

Chapter 27

Protect, Respect, and Remedy: The UN Framework for Business and Human Rights

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1. Introduction

The UDHR¹ of 1948 did not explicitly refer to the relationship between business and human rights. However, it provided in its preamble that ‘every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms.’ How can the existing international human rights system protect individuals and communities against corporate-related human rights harm? 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 chapter, which I presented to the United Nations Human Rights Council in 2008 in my capacity as Special Representative of the Secretary-General for Business and Human Rights, and which the Council welcomed unanimously, presents a principles-based conceptual and policy framework intended to help achieve this aim. The framework 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. The three principles form a complementary whole in that each supports the others in achieving sustainable progress.

Business is a major source of investment and job creation, and markets can be highly efficient means for allocating scarce resources. They constitute powerful forces capable of generating economic growth, reducing poverty, and increasing demand for the rule of law, thereby contributing to the realization of a broad spectrum of human rights. But markets work optimally only if they are embedded within rules, customs and institutions. Markets themselves require these to survive and thrive, while society needs them to manage the adverse effects of market dynamics and produce the public goods that markets under-supply. 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, signalling that all is not well.

The root cause of the business and human rights predicament today lies in the governance gaps created by globalization – 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. The business and human rights debate currently lacks an authoritative focal point. Claims and counter-claims proliferate, initiatives abound, and yet no effort reaches

1 GA Res. 217A (III), UN Doc. A/810 at 71 (1948).

significant scale. Amid this confusing mix, laggards – states as well as companies – continue to fly below the radar.

Some stakeholders believe that the solution lies in a limited list of human rights for which companies would have responsibility, while extending to companies, where they have influence, essentially the same range of responsibilities as states. For reasons this chapter spells out, the author does not share this view. Briefly, business can affect virtually all internationally recognized rights. Therefore, any limited list will almost certainly miss one or more rights that may turn out to be significant in a particular instance, thereby providing misleading guidance. At the same time, 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 chapter pursues the more promising path of addressing the specific responsibilities of companies in relation to all rights they may impact.

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, making it critically important to get the foundation right. Every stakeholder group, despite their other differences, has expressed the urgent need for a common conceptual and policy framework, a foundation on which thinking and action can build. Accordingly, in 2008, I proposed, and the United Nations (UN) Human Rights Council unanimously welcomed, the ‘protect, respect and remedy’ framework. It rests on differentiated but complementary responsibilities; 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. Each principle is an essential component of the framework: the state duty to protect because it lies at the very core of the international human rights regime;² 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.

2. Protect, Respect and Remedy

The framing of policy challenges can have profound consequences for assigning responsibilities to relevant actors and determining whether the combination is capable of meeting the overall policy objectives. The business and human rights agenda remains hampered because it has not yet been framed in a way that fully reflects the complexities and dynamics of globalization and provides governments and other social actors with effective guidance.

2.1 The Challenge

How should we frame today’s challenges in order to capture their essential attributes? As noted at the outset, our 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. Take the case of transnational corporations. Their legal rights have been

² The duty to protect is well established in international law and must not be confused with the concept of the ‘responsibility to protect’ in the humanitarian intervention debate.

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 nearly 3,000 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, including for alleged damages resulting from implementation of legislation to improve domestic social and environmental standards – even when the 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.³

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. Therefore, the parent company is generally not liable for wrongs committed by a subsidiary, even where it is the sole shareholder, unless the subsidiary is under such close operational control by the parent that it can be seen as its mere agent. 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, and the buyer bears no legal liability for the acts of suppliers even where the buyer may be in part responsible for those acts. Factors such as these make it exceedingly difficult to hold the extended enterprise accountable for human rights harm. Each legally distinct corporate entity is subject to the laws of the countries in which it is based and operates. Yet, states, particularly some developing countries, may lack the institutional capacity to enforce national laws and regulations against transnational firms doing business in their territory even when the will is there, or they may feel constrained from doing so by having to compete internationally for investment. Home states of transnational firms may be reluctant to regulate against overseas harm by these firms because the permissible scope of national regulation with extraterritorial effect remains poorly understood, or out of concern that those firms might lose investment opportunities or relocate their headquarters.

This dynamic is hardly limited to transnational corporations. To attract investments and promote exports, governments may exempt national firms from certain legal and regulatory requirements or fail to adopt such standards in the first place. And what is the result? A survey of allegations of the worst cases of corporate-related human rights harm conducted in 2006 indicated that 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.⁴ A significant fraction of the allegations involved companies being complicit in the acts of governments or armed factions.⁵ A study conducted for my UN mandate by the Office of the UN High Commissioner for Human Rights (OHCHR) confirms these findings but also shows that adverse business impacts on human rights are not limited to these contexts.⁶

3 *Piero Foresti, Laura De Carli and Others v Republic of South Africa* (International Centre for Settlement of Investment Disputes, case No. ARB (AF)/07/1).

4 See Interim report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. E/CN.4/2006/97 (22 February 2006).

5 *Ibid.*

6 'Corporations and human rights: a survey of the scope and patterns of alleged corporate-related human rights abuse', Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Addendum 2, UN Document A/HRC/8/5/Add.2, 23 May 2008.

2.2 The Framework

In so far as governance gaps are at the root of the business and human rights predicament, effective responses must aim to reduce those gaps. But individual actions, whether by states or firms, may be too constrained by the competitive dynamics just described. 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.⁷

Take first the state duty to protect. It has both legal and policy dimensions. It is now well established that 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.⁸ The specific language employed in the main UN human rights treaties varies, but all include two sets of obligations. First, the treaties commit states parties to refrain from violating the enumerated rights of persons within their territory and/or jurisdiction. Second, the treaties require states to ‘ensure’ (or some functionally equivalent verb) the enjoyment or realization of those rights by rights holders.⁹ In turn, ensuring that rights holders enjoy their rights requires protection by states against other social actors, including businesses, which impede or negate those rights. Guidance from international human rights bodies suggests that the state duty to protect applies to all recognized rights that private parties are capable of impairing, and to all types of business enterprises.¹⁰

The state duty to protect is a standard of conduct, not result. That is, states are not held responsible for corporate-related human rights abuse *per se* but may be considered in breach of their obligations where they fail to take appropriate steps to prevent it and to investigate, punish and redress it when it occurs.¹¹ Within these parameters, states have discretion as to how to fulfil the duty. The main human rights treaties generally contemplate legislative, administrative and judicial measures. The UN treaty bodies have recommended to states such measures as adopting anti-discrimination legislation governing employment practices; consulting with communities before approving mining and logging projects; monitoring and addressing the human rights impacts of such projects; and encouraging businesses to develop codes of conduct that include human rights.

7 Multi-stakeholder initiatives, such as the Kimberley Process, reflect elements of all three principles; they were discussed at length in last year’s report (UN Doc. A/HRC/4/35, paras. 52–61).

8 UN Docs A/HRC/4/35, and A/HRC/4/35/Add.1. Some states hold that this duty is limited to protecting persons who are within both their territory and jurisdiction.

9 For example, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child use ‘respect and ensure’, with ‘respect’ in the state context, meaning that the state must refrain from violating the rights. The Convention on the Rights of Persons with Disabilities requires states parties to ‘ensure and promote’, and to take appropriate measures to ‘eliminate’ abuse by private ‘enterprises’. The International Convention on the Elimination of All Forms of Racial Discrimination requires that each state party ‘shall prohibit and bring to an end ... racial discrimination by any persons, group or organization’. The Convention on the Elimination of All Forms of Discrimination Against Women *requires* states parties ‘to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise’. In the International Covenant on Economic, Social and Cultural Rights states parties undertake ‘to take steps ... achieving progressively the full realization of rights’, while its rights-specific provisions, such as those dealing with labour, refer to states ‘ensuring’ those rights.

10 See A/HRC/8/5/Add.1 for a summary of the Special Representative’s research on the UN human rights treaties and treaty body commentaries.

11 Corporate acts may be directly attributed to states in some circumstances, as where a state exercises such close control that the company is its mere agent.

The extraterritorial dimension of the duty to protect remains unsettled in international law. Current guidance from international human rights bodies suggests that states are not required to regulate the extraterritorial activities of businesses incorporated in their jurisdiction, but nor are they generally prohibited from doing so provided there is a recognized jurisdictional basis and that an overall reasonableness test is met. Within those parameters, some UN treaty bodies are encouraging home states to take steps to prevent abuse abroad by corporations within their jurisdiction.¹²

But there are also strong policy reasons for home states to encourage their companies to respect rights abroad, especially if a state itself is involved in the business venture – whether as owner, investor, insurer, procurer, or simply promoter. Such encouragement gets home states out of the untenable position of being associated with possible overseas corporate abuse. And it can provide much-needed support to host states that lack the capacity to implement fully an effective regulatory environment on their own. Moreover, there is an expanding web of potential corporate liability for international crimes, reflecting international standards but imposed through national courts.¹³ As discussed in the next section, in some jurisdictions innovations in regulation and adjudication are moving toward greater recognition of the complex organizational forms characteristic of modern business enterprises.

It is often stressed that governments are the appropriate entities to make the difficult balancing decisions required to reconcile different societal needs. However, there are questions about whether governments have got the balance right. Many governments take a narrow approach to managing the business and human rights agenda.¹⁴ 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. We elaborate further on these issues below.

The corporate responsibility to respect human rights is the second principle. It is recognized in such soft-law instruments as the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy,¹⁵ and the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises.¹⁶ 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’.¹⁷ It is one of the commitments companies undertake in

12 E.g. CERD/C/USA/CO/6 (2008), para. 30; CESCR General Comment 19 (2008), para. 54.

13 UN Doc. A/HRC/4/35, paras. 19–32.

14 UN Doc. A/HRC/4/35/Add.3.

15 ILO Official Bulletin, Series A, No. 3 (2000).

16 See Organization for Economic Co-operation and Development, DAFNE/IME/WPG(2000)15/FINAL.

17 International Organization of Employers, International Chamber of Commerce, Business and Industry Advisory Committee to the Organisation for Economic Co-operation and Development (OECD), ‘Business and Human Rights: The Role of Government in Weak Governance Zones’, December 2006, para. 15 [online]. Available from: <http://www.reports-and-materials.org/Role-of-Business-in-Weak-Governance-Zones-Dec-2006.pdf>.

joining the UN Global Compact.¹⁸ And indeed companies worldwide increasingly claim to respect human rights.¹⁹

To respect rights essentially means to act with due diligence to avoid infringing on the rights of others. 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.

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.²⁰ 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.

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. Section 5 below identifies criteria of effectiveness for grievance mechanisms and suggests ways to strengthen the current system.

3. The State Duty to Protect

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 fulfil 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. The following discussion is not intended to insist on specific legislative or other policy actions, but to illustrate important issues and innovative approaches the author believes deserve serious consideration. Adjudication is addressed in Section 5 below.

3.1 Corporate Culture

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

¹⁸ See [online]. Available from: <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/humanRights.html>.

¹⁹ UN Docs A/HRC/4/35/Add.3, A/HRC/4/35/Add.4, and ‘Human Rights Policies of Chinese Companies: Results from a Survey’, [online]. Available from: <http://www.business-humanrights.org/Documents/Ruggie-China-survey-Sep-2007.pdf>.

²⁰ A traditional definition of due diligence is ‘the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or discharge an obligation’. *Black’s Law Dictionary*, 8th edn (2006).

take to demonstrate their respect for rights, as described in Section 4 below. Two approaches are illustrated here.

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, sub-national authorities, and stock exchanges are calling for such disclosure.²¹ Sweden requires independently ensured sustainability reports, using Global Reporting Initiative guidelines for its state-owned enterprises, and China recently issued an advisory opinion on this subject.²² Some jurisdictions have gone further by redefining fiduciary duties. The recently revised United Kingdom (UK) Companies Act requires directors to ‘have regard’ to such matters as ‘the impact of the company’s operations on the community and the environment’,²³ and regulators are increasingly rejecting company attempts to prevent shareholder proposals regarding human rights issues being considered at annual general meetings.²⁴

Second, some states are beginning to use ‘corporate culture’ in deciding corporate criminal accountability.²⁵ They examine a company’s policies, rules and practices to determine criminal liability and punishment, rather than basing accountability on the individual acts of employees or officers. These principles may be invoked at the liability stage, or during sentencing and in exercising prosecutorial discretion.²⁶ Both incentivize companies to have appropriate compliance systems.

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.

3.2 Policy Alignment

The adverse effects of domestic policy incoherence include ‘vertical’ incoherence, in which governments take on human rights commitments without regard to implementation; and ‘horizontal’

21 Among other examples, the Johannesburg Securities Exchange mandates sustainability reporting, as does France’s law on new economic regulations.

22 ‘Guidelines for External Reporting by Swedish State-Owned Companies’, adopted 29 November 2007 [online]. Available from: <http://www.sweden.gov.se/sb/d/8194/a/93506>; and ‘Instructing Opinions About Central State-Owned Enterprises Fulfilling Social Responsibility’, issued by China’s State-Owned Asset Supervision and Administration Commission of the State Council, 4 January 2008.

23 Section 172 (1) (d) of the United Kingdom Companies Act (2006), which came into effect 1 October 2007.

24 ‘Trends in the Use of Corporate Law and Shareholder Activism to Increase Corporate Responsibility and Accountability for Human Rights’, prepared for the Special Representative by the law firm Fried Frank [online]. Available from: <http://www.business-humanrights.org/Documents/Fried-Frank-Memo-Dec-2007.pdf>.

25 ‘Corporate Culture as a Basis for the Criminal Liability of Corporations’, prepared for the Special Representative by the law firm Allens Arthur Robinson [online]. Available from: <http://www.reports-and-materials.org/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf>.

26 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).

incoherence, in which departments – such as trade, investment promotion, development, foreign affairs – work at cross-purposes with the state’s human rights obligations and the agencies charged with implementing them. Two instances of this latter pattern are considered below: the first from host states, and the second from home states.

To attract foreign investment, host states offer protection through bilateral investment treaties and host government agreements. They promise to treat investors fairly, equitably, and without discrimination, and to make no unilateral changes to investment conditions. But investor protections have expanded with little regard to states’ duties to protect, skewing the balance between the two. Consequently, host states can find it difficult to strengthen domestic social and environmental standards, including those related to human rights, without fear of foreign investor challenge, which can take place under binding international arbitration. This imbalance creates potential difficulties for all types of countries. Agreements between host governments and companies sometimes include promises to ‘freeze’ the existing regulatory regime for the project’s duration, which can be a half-century for major infrastructure and extractive industries projects. During the investment’s lifetime, even social and environmental regulatory changes that are applied equally to domestic companies can be challenged by foreign investors claiming exemption or compensation.

The imbalance is particularly problematic for developing countries. Our examination of nearly 90 contracts indicates that those signed with non-OECD countries constrain the host state’s regulatory powers significantly more than those signed with OECD countries – and that country risk ratings alone do not seem to account for the variance.²⁷ Yet, it is precisely in developing countries that regulatory development may be most needed. When investment cases go to international arbitration they are generally treated as commercial disputes in which public interest considerations, including human rights, play little or no role. Additionally, arbitration processes are often conducted in strict confidentiality so that the public in the country facing a claim may not even know of its existence. Where human rights and other public interests are concerned, transparency should be a governing principle, without prejudice to legitimate commercial confidentiality. States, companies, the institutions supporting investments, and those designing arbitration procedures should work towards developing better means to balance investor interests and the needs of host states to discharge their human rights obligations.²⁸

Now consider an example from the home state side. It concerns export credit agencies (ECAs), which finance or guarantee exports and investments in regions and sectors that may be too risky for the private sector alone. ECAs may be state agencies or privatized, but all are mandated by the state and perform a public function. Despite this state nexus, however, relatively few ECAs explicitly consider human rights at any stage of their involvement; indeed, in informal discussions, a number indicate they might require specific authority from their government overseers to do so.

On policy grounds alone, a strong case can be made that ECAs, representing not only commercial interests but also the broader public interest, should require clients to perform adequate due diligence on their potential human rights impacts. This would enable ECAs to flag up where serious human rights concerns would require greater oversight – and possibly indicate where state support should not proceed or continue. Closer alignment between a state’s ECA and its official development agency is also desirable. A development agency may view the arrival of an ECA-supported private investment in a particular region of a country as reason to focus its own efforts elsewhere. But if the

27 See ‘Stabilization clauses and human rights’ [online]. Available from: <http://www.reports-and-materials.org/Stabilization-Clauses-and-Human-Rights-11-Mar-2008.pdf>.

28 Similar concerns have been raised regarding international and regional trade agreements, specifically about the state’s ability to ensure access to essential services and protect the right to health. The Special Representative has not had the opportunity to conduct independent research on these trade-related issues.

investment has a large physical and social footprint, the chances are that it will generate pressures that local authorities may need help in managing – and which the home country development agency might be able to provide. This is but a small sample of issues where more effective policy alignment by states is required to support the business and human rights agenda.

3.3 The International Level

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.²⁹ Special procedures mandate holders can also highlight relevant issues.³⁰ OHCHR can contribute to capacity-building in states that may lack the necessary tools by providing technical advice. States are encouraged to share information about challenges and best practices, thus promoting more consistent approaches and perhaps increasing their expectations of each other for protecting rights against corporate abuse. Peer learning would be facilitated by states including information about business in their reports for the universal periodic review. 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.

Finally, the OECD Guidelines are currently the most widely applicable set of government-endorsed standards related to corporate responsibility and human rights. Most recently updated in 2000, their current human rights provisions not only lack specificity, but in key respects have also fallen behind the voluntary standards of many companies and business organizations. Revision of the guidelines addressing these concerns would be timely.

3.4 Conflict Zones

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. State policies and practices – where they exist at all – are limited, fragmented and mostly unilateral. The use of UN 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. A recent report by the UN Secretary-General recommends that this enforcement tool be continued and improved.³¹ But there is a need for more proactive policies

29 In June 2007, the Special Representative met with treaty body representatives to discuss their emerging guidance.

30 In June 2007, the Special Representative met with other human rights mandate holders to share experiences.

31 UN Doc. S/2008/18, particularly paras. 16–18. In some instances, the lists identifying individuals and companies for sanctions have been criticized on due process grounds.

to prevent harmful corporate involvement in conflict situations. As the UN Secretary-General notes, states need to do more to ‘promote conflict-sensitive practices in their business sectors’.³²

Home states could identify indicators to trigger alerts with respect to companies in conflict zones. They could then provide or facilitate access to information and advice – whether from home or their overseas embassies – to help businesses address the heightened human rights risks and ensure they act appropriately when engaging with local actors. There may be a point at which the home state would withdraw its support altogether. None of this detracts from host state duties to protect against all corporate abuse within their jurisdictions, including conflict zones.

In sum, the human rights regime rests upon the bedrock role of states. That is why the duty to protect is a core principle of the business and human rights framework. But meeting business and human rights challenges also requires the active participation of business directly. We now turn to the second principle.

4. The Corporate Responsibility to Respect

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. 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. At the same time, the norms would have extended to companies essentially the entire range of duties that states have, separated only by the undefined concepts of ‘primary’ versus ‘secondary’ obligations and ‘corporate sphere of influence’. 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.

The table below shows why any attempt to limit internationally recognized rights is inherently problematic. Drawn from more than 300 reports of alleged corporate-related human rights abuses, it makes a critical point: there are few if any internationally recognized rights that business cannot impact – or be perceived to impact – in some manner. Therefore, companies should consider all such rights. It may be useful for operational guidance purposes to map which rights companies have tended to affect most often in particular sectors or situations.³³ 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.³⁴ Both means of developing guidance should be pursued, but neither limits the rights companies should take into account.

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, we have focused on identifying the distinctive responsibilities of companies in relation to human rights.

³² *Ibid.*, para. 20.

³³ 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 [online]. Available from: <http://www.icmm.com/newsdetail.php?rcd=119>.

³⁴ The companies in the Business Leaders Initiative on Human Rights (BLIHR) are developing this approach. See [online]. Available from: <http://www.blihr.org>.

Table 27.1 Business impact on human rights

Labour rights		
Freedom of association	Right to equal pay for equal work	
Right to organize and participate in collective bargaining	Right to equality at work	
Right to non-discrimination	Right to just and favourable remuneration	
Abolition of slavery and forced labour	Right to a safe work environment	
Abolition of child labour	Right to rest and leisure	
Right to work	Right to family life	
Non-labour rights		
Right to life, liberty and security of the person	Right of peaceful assembly	Right to an adequate standard of living (including food, clothing, and housing)
Freedom from torture or cruel, inhuman or degrading treatment	Right to marry and form a family	Right to physical and mental health; access to medical services
Equal recognition and protection under the law	Freedom of thought, conscience and religion	Right to education
Right to a fair trial	Right to hold opinions, freedom of information and expression	Right to participate in cultural life, the benefits of scientific progress, and protection of authorial interests
Right to self-determination	Right to political life	Right to social security
Freedom of movement	Right to privacy	

Source: This table is based on a study of 320 cases (from all regions and sectors) of alleged corporate-related human rights abuse reported on the Business and Human Rights Resource Centre website⁷ from February 2005 to December 2007. Each case was coded for what right(s) the alleged abuse impacted, referencing the rights in the UDHR; International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (ICESCR); and International Labour Organization (ILO) core conventions.

*Available from: <http://www.business-humanrights.org/Home>.

4.1 *Respecting Rights*

In addition to compliance with national laws, the baseline responsibility of companies is to respect human rights. Failure to meet this responsibility can subject companies to the court of public opinion – comprising employees, communities, 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 licence to operate.³⁵

The corporate responsibility to respect exists independently of states’ duties. Therefore, there is no need for the slippery distinction between ‘primary’ state and ‘secondary’ corporate obligations – which in any event would invite endless strategic gaming on the ground about who is responsible for what. Furthermore, because the responsibility to respect is a baseline expectation, a company cannot compensate for human rights harm by performing good deeds elsewhere. Finally, ‘doing no harm’ is not merely a passive responsibility for firms but may entail positive steps – for example, a workplace anti-discrimination policy might require the company to adopt specific recruitment and training programmes.

4.2 *Due Diligence*

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.³⁶ If companies are to carry out due diligence, what factors should be considered? The process inevitably will be inductive and fact-based, but the principles guiding it can be stated succinctly. Companies should consider three sets of factors. The first is the country contexts in which their business activities take place, to highlight any specific human rights challenges they may pose. The second is what human rights impacts their own activities may have within that context – for example, in their capacity as producers, service providers, employers, and neighbours. The third is whether they might contribute to abuse through the relationships connected to their activities, such as with business partners, suppliers, state agencies, and other non-state actors. How far or how deep this process must go will depend on circumstances.

For the substantive content of the due diligence process, companies should look, at a minimum, to the international bill of human rights and the core conventions of the ILO, because the principles they embody comprise the benchmarks against which other social actors judge the human rights impacts of companies. The basic human rights due diligence process should include the following.³⁷

35 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.

36 ‘There are due 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 [online]. Available from: <http://www.business-humanrights.org/Updates/Archive/SpecialRepPapers>.

37 The principles are the same for all companies, although specific procedures may differ in small and medium-sized enterprises.

4.2.1 Policies Companies need to adopt a human rights policy. Broad aspirational language may be used to describe respect for human rights, but more detailed guidance in specific functional areas is necessary to give those commitments meaning.

4.2.2 Impact Assessments Many corporate human rights issues arise because companies fail to consider the potential implications of their activities before they begin. Companies must take proactive steps to understand how existing and proposed activities may affect human rights. The scale of human rights impact assessments will depend on the industry and national and local context.³⁸ While these assessments can be linked with other processes like risk assessments or environmental and social impact assessments, they should include explicit references to internationally recognized human rights. Based on the information uncovered, companies should refine their plans to address and avoid potential negative human rights impacts on an ongoing basis.

4.2.3 Integration The integration of human rights policies throughout a company may be the biggest challenge in fulfilling the corporate responsibility to respect. As in 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 unforeseen situations arise.³⁹

4.2.4 Tracking performance Monitoring and auditing processes permit a company to track ongoing developments. The procedures may vary across sectors and even among company departments, but regular updates of human rights impact and performance are crucial. Tracking generates information needed to create appropriate incentives and disincentives for employees and ensure continuous improvement. Confidential means to report non-compliance, such as hotlines, can also provide useful feedback. As companies adopt and refine due diligence practices, industry and multi-stakeholder initiatives can promote sharing of information, improvement of tools, and standardization of metrics. The UN Compact is well-positioned to play such a role, enjoying a United Nations platform and reaching widely into the corporate community, including in developing countries.

4.3 Sphere of Influence

Sphere of influence was introduced into corporate social responsibility discourse by the UN Global Compact. It was intended as a spatial metaphor: the 'sphere' was expressed in concentric circles with company operations at the core, moving outward to suppliers, the community, and beyond, with the assumption that the 'influence' – and thus presumably the responsibility – of the company declines from one circle to the next. The draft norms later proposed the concept as a basis for attributing legal obligations to companies, using it as though it were analogous to the jurisdiction of states.

38 The Special Representative submitted a separate report on this subject in 2007 (UN Doc. A/HRC/4/74).

39 BLIHR, OHCHR, and the Global Compact, *A Guide for Integrating Human Rights into Business Management* [online]. Available from: www.ohchr.org/Documents/Publications/GuideHRBusinessen.pdf.

Sphere of influence remains a useful metaphor for companies in thinking about their human rights impacts beyond the workplace and in identifying opportunities to support human rights, which is what the UN Global Compact seeks to achieve.⁴⁰ But a more rigorous approach is required to define the parameters of the responsibility to respect and its due diligence component. To begin with, sphere of influence conflates two very different meanings of influence: one is impact, where the company's activities or relationships are causing human rights harm; the other is whatever leverage a company may have over actors that are causing harm. The first falls squarely within the responsibility to respect; the second may only do so in particular circumstances.

Anchoring corporate responsibility in the second meaning of influence requires assuming, in moral philosophy terms, that 'can implies ought'. But companies cannot be held responsible for the human rights impacts of every entity over which they may have some influence, because this would include cases in which they were not a causal agent, direct or indirect, of the harm in question. Nor is it desirable to have companies act whenever they have influence, particularly over governments. Asking companies to support human rights voluntarily where they have influence is one thing; but attributing responsibility to them on that basis alone is quite another. Moreover, influence can only be defined in relation to someone or something. Consequently, it is itself subject to influence: a government can deliberately fail to perform its duties in the hope or expectation that a company will yield to social pressures to promote or fulfil certain rights – again demonstrating why state duties and corporate responsibilities must be defined independently of one another.

Finally, the emphasis on proximity in the sphere of influence model can be misleading. Clearly, companies need to be concerned with their impact on workers and surrounding communities. But their activities can equally affect the rights of people far away from the source – as, for example, violations of privacy rights by Internet service providers can endanger dispersed end-users. Hence, it is not proximity that determines whether or not a human rights impact falls within the responsibility to respect, but rather the company's web of activities and relationships. In short, the scope of due diligence to meet the corporate responsibility to respect human rights is not a fixed sphere, nor is it based on influence. Rather, it depends on the potential and actual human rights impacts resulting from a company's business activities and the relationships connected to those activities.

4.4 Complicity

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. Due diligence can help a company avoid complicity.

The legal meaning of complicity has been spelled out most clearly in the area of aiding and abetting international crimes; that is, knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime, as discussed in my 2007 report to the Human Rights Council.⁴¹ 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.

⁴⁰ See [online]. Available from: <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>.

⁴¹ UN Doc. A/HRC/4/35, paras. 22–32.

In non-legal contexts, corporate complicity has become an important benchmark for social actors, including public and private investors, the UN Global Compact, campaigning organizations, and companies themselves. Claims of complicity can impose reputational costs and even lead to divestment, without legal liability being established.⁴² In this context, allegations of complicity have included indirect violations of the broad spectrum of human rights – political, civil, economic, social, and cultural.

Owing to the relatively limited case history, especially in relation to companies rather than individuals, and given the substantial variations in definitions of complicity within and between the legal and non-legal spheres, it is not possible to specify definitive tests for what constitutes complicity in any given context. But companies should bear in mind the considerations set out below.

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.⁴³ 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. Similarly, deriving a benefit from a human rights abuse is not likely on its own to bring legal liability. Nevertheless, benefiting from abuses may carry negative implications for companies in the public perception. 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.

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 following orders, fulfilling contractual obligations, or even complying with national law will not, alone, guarantee it legal protection.

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 – which, as noted, apply not only to their own activities but also to the relationships connected with them.

5. Access to Remedies

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 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

42 The Norwegian Government pension fund excludes and has divested from companies, including Wal-Mart, for complicity in human rights violations. Council on Ethics for the Government Pension Fund, annual reports 2006 and 2007 [online]. Available from: http://www.regjeringen.no/en/sub/Styrer-rad-utvalg/ethics_council/annual-reports.html?id=458699.

43 For example, International Criminal Tribunal for the Former Yugoslavia, Trial Chamber judgement *Kvočka et al.* (IT-98-30/1-T), 2 November 2001, paras. 257–61.

and seek remediation, without prejudice to legal channels available. Providing access to remedy does not presume that all allegations represent real abuses or bona fide complaints.

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.⁴⁴ Redress could include compensation, restitution, guarantees of non-repetition, changes in relevant law and public apologies. As discussed earlier, regulators are also using new tools to hold corporations accountable under both civil and criminal law, focused on failures in organizational culture.

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. State-based, non-judicial mechanisms include agencies with oversight of particular standards (for example, health and safety); publicly funded mediation services, such as those handling labour rights disputes in the UK and South Africa; national human rights institutions; or mechanisms such as the OECD's National Contact Points.

Non-state mechanisms may be linked to industry-based or multi-industry organizations; to multi-stakeholder initiatives ensuring member compliance with standards; to project financiers requiring certain standards of clients; or to particular companies or projects. Non-state mechanisms must not undermine the strengthening of state institutions, particularly judicial mechanisms, but can offer additional opportunities for recourse and redress. Yet this patchwork of mechanisms remains incomplete and flawed. It must be improved in its parts and as a whole.

5.1 Judicial Mechanisms

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.

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. In common law countries, the court may dismiss the case based on *forum non conveniens* grounds – essentially, that there is a more appropriate forum for it. Even the most independent judiciaries may be influenced by governments arguing for dismissal based on various 'matters of state'. These obstacles may deter claims or leave the victim with a remedy that is difficult to enforce.

The law is slowly evolving in response to some of these obstacles. In some jurisdictions, plaintiffs have brought cases against parent companies claiming that they should be held responsible for their

44 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. See UN Doc. A/HRC/4/35/Add.1, para. 64.

own actions and omissions in relation to harm involving their foreign subsidiaries.⁴⁵ Elsewhere it is getting somewhat more difficult for defendant companies to have cases alleging harm abroad dismissed on the basis that there is a more appropriate forum.⁴⁶ And foreign plaintiffs are using the United States (US) Alien Tort Claims Act to sue even non-US companies for harm suffered abroad.⁴⁷ 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.

5.2 Non-Judicial Grievance Mechanisms

Non-judicial mechanisms to address alleged breaches of human rights standards should meet certain principles to be credible and effective. Based on a year of multi-stakeholder and bilateral consultations conducted under my mandate,⁴⁸ we have found that, at a minimum, such mechanisms must be:

- a. *Legitimate*: a mechanism must have clear, transparent and sufficiently independent governance structures to ensure that no party to a particular grievance process can interfere with the fair conduct of that process.
- 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.

45 For example, *Connelly v RTZ Corporation plc and Others* [1998] AC 854, and *Lubbe v Cape plc* [2000] 4 All ER 268 (House of Lords, United Kingdom).

46 The European Court of Justice has confirmed that national courts in an EU member state may not dismiss actions against companies domiciled in that state on *forum non conveniens* grounds. *Owusu v Jackson* [2005] ECR-I-1283. And in Australia, defendants must now prove that the forum is ‘clearly inappropriate’. *Voth v Manildra Flour Mills Pty. Ltd.* (1990) 171 C.L.R. 538 (H.C.A.).

47 More than 40 cases have been brought against companies under this statute since 1993, when the first was filed.

48 The process involved experts from all stakeholder groups and regions. These principles, based on more specific guidance developed for companies, apply across non-judicial mechanisms of different kinds. See [online]. Available from: http://www.business-humanrights.org/Links/Repository/308254/link_page_view.

5.3 Company-Level Grievance Mechanisms

Currently, the primary means through which grievances against companies play out are litigation and public campaigns. 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. 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.

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.

5.4 State-Based Non-Judicial Mechanisms

Our research indicates that out 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.⁴⁹ 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.⁵⁰

The actual and potential importance of these institutions cannot be overstated. Where NHRIs are able to address grievances involving companies, they can provide a means to hold business accountable. NHRIs are particularly well positioned to provide processes – whether adjudicative or mediation-based – that are culturally appropriate, accessible, and expeditious. Even where they cannot themselves handle grievances, they can provide information and advice on other avenues of recourse to those seeking remedy. Through increased interchange of information, they could act as lynchpins within the wider system of grievance mechanisms, linking local, national and international levels across countries and regions. NHRIs that do not currently publicize information about their business-related work should do so.

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. The NCPs are potentially an important vehicle for providing remedy. However, with a few exceptions, experience suggests that in practice they have too often failed to meet this potential. The housing of some NCPs

49 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 [online]. Available from: <http://www.nhri.net/default.asp?PID=312&DID=0>.

50 'Business and Human Rights: A Survey of NHRI Practices' [online]. Available from: <http://www.business-humanrights.org/Gettingstarted/UNSpecialRepresentative>.

primarily or wholly within government departments tasked with promoting business, trade and investment raises questions about conflicts of interest. NCPs often lack the resources to undertake adequate investigation of complaints and the training to provide effective mediation. There are typically no time frames for the commencement or completion of the process, and outcomes are often not publicly reported. In sum, many NCP processes appear to come up short when measured against the minimum principles set out in Section 5.2 above.

Certain NCPs, recognizing such shortfalls, have sought innovative solutions. Several have involved multiple government departments and created multi-stakeholder advisory groups. Perhaps most interesting is the decision of the Dutch government to reorganize its NCP such that a four-person, multi-stakeholder group handles grievances independent of, though supported administratively by, the government. Alternative suggestions have included placing NCPs under the legislative branch or within a NHRI. OECD and adhering states should consider these and other options for addressing current deficits, while preserving the important role of governments in raising awareness of the guidelines and providing incentives for corporate compliance and learning.

5.5 Multi-Stakeholder or Industry Initiatives and Financiers

For multi-stakeholder or industry initiatives aiming to advance human rights standards in the practices of their corporate members, a grievance mechanism provides an important check on performance. The same is true for financial institutions seeking to ensure compliance with human rights standards in the conduct of the projects they support. In the absence of an effective grievance mechanism, the credibility of such initiatives and institutions may be questioned. The Voluntary Principles on Security and Human Rights⁵¹ recently faced this challenge, and I know of calls for other initiatives, including the Equator Principles,⁵² to develop a grievance process. Furthermore, while many of these mechanisms require their corporate members or clients to have their own grievance processes as a first port of call, few set clear process standards for them. This risks encouraging tokenistic rather than effective processes at the operational level.

As the number of initiatives aimed at promoting standards increases, collaborative models for their grievance mechanisms will likely become more important. These could facilitate access for complainants by providing a single avenue for recourse to multiple organizations; marshal the collective leverage of organizations and their members to achieve solutions; and reduce the resource implications for the individual entities involved. The organizations concerned must remain responsible for ensuring that any such mechanism meets the minimum principles described above.

5.6 Gaps in Access

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.

Yet, this is not solely about a lack of information. It also reflects intended and unintended limitations in the competence and coverage of existing mechanisms. Consequently, some actors have

51 [online]. Available from: http://www.fco.gov.uk/resources/en/pdf/pdf7/fco_voluntaryprinciples.

52 [online]. Available from: <http://www.equator-principles.com/>.

proposed the creation of a global ombudsman function that could receive and handle complaints. Such a mechanism would need to provide ready access without becoming a first port of call; offer effective processes without undermining the development of national mechanisms; provide timely responses while likely being located far from participants; and furnish appropriate solutions while dealing with different sectors, cultures and political contexts. It would need to show some early successes if faith in its capacity were not quickly to be undermined. To perform these tasks, any such function would need to be well resourced. Careful consideration should go into whether these criteria actually can and would be met before moving in this direction.

6. Conclusion

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.

In fact, progress has been made in the past decade, at least in some industries and by growing numbers of firms including public–private hybrids combining mandatory with voluntary measures, and industry and company self-regulation.⁵³ All have their strengths and shortcomings, but few would have been conceivable a mere decade ago. Likewise, there is an expanding web of potential corporate liability for international crimes, reflecting international standards but imposed through national courts. Governments have adopted a variety of measures, albeit gingerly to date, to promote a corporate culture respectful of human rights. Fragments of international institutional provisions exist with similar aims.

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. The UN 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 expectations and aspirations. The Human Rights Council 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.

⁵³ See ‘Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts’, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Document A/HRC/4/35, 19 February 2007.