingly
rejecting company attempts to prevent shareholder proposals regarding human rights issues being considered at annual general meetings.

31. Second, some States are beginning to use “corporate culture” in deciding corporate criminal accountability. They examine a company’s policies, rules and practices to determine criminal liability and punishment, rather than basing accountability on the individual.... These principles may be invoked at the liability stage, or during sentencing and in exercising prosecutorial discretion. Both incentivize companies to have appropriate compliance systems.

32. In principle, inducing a rights-respecting corporate culture should be easier to achieve in State-owned enterprises (SOEs). Senior management in SOEs is typically appointed by and reports to State entities. Indeed, the State itself may be held responsible under international law for the internationally wrongful acts of its SOEs if they can be considered State organs or are acting on behalf, or under the orders, of the State. Beyond any legal obligations, human rights harm caused by SOEs reflects directly on the State’s reputation, providing it with an incentive in the national interest to exercise greater oversight. Much the same is true of sovereign wealth funds and the human rights impacts of their investments.

C. The International Level

43. Effective guidance and support at the international level would help States achieve greater policy coherence. The human rights treaty bodies can play an important role in making recommendations to States on implementing their obligations to protect rights vis-à-vis corporate activities.

45. Where States lack the technical or financial resources to effectively regulate companies and monitor their compliance, assistance from other States with the relevant knowledge and experience offers an important means to strengthen the enforcement of human rights standards. Such partnerships could be particularly fruitful between States that have extensive trade and investment links, and between the home and host States of the same transnationals.

D. Conflict Zones

47. It is well established that some of the most egregious human rights abuses, including those related to corporations, occur in conflict zones. The human rights regime cannot function as intended in the unique circumstances of sporadic or sustained violence, governance breakdown, and absence of the rule of law. Specific policy innovations are required to prevent corporate abuse, yet it seems that many States lag behind international institutions and responsible businesses in grappling with these difficult issues.

28. For examples of the former, see section 12.3 of Australia’s Criminal Code Act 1995 (Cth) and article 102 of the Swiss Penal Code. For an example of the latter, see chapter 8 of the United States Federal Sentencing Guidelines Manual: (2006) §8C2.5(b)(1).
48. State policies and practices where they exist at all are limited, fragmented and mostly unilateral. The use of Security Council sanctions targeting certain companies deemed to have contributed to conflicts in the Democratic Republic of the Congo, Sierra Leone and Liberia demonstrated a restraining effect. … But there is a need for more proactive policies to prevent harmful corporate involvement in conflict situations. As the Secretary-General notes, States need to do more to “promote conflict-sensitive practices in their business sectors” [textbook §9.2.B.1. Conflict Diamonds].

III. THE CORPORATE RESPONSIBILITY TO RESPECT

51. When it comes to the role companies themselves must play, the main focus in the debate has been on identifying a limited set of rights for which they may bear responsibility [italics added]. For example, the draft norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights generated intense discussions about whether its list of rights was too long or too short, and why some rights were included and others not. … This formula emphasizes precisely the wrong side of the equation: defining a limited list of rights linked to imprecise and expansive responsibilities, rather than defining the specific responsibilities of companies with regard to all rights.

52. The … attempt to limit internationally recognized rights is inherently problematic. … It may be useful for operational guidance purposes to map which rights companies have tended to affect most often in particular sectors or situations.37 It is also helpful for companies to understand how human rights relate to their management functions—for example, human resources, security of assets and personnel, supply chains, and community engagement.38 Both means of developing guidance should be pursued, but neither limits the rights companies should take into account.

53. The more difficult question of what precise responsibilities companies have in relation to rights has received far less attention. While corporations may be considered “organs of society,” they are specialized economic organs, not democratic public interest institutions. As such, their responsibilities cannot and should not simply mirror the duties of States. Accordingly, the Special Representative has focused on identifying the distinctive responsibilities of companies in relation to human rights.

A. Respecting Rights

54. In addition to compliance with national laws, the baseline responsibility of companies is to respect [all] human rights.a Failure to meet this responsibility can subject companies to the courts of public opinion—comprising employees, communities,

37. For example, the International Council on Mining and Metals conducted a study of 38 cases of allegations of human rights or related abuses involving mining companies in order to uncover patterns of human rights impacts. Second submission to the Special Representative, October 2006, available at <http://www.icmm.com/newsdetail.php?rcd=119>.
38. The companies in the Business Leaders Initiative on Human Rights (BLIHR) are developing this approach. See <http://www.blihr.org>.

a. Does this expectation expect too much of corporations? Would it have been better to delay its presentation until the basic program was further along? Alternatively, was it best to present all of the foreseeable program at once?
consumers, civil society, as well as investors—and occasionally to charges in actual courts. Whereas governments define the scope of legal compliance, the broader scope of the responsibility to respect is defined by social expectations—as part of what is sometimes called a company’s social license to operate.39

B. Due diligence

56. To discharge the responsibility to respect requires due diligence. This concept describes the steps a company must take to become aware of, prevent and address adverse human rights impacts. Comparable processes are typically already embedded in companies because in many countries they are legally required to have information and control systems in place to assess and manage financial and related risks.40

58. For the substantive content of the due diligence process, companies should look, at a minimum, to the international bill of human rights [text §10.2.B.] and the core conventions of the ILO [International Labor Organization], because the principles they embody comprise the benchmarks against which other social actors judge the human rights impacts of companies.

62. The integration of human rights policies throughout a company may be the biggest challenge in fulfilling the corporate responsibility to respect. As is true for States, human rights considerations are often isolated within a company. That can lead to inconsistent or contradictory actions: product developers may not consider human rights implications; sales or procurement teams may not know the risks of entering into relationships with certain parties; and company lobbying may contradict commitments to human rights. Leadership from the top is essential to embed respect for human rights throughout a company, as is training to ensure consistency, as well as capacity to respond appropriately when unforesen situations arise. 43

D. Complicity

73. The corporate responsibility to respect human rights includes avoiding complicity. The concept has legal and non-legal pedigrees, and the implications of both are important for companies. Complicity refers to indirect involvement by companies in human rights abuses—where the actual harm is committed by another party, including governments and non-State actors [italics added]. Due diligence can help a company avoid complicity.

39. There are situations where national laws and international standards conflict. Further guidance for companies needs to be developed, but companies serious about seeking to resolve the dilemma are finding ways to honour the spirit of international standards.

40. “There are diligence processes that a corporation must undertake to meet its general legal obligations that either accommodate or are at least amenable to consideration of human rights laws or standards”. Allens Arthur Robinson, “Corporate duty and human rights under Australian law,” prepared for the Special Representative, p. 1, available at <http://www.businesshumanrights.org/Updates/Archive/SpecialRepPapers>.

74. The legal meaning of complicity has been spelled out most clearly in the area of aiding and abetting international crimes, i.e. knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime. The number of domestic jurisdictions in which charges for international crimes can be brought against corporations is increasing, and companies may also incur non-criminal liability for complicity in human rights abuses.

75. In non-legal contexts, corporate complicity has become an important benchmark for social actors, including public and private investors, the Global Compact, campaigning organizations, and companies themselves. Claims of complicity can impose reputational costs and even lead to divestment, without legal liability being established. In this context, allegations of complicity have included indirect violations of the broad spectrum of human rights—political, civil, economic, social, and cultural.

77. Mere presence in a country, paying taxes, or silence in the face of abuses is unlikely to amount to the practical assistance required for legal liability. However, acts of omission in narrow contexts have led to legal liability of individuals when the omission legitimized or encouraged the abuse. Moreover, under international criminal law standards, practical assistance or encouragement need neither cause the actual abuse, nor be related temporally or physically to the abuse [text §9.6].

79. Legal interpretations of “having knowledge” vary. When applied to companies, it might require that there be actual knowledge, or that the company “should have known,” that its actions or omissions would contribute to a human rights abuse. Knowledge may be inferred from both direct and circumstantial facts. The “should have known” standard is what a company could reasonably be expected to know under the circumstances.

80. In international criminal law, complicity does not require knowledge of the specific abuse or a desire for it to have occurred, as long as there was knowledge of the contribution. Therefore, it may not matter that the company was merely carrying out normal business activities if those activities contributed to the abuse and the company was aware or should have been aware of its contribution. The fact that a company was

81. In short, the relationship between complicity and due diligence is clear and compelling: companies can avoid complicity by employing the due diligence processes described above.

IV. ACCESS TO REMEDIES

82. Effective grievance mechanisms play an important role in the State duty to protect, in both its legal and policy dimensions, as well as in the corporate responsibility to respect. State regulation proscribing certain corporate conduct will have little impact without accompanying [State compliance] mechanisms to investigate, punish, and redress abuses. Equally, the corporate responsibility to respect requires a means for those who believe they have been harmed to bring this to the attention of the company and seek

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48. For example, International Criminal Tribunal for the former Yugoslavia, Trial Chamber judgement Kvocka et al (IT-98-30/1-T), 2 November 2001, paras. 257-261. Following orders, fulfilling contractual obligations, or even complying with national law will not, alone, guarantee it legal protection.
remediation, without prejudice to legal channels available. Providing access to remedy does not presume that all allegations represent real abuses or bona fide complaints.

83. Expectations for States to take concrete steps to adjudicate corporate-related human rights harm are expanding. Treaty bodies increasingly recommend that States investigate and punish human rights abuse by corporations and provide access to redress for such abuse when it affects persons within their jurisdiction.\footnote{For instance, the Committee on the Rights of the Child increasingly recommends that States parties comply with article 3 (4) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, which requires them to take measures, where appropriate and, subject to national law, to establish criminal, civil or administrative liability of legal persons for treaty offences.} Redress could include compensation, restitution, guarantees of non-repetition, changes in relevant law and public apologies. …

84. Non-judicial mechanisms play an important role alongside judicial processes. They may be particularly significant in a country where courts are unable, for whatever reason, to provide adequate and effective access to remedy. Yet they are also important in societies with well-functioning rule of law institutions, where they may provide a more immediate, accessible, affordable, and adaptable point of initial recourse.

A. Judicial Mechanisms

88. Judicial mechanisms are often under-equipped to provide effective remedies for victims of corporate abuse. Victims face particular challenges when seeking personal compensation or reparation as opposed to more general sanction of the corporation through a fine or administrative remedies. They may lack a basis in domestic law on which to found a claim. Even if they can bring a case, political, economic or legal considerations may hamper enforcement.

89. Some complainants have sought remedy outside the State where the harm occurred, particularly through home State courts, but have faced extensive obstacles. Costs may be prohibitive, especially without legal aid; non-citizens may lack legal standing; and claims may be barred by statutes of limitations. Matters are further complicated if the claimant is seeking redress from a parent corporation for actions by a foreign subsidiary. … These obstacles may deter claims or leave the victim with a remedy that is difficult to enforce.

90. The law is slowly evolving in response to some of these obstacles. … And foreign plaintiffs are using the United States Alien Tort Claims Act to sue even non-United States companies for harm suffered abroad [textbook §10.6.C.].

91. States should strengthen judicial capacity to hear complaints and enforce remedies against all corporations operating or based in their territory, while also protecting against frivolous claims. States should address obstacles to access to justice, including for foreign plaintiffs—especially where alleged abuses reach the level of widespread and systematic human rights violations.

B. Non-judicial Grievance Mechanisms

92. Non-judicial mechanisms to address alleged breaches of human rights standards should meet certain principles to be credible and effective. … [T]he Special Representative believes that, at a minimum, such mechanisms must be:
(b) Accessible: a mechanism must be publicized to those who may wish to access it and provide adequate assistance for aggrieved parties who may face barriers to access, including language, literacy, awareness, finance, distance, or fear of reprisal;

c) Predictable: a mechanism must provide a clear and known procedure with a time frame for each stage and clarity on the types of process and outcome it can (and cannot) offer, as well as a means of monitoring the implementation of any outcome;

d) Equitable: a mechanism must ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair and equitable terms;

e) Rights-compatible: a mechanism must ensure that its outcomes and remedies accord with internationally recognized human rights standards;

(f) Transparent: a mechanism must provide sufficient transparency of process and outcome to meet the public interest concerns at stake and should presume transparency wherever possible; non-State mechanisms in particular should be transparent about the receipt of complaints and the key elements of their outcomes.

C. Company-level Grievance Mechanisms

93. Currently, the primary means through which grievances against [multinational] companies play out are litigation and public campaigns [although there are working alternative dispute resolution mechanisms available, per text §8.1.B.]. For a company to take a bet on winning lawsuits or successfully countering hostile campaigns is at best optimistic risk management. Companies should identify and address grievances early, before they escalate. An effective grievance mechanism is part of the corporate responsibility to respect.

94. A company can provide a grievance mechanism directly and be integrally involved in its administration. This could include the use of external resources—possibly shared with other companies—such as hotlines for raising complaints, advisory services for complainants, or expert mediators. Or it may involve a wholly external mechanism. Whatever the form, the company should ensure that the process abides by the principles outlined above.

95. Where a company is directly involved in administering a mechanism, problems may arise if it acts as both defendant and judge. Therefore, the mechanism should focus on direct or mediated dialogue. It should be designed and overseen jointly with representatives of the groups who may need to access it. Care should be taken to redress imbalances in information and expertise between parties, enabling effective dialogue and sustainable solutions. These mechanisms should not negatively impact opportunities for complainants to seek recourse through State-based mechanisms, including the courts.

D. State-based Non-judicial Mechanisms

96. According to the research carried out under the mandate, of the 85 recognized national human rights institutions (NHRIs) at least 40 are able to handle grievances
related to the human rights performance of companies. Of these, 31 are accredited under the Paris Principles. Some are limited to human rights abuses alleged against State-owned enterprises or private companies providing public services. Others can address grievances against any kind of company, but only with regard to specific kinds of human rights-related grievances, often discrimination. A third group—notably in Africa—admits grievances against all companies with regard to any human rights issue.

98. The 40 States adhering to the OECD Guidelines for Multinational Enterprises must provide a National Contact Point (NCP) whose tasks include handling grievances. OECD provides procedural guidance, with individual NCPs having flexibility in the application of the Guidelines. However, experience suggests that in practice they have too often failed to meet this potential.

F. Gaps in Access

102. The foregoing describes a patchwork of grievance mechanisms at different levels of the international system, with different constituencies and processes. Yet considerable numbers of individuals whose human rights are impacted by corporations, lack access to any functioning mechanism that could provide remedy. This is due in part to a lack of awareness as to where these mechanisms are located, how they function, and what supporting resources exist. NHRIs, NGOs, academic institutions, governments and other actors could address this gap through improved information flows.

V. CONCLUSION

104. The current debate on the business and human rights agenda originated in the 1990s, as liberalization, technology, and innovations in corporate structure combined to expand prior limits on where and how businesses could operate globally. Many countries, including in the developing world, have been able to take advantage of this new economic landscape to increase prosperity and reduce poverty. But as has happened throughout history, rapid market expansion has also created governance gaps in numerous policy domains: gaps between the scope of economic activities and actors, and the capacity of political institutions to manage their adverse consequences. The area of business and human rights is one such domain.

106. Without in any manner disparaging these steps, our fundamental problem is that there are too few of them, none has reached a scale commensurate with the challenges at hand, there is little cross-learning, and they do not cohere as parts of a more systemic response with cumulative effects. That is what needs fixing. And that is what the framework of “protect, respect and remedy” is intended to help achieve.

107. The United Nations is not a centralized command-and-control system that can impose its will on the world—indeed it has no “will” apart from that with which Member States endow it. But it can and must lead intellectually and by setting expecta-

54. The Paris Principles relate to the status of national human rights institutions (NHRIs) and establish criteria for their composition, guarantees of independence and pluralism, competence, responsibilities and methods of operation. See <http://www.nhri.net/default.asp?PID=312&DID=0>.
tions and aspirations. The Human Rights Council [text §10.2.C.2.] can make a singular contribution to closing the governance gaps in business and human rights by supporting this framework, inviting its further elaboration, and fostering its uptake by all relevant social actors.