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The Wild West of Company-Level Grievance Mechanisms: Drawing Normative Borders to Patrol the Privatization of Human Rights Remedies

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ABSTRACT

This Article is the first to present a normative framework that challenges the privatization of remedies established by corporations to resolve human rights violations which they contribute to or cause. The need to draw such normative borders responds to an unprecedented innovation of ordinary company complaint mechanisms to handle human rights grievances suffered by individuals and communities. This development traces back to the 2011 approval of the United Nations Guiding Principles on Business and Human Rights ("UNGPs") which call on companies to develop operational-level grievance mechanisms *("OGMs") to handle a range of claims which may include those involving serious harms. This Article shares empirical evidence from a six-year study that demonstrates a notable uptick in companies developing OGMs, especially as they come under increasing pressure from private and public sources to comply with the UNGPs. Surprisingly, these redress mechanisms operate with virtually no government regulation or oversight even though the right to an effective remedy and holding private actors like companies to account go to the core of protecting fundamental rights. Remarkably, there has been minimal challenge or discussion about this concerning situation, most likely due to some ambiguities in the UNGPs and the lack of guidance from the U.N. bodies in charge of their implementation regarding any normative limits on the use of these private remedies. Indeed, an opinion issued by the Office of the High Commissioner for Human Rights in 2013 concerning a high profile OGM established by the Barrick Gold Corporation even suggests that company grievance mechanisms may operate beyond the normal boundaries of the law and require greater normative flexibility, drawing an analogy to administrative reparation programs employed in post-conflict settings. This Article challenges this analogy and the resulting conclusion through three normative arguments. First, administrative reparation programs in post-conflict settings are state-led initiatives that operate within clear normative boundaries and have been subject to review by international human rights bodies. Second, this external review occurs because governments can be held liable for failing to fulfill two positive duties: the obligation to protect human rights even when violated by private actors,*

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and the obligation to ensure the right to access an effective remedy if such protection fails. Finally, a state cannot delegate either of these positive obligations to a private entity like a company, at least not without some oversight. This Article argues that because the UNGPs also recognize these foundational principles, they should be interpreted to support more regulation of OGMs—a position supported by recent judgments issued by the Inter-American Court of Human Rights. This Article concludes by acknowledging the current reality in which OGMs may serve as the only remedy available to some communities in states with weak remedial systems, and proposes a new agenda to ensure that OGMs operate subject to oversight to ensure they are effective and thus serve the ultimate aim of victim redress and corporate accountability.

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Introduction

Once upon a time, companies operated ungoverned and without borders, Wild West style. They often escaped legal, political, and social accountability for operations that negatively impacted individuals and communities, even if those impacts amounted to serious human rights violations. This situation arose due in part to the lack of robust national as well as international legal frameworks to corral such unharnessed power.[1] However, more recently, thanks to an ever-growing Business and Human Rights ("BHR") grassroots movement that spans the globe, the needle now pushes towards setting clearer normative boundaries that rein in corporations to keep them from operating in any which way they want. A new zeitgeist now normalizes popular expectations that companies should not exist above the law, but rather should be "patrolled" to operate within "the borders" of the law.[2]

1. *Developments in the Law: International Criminal Law*, 114 Harv. L. Rev. 1943, 2030 (2001) ("Though corporations are capable of interfering with the enjoyment of a broad range of human rights, international law has failed both to articulate the human rights obligations of corporations and to provide mechanisms for regulating corporate conduct in the field of human rights.").

2. I borrow this metaphor from former Supreme Court Justice Stephen Breyer, who shared that the role of the Court is to be a "boundary patrol," ensuring that society operates within the borders of the Constitution. Stephen Breyer, *Making Our Democracy Work: The Yale Lectures,* 120 Yale L.J. 1999, 2000 (2011). By analogy, in this Article I am presenting the enforcers of human rights law as a check on companies to ensure they also act within the boundaries of the law to balance the interests of society against company profits.

The pursuit of reining in corporate power is certainly not new. The field of BHR has roots in the Corporate Social Responsibility ("CSR") movement of the 1970s, a philanthropic approach that has prompted many companies to respond to criticisms about their role in society.[3] Yet, the newest manifestation of corporate accountability differs in one critical way: it is no longer a purely voluntary, discretionary approach involving self-accountability. Rather, it now offers a harder limit to corporations that is grounded in an authoritative legal framework. Thus, companies feel new pressures to comply with human rights norms, especially when these norms are incorporated into domestic law with binding legal effect.[4]

This paradigm shift gained momentum in 2011 following the United Nations Human Rights Council's unanimous endorsement of the United Nations Guiding Principles on Business and Human Rights ("UNGPs"), which were developed by the late John Ruggie in his role as U.N. Special Representative.[5] Since their debut, the UNGPs have helped rally and solidify the BHR movement, due largely to Ruggie's consensus-building approach that included not just civil societies, but also governments and even companies. Although the UNGPs are soft law, their acceptance by a wide range of stakeholders lends them more weight.[6]

For instance, a growing number of governments have begun to incorporate the UNGPs into domestic law. One such example occurred in 2017, when France passed a law requiring companies to implement human rights due diligence processes that included civil remedies for aggrieved individuals and communities, thus leading the way for other European nations to initiate similar legislative projects.[7] In addition, there are growing political, social, and cultural forces demanding corporate accountability. For example,

3. May Miller-Dawkins et al., Corp. Accountability Rsch., Beyond Effectiveness Criteria: The Possibilities and Limits of Transnational Non-Judicial Redress Mechanisms 12 (2016), https://corporateaccountabilityresearch.net/njm-report-i-beyond-the-uns-effectiveness-criteria [https://perma.cc/9NE2-XX56].

4. *See* Pinar Kara, *The Role of Corporate Social Responsibility in Corporate Accountability of Multinationals: Is It Ever Enough Without 'Hard Law'?*, 15 Eur. Co. L.J. 118 (2018). Even when human rights due diligence requirements are voluntary, they can come to be seen as industry standards of care in tort law, creating a cause of action for private individuals to sue companies for human rights violations. *See* Madeleine Conway, *A New Duty of Care? Tort Liability from Voluntary Human Rights Due Diligence in Global Supply Chains*, 40 Queen's L.J. 741 (2015); Douglass Cassel, *Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence*, 1 Bus. & Hum. Rts. J. 179 (2016). See generally Lisa J. Laplante, *Human Torts*, 39 Cardozo L. Rev. 245 (2017) [hereinafter Laplante, *Human Torts*], for a broader discussion on how tort law may be used to vindicate human rights by companies.

5. U.N. High Comm'r for Hum. Rts., *Guiding Principles on Bus. & Hum. Rts.* at iv, U.N. Doc. HR/PUB/11/04 (2011) [hereinafter UNGPs].

6. *See* Rachel Chambers & Anil Yilmaz Vastardis, *Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in Ensuring Corporate Accountability*, 21 Chi. J. Int'l L. 323, 332 (2021); Olga Martin-Ortega, *Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last?*, 31 Neth. Q. Hum. Rts. 44, 57 (2013).

7. Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance de sociétés mères et des entreprises donneuses d'ordre [Law 2017-399 of March 27, 2017 Relating to the Duty of Vigilance of Parent Companies and Subsidiaries], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 28, 2017.

the 2020 United States national election brought corporate accountability to the forefront when presidential candidate and United States Senator Elizabeth Warren made the theme one of her campaign platforms.[8] Then-candidate Joe Biden went as far as to describe corporate America as "greedy as hell" to appeal to progressive voters and suggested that there might be better accountability under his administration.[9]

Along with the politicization of the issue, major media outlets, political blogs, and thought leaders have come to more frequently address the perceived unlimited power of corporations, calling into question what has been an astonishing tolerance of corporate self-regulation.[10] Similarly, there has been a growth of think tanks, academic centers, and NGOs dedicated to monitoring, campaigning against, suing, and generally calling out how corporations impact human rights.[11] With the backing of civil society and legal advocates, victims are even pushing for corporate accountability in the courts, especially in Europe.[12] Although modest, these emerging regula-

8. *See* Zachary Warmbrodt, *Warren Leads Democrats in Pushing for Crackdowns on Executives*, POLITICO (Apr. 3, 2019), https://www.politico.com/story/2019/04/03/warren-executives-incarceration-1319175 [https://perma.cc/BQD7-DN8V]; Kara Voght, *The Elizabeth Warren of This Recession Is. . .An Elizabeth Warren Staffer*, MOTHER JONES (Apr. 6, 2020), https://www.motherjones.com/politics/2020/04/bharat-ramamurti-elizabeth-warren-oversight-coronavirus-stimulus [https://perma.cc/K8UT-866G.

9. Catherine Boudreau & Nancy Vu, *Biden vs. Corporate America*, POLITICO (Aug. 11, 2020), https://www.politico.com/newsletters/the-long-game/2020/08/11/biden-versus-corporate-america-490033 [https://perma.cc/W728-37QR].

10. *See, e.g.*, National Public Radio, *On Point: More than Money: The Cost of Monopolies in America*, WBUR RADIO (Feb. 14, 2022–Jan. 2, 2023), https://www.wbur.org/radio/programs/onpoint/tag/monopolies-in-america [https://perma.cc/43C2-S6WU] (a podcast series exploring the power of monopolies in the U.S. and the evolution of antitrust law and whether it is poised for change); *Doug MacMillan Joins The Post as a Corporate Accountability Reporter*, WASH. POST (Jan. 18, 2019), https://www.washingtonpost.com/pr/2019/01/18/doug-macmillan-joins-post-corporate-accountability-reporter/ [https://perma.cc/YJ4A-DBPJ] (illustrating how top news outlets have dedicated journalists to cover the theme of corporate accountability); Kyle Bragg & Rev. Kirsten John Foy, *Corporate Accountability is Just as Important as Police Accountability*, THE HILL (June 19, 2020), https://thehill.com/opinion/civil-rights/503527-corporate-accountability-is-just-as-important-as-police-accountability/ [https://perma.cc/5HS5-LQLS] (calling attention to the need to hold business accountable for perpetuating systems of discrimination); Amol Mehra, *Globalization, Corporate Accountability, and Human Rights*, HUFFPOST (Dec. 12, 2016), https://www.huffpost.com/entry/globalization-corporate-accountability-and-human_b_5841cac9e4b0cf3f6455896d [https://perma.cc/942E-5CXX] (offering a human rights law framework for understanding the relevance of corporate accountability for addressing the roots of social and economic inequality); Megha Bahree, *Corporate Accountability Is Missing One Big Thing: Accountability*, HUFFPOST (Jan. 14, 2021), https://www.huffpost.com/entry/corporate-accountability-climate-pledges_n_5ffec2e0c5b63642b7007c27 [https://perma.cc/N3SK-VNQS] (interviewing Michael O'Leary on his book ACCOUNTABLE: THE RISE OF CITIZENS CAPITALISM on moving companies to fulfill their promises to respect human rights); Andrew Ross Sorkin, *How Shareholder Democracy Failed the People*, N.Y. TIMES (Aug. 20, 2019), https://www.nytimes.com/2019/08/20/business/dealbook/business-roundtable-corporate-responsibility.html?searchResultPosition=1 [https://perma.cc/JG2P-56TY] (exemplifying the attention paid by thought leaders on the subject).

11. *See, e.g.*, *Our Work*, INT'L CORP. ACCOUNTABILITY ROUNDTABLE, https://icar.ngo/our-work-overview/ [https://perma.cc/E8R4-DHBA] (last visited Mar. 24, 2023) (consisting of 41 members and formed in 2011 soon after the approval of the UNGPs); *About Us*, CORP. ACCOUNTABILITY LAB, https://corpaccountabilitylab.org/our-mission [https://perma.cc/M497-CLUY] (last visited Feb. 28, 2022) (providing an example of a more recent initiative).

12. *See generally* Rachel Chambers & Gerlinde Berger-Walliser, *The Future of International Corporate Human Rights Litigation: A Transatlantic Comparison*, 58 AM. BUS. L.J. 579 (2021).

tions, political commitments, public proclamations, and legal victories provide evidence of a slow but steady paradigm shift that drifts closer to meeting rising public expectations for the reining in of corporate power by pressuring business leaders to comply with these norms.[13]

Against this background, it is thus surprising that the UNGPs seem to leave intact an area of voluntary corporate discretion that goes to the heart of corporate accountability: allowing companies to provide private remedies to redress grievances for negative human rights impacts, including those that cause the most serious physical and mental harm, without clear governmental oversight. Indeed, a unique aspect to the UNGPs is a strong emphasis on operational-level grievance mechanisms—a term of art that is popularly understood as private company-level grievance processes.[14] In the BHR field, OGMs are generally understood to fall within the broader category of non-state-based, non-judicial grievance mechanisms ("NSGMs").[15] The focus on OGMs traces back to Special Representative Ruggie, who viewed them as an important response to a 'remedy gap' in which victims encountered serious challenges when trying to access state remedies such as courts.[16] Since the approval of the UNGPs, there has been a notable uptick in the number of companies creating OGMs to handle human rights issues.[17] The OGM Research Project, directed by the Author, has tracked this development through empirical data.[18]

Although a close reading of the UNGPs suggests that these mechanisms may receive a wide range of complaints that do not necessarily rise to the level of human rights issues, the Guiding Principles also do not foreclose the

13. *See* Paul Kielstra, Economist Intelligence Unit, The Road from Principles to Practice: Today's Challenges for Business in Respecting Human Rights 4 (2015), https://www.universal-rights.org/urg-policy-reports/the-road-from-principles-to-practice-todays-challenges-for-business-in-respecting-human-rights/ [https://perma.cc/4S3J-Z8HH].

14. UNGPs, *supra* note 5, princ. 29 cmt., at 31–32. The term "OGM" was intended to encompass more than just company-level grievance mechanisms; however, over the last decade it has come to be understood as such. E-mail from Caroline Rees, President & Co-Founder, Shift, to Lisa J. Laplante, Professor of L., New England L. Bos. (Feb. 11, 2022, 15:24 EST) (on file with author).

15. Mark Wielga & James Harrison, *Assessing the Effectiveness of Non-State-Based Grievance Mechanisms in Providing Access to Remedy for Rightsholders: A Case Study of the Roundtable on Sustainable Palm Oil,* 6 Bus. & Hum. Rts. J. 67, 68 (2021).

16. John Ruggie (Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Addendum: Piloting Principles for Effective Company/Stakeholder Grievance Mechanisms: A Report of Lessons Learned*, ¶ 1, U.N. Doc. A/HRC/17/31/Add.1 (May 24, 2011) ("Effective judicial systems must be at the core of any such system of remedy, yet they are not always available, accessible, appropriate, or the desired avenue of those impacted. Non-judicial grievance mechanisms therefore provide an important complement and supplement for such situations.").

17. Olivia Belanger & Brianna Tsui, Ctr. for Int'l L. & Pol'y, Periodic Project Report: 2021 Trends and General Practices of Company Operational-Level Grievance Mechanisms 20 (2022), https://www.nesl.edu/docs/default-source/default-document-library/2021-ogm-trend-analysis-june-2022.pdf?sfvrsn=A49a7ca0._2 [https://perma.cc/EC36-7XS7].

18. *See generally id.* (synthesizing general trends based on thirty-five questions aimed at a general survey of the nature and operation of company-level grievance mechanisms available for human rights issues).

possibility of human rights claims being filed.[19] Yet, remarkably, despite the potential for a purely private remedy to handle a range of human rights claims, the UNGPs do not appear to provide any bright-line rules regarding how and if OGMs should be used to remedy certain types of claims, such as the most serious rights harms against physical and mental integrity. Nor do they offer clear directions on how states must regulate and oversee OGMs that handle human rights issues. Hence, the current paradigm sees private companies enjoying full discretion in determining the designs, operations, and outcomes of these company-level remedies, often below the radar and with little transparency, Wild West style. Thus, paradoxically, in the push to bridge the remedy gap, the UNGPs may have potentially fostered a situation that undermines the goal of corporate accountability for human rights harms, evoking an earlier era where companies escaped being held responsible for serious human rights abuses.

Despite this alarming situation, there is minimal study or discussion of how to correct course and ensure proper oversight of OGMs, leaving the full scope of their impact unknown. On the contrary, most discussions of OGMs focus on their perceived importance for ensuring victims' access to remedies.[20] Only a handful of studies based on anecdotal negative experiences have begun to raise concerns about these purely private remedies, but they tend to focus on how companies can better comply with the effectiveness criteria laid out in Principle 31 of the UNGPs and leave unclear how this compliance will be ensured.[21] No one has offered an interpretation of the UNGPs that suggests states must assume this oversight role or any discussion of the normative limitations to the scope and operation of OGMs when handling human rights claims. As a result, there is no clear government regulation making sure that OGMs handling human rights claims are effective, transparent and fair.

This situation may arise, in part, out of the limited guidance from the United Nations bodies charged with overseeing the implementation of the UNGPs. Indeed, one of the first and only authoritative opinions on OGMs issued in 2013 by the Office of the High Commissioner for Human Rights ("OHCHR") appears to give OGMs wide license to operate in a normative 'no-man's land.'[22] The OHCHR opinion takes a policy approach when referring to reparation programs established by governments in post-conflict set-

19. *See infra* Part I.B.2 (discussing results from the OGM Research Project).

20. *Id.*

21. *Id.*

22. *See* U.N. High Comm'r for Hum. Rts., Re: Allegations Regarding the Porgera Joint Venture Remedy Framework (July 2013), https://www.ohchr.org/sites/default/files/Documents/Issues/Business/LetterPorgera.pdf [https://perma.cc/3XQU-BHWV] [hereinafter Re: Allegations] (weighing in on the controversial OGM established by the Barrick Gold Corporation and the Porgera Joint Venture to handle sexual violence).

tings to suggest that "context" may require a more flexible normative framework for settlements achieved through OGMs.[23]

This Article challenges the apparent view that OGMs may operate without clear normative boundaries and argues that, on the contrary, human rights law supports the proposal for more robust state regulation and oversight of these private remedies. To reach that conclusion, this Article will first demonstrate how the analogy to post-conflict settings does not necessarily mean more leniency in the operation of OGMs. Drawing from recent cases from the Inter-American Court of Human Rights ("IACtHR"), this Article will show that post-conflict reparation programs are in fact subject to careful review to ensure they align with effectiveness criteria, thus debunking the idea that they operate within an exceptional, extraordinary legal vacuum.

This Article further demonstrates how the IACtHR's review of administrative reparation programs arises out of positive duties to protect the right to remedy as grounded in human rights law. Significantly, it will be shown that the IACtHR applies these same positive duties to cases related to companies resulting in recent jurisprudence incorporating the UNGPs. Essentially, this normative framework calls on states to comply with the positive duty to protect fundamental rights, and if they fail to do so, to provide access to an effective remedy. Ultimately, these normative boundaries serve to caution states from delegating—or privatizing—fundamental rights, including the right to an effective remedy, at least not without proper oversight. This Article revisits the original intent of the UNGPs to suggest that they align with this international framework since they were never intended to handle the most serious human rights claims. Moreover, the Author will offer an interpretation of how the UNGPs even require government oversight of OGMs that handle human rights claims. However, in accepting the reality that OGMs may continue to be necessary to fill a remedy gap in countries where state remedies may be weak or inaccessible, this Article concludes by proposing an agenda for establishing clearer guidelines on how to best ensure the accountability of private grievance mechanisms.

This Article begins by tracing the origin of OGMs to demonstrate how the UNGPs transformed ordinary company complaint mechanisms into avenues for private redress for human rights harms. Additionally, original empirical research is presented to demonstrate the significant growing practice of companies implementing OGMs to handle human rights claims following the approval of the UNGPs, while also pointing to some concerning trends related to that practice. Part II provides an inventory of the different private and public sources that pressure companies to establish OGMs to handle human rights issues. Part III explores some of the concerns related to these private redress mechanisms while observing that there has been mini-

23. *Id.* at 13.

mal exploration of the potential normative basis for limiting their scope of operation. Part IV challenges the conclusion reached by the OHCHR, which suggested that OGMs may operate outside of clear normative boundaries, by pointing out the flaws in the analogy to administrative reparation programs in post-conflict settings. Part V then outlines the normative boundaries arising out of human rights law which call for greater state regulation and oversight of OGMs, given that states cannot abdicate their positive duties to protect human rights and guarantee private remedies. This exploration draws from recent jurisprudence from the IACtHR related to cases concerning businesses that explicitly invoke the UNGPs. This Article then posits that the UNGPs never intended OGMs to become private human rights redress mechanisms, and in fact can be interpreted to call for state regulation and oversight. Finally, the conclusion proposes a new agenda for affirmatively ensuring accountability for these private accountability mechanisms, which may be necessary given the realities of some countries failing to provide adequate remedies.

I. Repairing Human Rights Wrongs Through Private Remedies

Companies hold immense power to significantly impact people every day and everywhere. As opinion columnist Michelle Goldberg wrote following the January 6, 2021 insurrection at the United States capitol, and the subsequent banning of Donald Trump from Twitter and Facebook: "I find myself both agreeing with how technology giants have used their power in this case, and disturbed by just how awesome their power is."[24] Paradoxically, this "awesome power" means that companies have the potential for doing as much harm as good.

Indeed, it is not uncommon to hear of company operations or products impacting individuals and communities in a manner that leaves behind social, economic, and environmental devastation.[25] No one industry can be singled out. For example, companies working in extraction, manufacturing, and technology face accusations of serious human rights violations that arise out of "flashpoint" issues such as pollution and environmental degradation,[26] displacement of indigenous communities,[27] poor working conditions

24. Michelle Goldberg, *The Scary Power of the Companies That Finally Shut Trump Up*, N.Y. Times (Jan. 11, 2021), https://www.nytimes.com/2021/01/11/opinion/twitter-facebook-trump-ban.html [https://perma.cc/8EHZ-PS8M].

25. *See* Steve Tombs & Dave Whyte, *Introduction: Corporations Beyond the Law? Regulation, Risk and Corporate Crime in a Globalised Era*, 5 Risk Mgmt Int'l J. 9, 11 (2003); Chris Albin-Lackey, Hum. Rts. Watch, Without Rules: A Failed Approach to Corporate Accountability (2013), https://respect.international/wp-content/uploads/2020/06/Without-Rules-A-Failed-Approach-to-Corporate-Accountability.pdf [https://perma.cc/SD25-J9YV].

26. *See, e.g.*, Paula Spieler, *The La Oroya Case: The Relationship Between Environmental Degradation and Human Rights Violations*, 18 Hum. Rts. Brief 19 (2010).

and unfair labor practices including child labor,[28] and involvement in armed conflicts leading to civilian casualties,[29] among others. For this reason, not long into his term as Special Representative, Ruggie recognized that "there are few if any internationally recognized rights business cannot impact—or be perceived to impact—in some manner."[30]

Ruggie, strapped with the mission to formulate a normative framework to rein in such awesome corporate power, went on to galvanize an ever-growing Business and Human Rights movement which gained further momentum after the adoption of the 2011 UNGPs.[31] Certainly, Ruggie has been credited for building consensus and obtaining buy-in from all stakeholders, including businesses, which has helped elevate the UNGPs as an authoritative normative framework that quickly became influential in many spheres of corporate accountability.[32] Hence, *The Economist* reported that the approval of the UNGPs was a "watershed event" in recognizing a corporate responsibility to respect human rights.[33]

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27. *See, e.g.*, Juliana Nnoko-Mewanu, Hum. Rts. Watch, "When We Lost the Forest, We Lost Everything": Oil Palm Plantations and Rights Violations in Indonesia (2019), https://www.hrw.org/sites/default/files/report_pdf/indonesia0919_web.pdf [https://perma.cc/95CH-LF33].

28. *See, e.g.*, Int'l Lab. Org., The Rana Plaza Accident and its Aftermath, https://www.ilo.org/global/topics/geip/WCMS_614394/lang—en/index.htm [https://perma.cc/EMR3-3HNQ] (last visited July 27, 2022) (describing the collapse of the Rana Plaza building due to unsafe conditions in Bangladesh that resulted in the deaths of at least 1,132 and injured more than 2,500 people working in garment manufacturing); Michele Fabiola Lawson, *The DRC Mining Industry: Child Labor and the Formalization of Small-Scale Mining*, Wilson Ctr., (Sept. 1, 2021), https://www.wilsoncenter.org/blog-post/drc-mining-industry-child-labor-and-formalization-small-scale-mining [https://perma.cc/Y7GE-CHK3] (highlighting that the cobalt industry in the Democratic Republic of Congo employs 40,000 children, "some as young as six years" to perform "informal small-scale mining in which laborers earn less than $2 per day while using their own tools, primarily their hands").

29. *See, e.g.*, *Kiobel v. Royal Dutch Petrol. Co.*, 569 U.S. 108 (2013) (detailing allegations made by Nigerian civilians that Dutch, English, and Nigerian corporations aided Nigerian military forces as they violently suppressed demonstrations against the environmental impacts of these corporations' activities).

30. John Ruggie (Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development: Protect, Respect and Remedy: a Framework for Business and Human Rights*, ¶ 52, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) [hereinafter, *Protect, Respect and Remedy Framework*]. Ruggie served his term from 2005 to 2011. *Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises*, U.N. High Comm'r for Hum. Rts., https://www.ohchr.org/en/special-procedures/wg-business/special-representative-secretary-general-human-rights-and-transnational-corporations-and-other [https://perma.cc/SWK3-BRUG] (last visited Apr. 5, 2023).

31. Press Release, Office of the Secretary-General, Secretary-General Appoints John Ruggie of United States Special Representative on Issue of Human Rights, Transnational Corporations, Other Business Enterprises, U.N. Press Release SG/A/934 (July 28, 2005).

32. *See* Brigitte Hamm, *The Struggle for Legitimacy in Business and Human Rights Regulation—a Consideration of the Processes Leading to the UN Guiding Principles and an International Treaty,* 23 Hum. Rts. Rev. 103, 113 (2022) (writing that "Ruggie's efforts towards consensus building can themselves be seen as an important source of legitimacy: All stakeholders, even civil society organizations in spite of some persisting reservations, supported the endeavor"); *see also* John Ruggie, Just Business: Multinational Corporations and Human Rights 121 (2013) [hereinafter Just Business] (describing how the International Finance Corporation, the private sector lending arm of the World Bank Group, incorporated the core concepts of the UNGPs in its development finance sustainability policy).

33. Kielstra, *supra* note 13, at 4.

The UNGPs are arranged in three pillars to represent multiple stakeholders and their roles in ensuring that businesses adhere to their responsibility to respect human rights and cooperate to remedy negative human rights impacts.[34] Pillar I recognizes the duty of states to protect human rights, including by ensuring that companies do not negatively impact human rights and holding them accountable if they do.[35] This duty is not aspirational; rather, it reflects pre-existing duties of governments under international human rights treaties.[36] Pillar II frames the obligation of companies to "respect" human rights as not only complying with state regulations, but also proactively arranging their operations to prevent, mitigate, and remedy risks that give rise to human rights harms.[37] Finally, Pillar III focuses on ensuring victims of human rights violations caused or contributed to by companies have access to a remedy.[38] The "Protect, Respect, and Remedy" framework (the shorthand reference to this arrangement) stands for the ultimate idea that corporations should be held accountable for how their operations, goods, and services negatively impact human rights. In this way, the UNGPs have helped challenge the traditional view that human rights laws only constrain states by providing a normative framework for regulating the activities of non-state actors not directly bound by treaties.[39]

Ultimately, the most direct means of ensuring corporate accountability is when people and communities harmed by companies are able to access redress mechanisms to bring claims, whether judicial or non-judicial.[40] Thus, while remedies play a critical role in affording victims much needed reparations and satisfaction, they also ensure that companies do not operate beyond the borders of the law.[41] Remedies are, in fact, the primary vehicle for ensuring the vindication of all other rights, and for this reason are stand-alone substantive rights that trigger a government's obligation to ensure access to

34. Noura Barakat, *The U.N. Guiding Principles: Beyond Soft Law*, 12 HASTINGS BUS. L.J. 591, 597–98 (2016) (describing Pillar I as the state's responsibilities, Pillar II as corporate responsibilities, and Pillar III as access to remedy).

35. UNGPS, *supra* note 5, princs. 1–10, at 3–12.

36. *Id.* princs. 12, at 13.

37. *Id.* princs. 11–24, at 13–26.

38. *Id.* princs. 25–31, at 27–35.

39. Laplante, *Human Torts*, *supra* note 4, at 257–58; *see also, e.g.*, Steven Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility,* 443 YALE L. REV. 111 (2001) (presenting a theory of corporate responsibility for human rights protection based on international law that would impose human rights obligations on corporations directly); Robert McCorquodale, *Overlegalizing Silences: Human Rights and Nonstate Actors*, 96 AM. SOC'Y INT'L L. PROC. 384, 385 (2002); ANDREW CLAPHAM, HUMAN RIGHTS AND NON-STATE ACTORS ix-x (2013).

40. Rep. of Working Grp. On the Issue of Hum. Rts. & Transnat'l Corps. and Other Bus. Enterprises, U.N. Doc. A/72/162, ¶ 80 (2017) ("[T]he concept of effective remedies is closely connected to the idea of corporate accountability.") [hereinafter Rep. of Working Grp.].

41. Margaret Walker, *Moral Vulnerability and the Task of Reparations*, *in* VULNERABILITY: NEW ESSAYS IN ETHICS AND FEMINIST PHILOSOPHY 110, 110 (Catriona Mackenzie et. al. eds., 2014) (arguing that "[w]hile the occasion of reparative justice is significant wrongs and wrongful harms and losses . . . the aim of reparative practices is not only or even primarily to redress those harms and losses, but to address the moral vulnerability of victims by affirming their status in accountability relations").

effective and adequate redress.[42] Hence, the right to an effective remedy is one of the most fundamental rights, given that it serves as the oil that makes the entire human rights machine operate effectively. Its omission leaves all other rights vulnerable while providing impunity for wrongdoers.

Yet, despite their utmost importance, accessible remedies tend to present the greatest challenge in the quest for corporate accountability. In his memoir, Ruggie recognized the great importance of ensuring "greater access by victims to effective remed[ies]"[43] but discovered only a "patchwork" of redress mechanisms, which were "incomplete and flawed" at best.[44] There is an abundance of evidence on the shortcomings of and obstacles to ensuring redress for victims of corporate human rights abuses.[45] The challenges to access may be due to economic barriers, such as not being able to afford a lawyer; physical barriers, such as living too far from dispute resolution centers, including courts; or even cultural barriers, such as not knowing that a right to redress exists.[46] Even in the United States where courts are more culturally accepted and relatively easier to access, only 10% of grievances are processed by courts.[47]

Given the importance and challenging nature of the issue, the topic of remedies drew notable attention from Ruggie and his team. While recognizing the importance of strengthening judicial avenues of redress, Ruggie envisioned a larger universe of "grievance mechanisms"[48] that included nonjudicial mechanisms (both governmental and private).[49] Within this "rem-

42. Jonathan Drimmer & Lisa Laplante, *The Third Pillar: Remedies, Reparations, and the Ruggie Principles*, *in* THE BUSINESS AND HUMAN RIGHTS LANDSCAPE: MOVING FORWARD, LOOKING BACK 347 (Jena Martin & Karen E. Bravo eds., 2015) (presenting the legal framework for the right to remedy); Erika George & Lisa Laplante, *Access to Remedy: Treaty Talks and the Terms of a New Accountability Accord*, *in* BUILDING A TREATY ON BUSINESS AND HUMAN RIGHTS: CONTEXT AND CONTOURS 377, (Surya Deva & David Bilchitz eds., 2017) (explaining how ensuring the right to remedy goes towards protecting all other rights); Lisa Laplante, *Just Repair*, 48 CORNELL INT'L L.J. 514, 523–25 (2015) [hereinafter Laplante, *Just Repair*].

43. Drimmer & Laplante, *supra* note 42, at 343.

44. *Protect, Respect and Remedy Framework*, *supra* note 30, at 22.

45. OXFORD PRO BONO PUBLICO, UNIV. OXFORD, OBSTACLES TO JUSTICE AND REDRESS FOR VICTIMS OF CORPORATE HUMAN ABUSE 349–59 (Nov. 3, 2008), https://media.business-humanrights.org/media/documents/files/reports-and-materials/Oxford-Pro-Bono-Publico-submission-to-Ruggie-3-Nov-08.pdf [https://perma.cc/8274-TMXX]; *see generally* GWYNNE SKINNER, RACHEL CHAMBERS, & SARAH MCGRATH, TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS: OVERCOMING BARRIERS TO JUDICIAL REMEDY (2020) (describing functional and institutional barriers that victims face in seeking remedies for human rights violations).

46. JENNIFER ZERK, U.N. HIGH COMM'R. FOR HUM. RTS., CORPORATE LIABILITY FOR GROSS HUMAN RIGHTS ABUSES: TOWARDS A FAIRER AND MORE EFFECTIVE SYSTEM OF DOMESTIC LAW REMEDIES 7 (July 2014), https://www.ohchr.org/sites/default/files/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf [https://perma.cc/FJ5E-NW2P].

47. EMMA WILSON & EMMA BLACKMORE, DISPUTE OR DIALOGUE? COMMUNITY PERSPECTIVES ON COMPANY-LED GRIEVANCE MECHANISMS 8 (2013) [hereinafter DISPUTE OR DIALOGUE].

48. E-mail from Caroline Rees to Lisa Laplante, *supra* note 14. The UNGPs explain: "The term grievance mechanism is used to indicate any routinized, State-based or non-State-based, judicial or nonjudicial process through which grievances concerning business-related human rights abuse can be raised and remedy can be sought." UNGPS, *supra* note 5, princ. 25 cmt., at 27.

49. Drimmer & Laplante, *supra* note 42, at 341–43.

edy eco-system," OGMs present non-state, non-judicial approaches to remedies, including those established by companies to respond to stakeholders impacted by their operations, goods, or services.[50] Ultimately, Ruggie set in motion a significant new focus on private grievance mechanisms previously overlooked in the quest for corporate accountability.

A. Conceptualizing Operational-Level Grievance Mechanisms

When Ruggie began to dig deeper into the subject of OGMs, he found that they were "[t]he most underdeveloped component of remedial systems in the business and human rights domain."[51] Ruggie's team began its own mapping of remedies with academic collaborators and observed that it was rare to find "[d]edicated processes or pathways for community complaints and grievances" unless they were required by law, such as through licensing or regulation.[52] Caroline Rees, Director of the Governance and Accountability Program at Harvard University's John F. Kennedy School of Government, worked with Ruggie as a lead advisor and hypothesized that companies may experience a "lingering aversion" to resorting to these mechanisms.[53] This aversion was based on a perceived lack of clear guidance that might set them up for failure, leaving potential pathways to conflict management "getting short shrift."[54] In understanding non-judicial remedies generally, including company-level mechanisms, she championed decentralized mechanisms, observing that they have "a potentially powerful role to play."[55] Importantly, she viewed OGMs as more than "a stop-gap while state regulation or judicial mechanisms develop and mature," but rather as an important stand-alone tool for ensuring compliance with human rights responsibilities.[56]

In 2008, Ruggie introduced the concept of OGMs in his first report to the U.N., recommending that companies provide "a means for those who believe they have been harmed to bring this to the attention of the company and seek remediation, without prejudice to legal channels available."[57] As a follow up, Ruggie's team responded to the paucity of guidance on the role of OGMs by initiating pilot studies to understand OGMs' untapped potential

50. E-mail from Caroline Rees to Lisa Laplante, *supra* note 14.

51. Just Business, *supra* note 32, at 104.

52. Dr. Deanna Kemp & Carol J. Bond, Ctr. for Soc. Resp. in Mining, Mining Industry Perspectives on Handling Community Grievances 17 (2009), https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/other_mining_industry_perspectives_on_handling_community_grievances.pdf [https://perma.cc/25YX-8R5W].

53. Caroline Rees, *Foreword* to Kemp & Bond, *supra* note 52, at iv.

54. *Id.*

55. Caroline Rees & David Vermijs, Harv. Kennedy Sch. Corp. Soc. Resp. Initiative, Mapping Grievance Mechanisms in the Business and Human Rights Arena 5 (2008), https://media.business-humanrights.org/media/documents/files/reports-and-materials/Rees-Vermijs-Mapping-grievance-mechanisms-Jan-2008.pdf [https://perma.cc/ZH4R-ZMJW].

56. *Id.*

57. *Protect, Respect and Remedy Framework*, *supra* note 30, at 22.

and what role, if any, they could play in providing remedies to victims. They worked closely with companies to generate greater guidance on how OGMs might better provide remedies for individuals and communities impacted by company operations.[58] This collaboration led to some of the first guidelines and reports that brought attention to these hitherto rarely discussed private redress mechanisms.[59] Certain industry sectors, like mining, were especially quick to engage with Ruggie[60] and eventually issued their own guidance manuals on implementing operational-level grievance mechanisms.[61] This early focus on the topic of OGMs helped to make private remedies an "issue du jour."[62]

This work ultimately led to the UNGPs including a prominent focus on non-state, non-judicial remedies, including OGMs. Specifically, UNGP Principle 29 calls on the private sector to "establish or participate in effec-

58. For example, his team elaborated principles through multi-stakeholder consultations conducted by the Corporate Responsibility Initiative in 2007, eventually setting them out in a guidance tool. CAROLINE REES, HARV. KENNEDY SCH. CORP. SOC. RESP. INITIATIVE, CORPORATIONS AND HUMAN RIGHTS: ACCOUNTABILITY MECHANISMS FOR RESOLVING COMPLAINTS AND DISPUTES 24–25 (2007) https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/report_15_accountabilitymechanisms.pdf [https://perma.cc/XQ25-JBT9]. In March 2009, the International Organisation of Employers, International Chamber of Commerce, and Business and Industry Advisory Committee to the OECD began to collaborate on this project, and four companies volunteered to take part in a pilot OGM project. These companies were: (1) Carbones del Cerrejón Ltd. in Colombia, a coal mining joint venture of Anglo American, BHP Billiton, and Xstrata Coal; (2) Esquel Group in Hong Kong, piloting a mechanism at its apparel facility in Viet Nam; (3) Sakhalin Energy Investment Corporation in the Russian Federation, an oil and gas joint venture of Gazprom, Royal Dutch Shell, Mitsui & Co. Ltd., and Mitsubishi Corporation; (4) Tesco Stores Ltd., a major United Kingdom supermarket working with a group of its fruit suppliers in South Africa. CAROLINE REES, HARV. KENNEDY SCH. CORP. SOC. RESP. INITIATIVE, PILOTING PRINCIPLES FOR EFFECTIVE COMPANY-STAKEHOLDER GRIEVANCE MECHANISMS: A REPORT OF LESSONS LEARNED 8 (2011), https://shiftproject.org/resource/piloting-principles-for-effective-company-stakeholders-grievance-mechanisms-a-report-of-lessons-learned/ [https://perma.cc/5QJQ-BHHZ] [hereinafter REES, PILOTING PRINCIPLES].

59. *See, e.g.,* Caroline Rees, *Grievance Mechanisms for Business and Human Rights: Strengths, Weaknesses and Gaps* 31 (Harv. Kennedy Sch. Corp. Soc. Resp. Initiative, Working Paper No. 40, 2008), https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/workingpaper_40_Strengths_Weaknesses_Gaps.pdf [https://perma.cc/22TT-FQRB]; HARV. KENNEDY SCH. CORP. SOC. RESP. INITIATIVE, RIGHTS-COMPATIBLE GRIEVANCE MECHANISMS: A GUIDANCE TOOL FOR COMPANIES AND THEIR STAKEHOLDERS 15–40 (2008), https://www.globalcompact.de/migrated_files/wAssets/docs/Menschenrechte/Ocai/workingpaper_41_rights-compatible_grievance_mechanisms_may2008fnl.pdf [https://perma.cc/S7VL-4KRV]; CAROLINE REES, HARV. KENNEDY SCH. CORP. SOC. RESP. INITIATIVE, ACCESS TO REMEDIES FOR CORPORATE HUMAN RIGHTS IMPACTS: IMPROVING NON-JUDICIAL MECHANISMS 7–13 (2008), https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/report_32_consultation_report_november_08.pdf [https://perma.cc/XB3K-B4TZ]. *See also* REES & VERMIJS, *supra* note 55, at 7–22.

60. For example, the International Council on Mining and Minerals, which represents these industries, made several submissions to the Special Representatives strongly endorsing corporate level grievance mechanisms. KEMP & GOTZMANN, *infra* note 193, at 11–12. To learn more about the unique situation of mines, see Lisa J. Laplante & Suzanne Spears, *Out of the Conflict Zone: The Business and Development Case for Community Consent Processes in the Extractive Sector*, 11 YALE HUM. RTS. & DEV. L.J. 69 (2008).

61. One of the first collaborations included the Centre for Social Responsibility in Mining at the Sustainable Minerals Institute at The University of Queensland. *See* KEMP & BOND, *supra* note 52, at iv–v.

62. *Id.* at 10.

tive *operational-level grievance mechanisms* for individuals and communities who may be adversely impacted."[63] Upon the Human Rights Council's approval of the UNGPs, "OGM" became a more regularly referenced term, although it was rarely found in practice or literature before Ruggie's focus on these mechanisms.[64] As explained by Rees, the term "OGM" was adopted to capture a broad array of approaches that sought to ensure decentralized access to remedies, especially at the level of operation where grievances arise.[65] Today, the term is used to refer generally to grievance mechanisms set up by companies,[66] sometimes in collaboration with other stakeholders.[67]

Significantly, although the UNGPs do not propose that OGMs are intended to resolve human rights claims per se, they also do not necessarily foreclose such a possibility.[68] Certainly, the UNGPs recognize that "grievance[s]" can be understood as even a "perceived injustice evoking an individual's or a group's sense of entitlement, which may be based on law, contract, explicit or implicit promises, customary practice, or general notions of fairness of aggrieved communities."[69] At the same time, the UNGPs include language that could suggest to companies and other practice influencers that OGMs are also appropriate avenues for resolving complaints of human rights abuses. Specifically, the commentary to Principle 29 explains that a key function of OGMs is to identify "adverse human rights impacts as a part of an enterprise's ongoing human rights due diligence" and provide "a channel for those directly impacted by the enterprise's operations to raise concerns when they believe they are being or will be adversely impacted."[70] The commentary to Principle 22 then names OGMs as "one effective means of enabling remediation when they meet certain core criteria, as set out in Principle 31."[71] Given that the UNGPs direct companies to provide for or cooperate in remediation,[72] it follows that they may view all remedies, including procedural remedies such as OGMs, as valid for meeting

63. UNGPs, *supra* note 5, princ. 29, at 31 (emphasis added).

64. Benjamin Grama, *Company-Administered Grievance Processes For External Stakeholders: A Means For Effective Remedy, Community Relations, or Private Power?*, 39 Wisc. Int'l L.J. 71 (2022).

65. E-mail from Caroline Rees to Lisa Laplante, *supra* note 14.

66. For example, even United Nations bodies engaged in the promotion of the UNGPs have approached OGMs as pertaining to company grievance mechanisms. For an early such example, see Rep. of Working Grp., *supra* note 40, ¶ 9. The commentary to the UNGPs explains that "[o]ne category of non-State-based grievance mechanisms encompasses those administered by a business enterprise alone or with stakeholders, by an industry association or a multi-stakeholder group." UNGPS, *supra* note 5, princ. 28 cmt., at 31.

67. UNGPS, *supra* note 5, princ. 28 cmt., at 31.

68. *Id.* princ. 29 cmt., at 32 (indicating that OGMs "need not require that a complaint or grievance amount to an alleged human rights abuse before it can be raised").

69. *Id.* princ. 25 cmt., at 27.

70. *Id.* princ. 29 cmt., at 32.

71. *Id.* princ. 22 cmt., at 24.

72. Principle 22 directs that "[w]here business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes." *Id.* princ. 22, at 24.

that expectation.[73] Ultimately, when read together, these principles support the interpretation that the UNGPs encourage companies to use OGMs to resolve adverse human rights impacts.

As will be discussed next, current practice suggests that companies indeed received the green light to adapt purely private company grievance mechanisms to respond to human rights issues as part of a general responsibility to comply with the new normative framework established by the UNGPs. In doing so, the OGM model in its current incarnation represents a novel expansion of traditional approaches to company grievance mechanisms, which were historically not typically envisioned as channels for "human rights" claims.

B. Innovating the Ordinary: The Extraordinary Role of Operational-Level Grievance Mechanisms in Remedying Human Rights Harms

Long before the UNGPs came into existence, OGMs traditionally served as a way for companies to handle a myriad of complaints, often related to minor grievances brought by employees and customers.[74] Certainly, some of the complaints may have involved situations that could be termed human rights issues (such as labor rights issues, health and safety, privacy, etc.), but they were rarely framed as human rights grievance mechanisms or linked to an explicit human rights policy.

At the simplest level, these mechanisms may have consisted of hanging a box on the wall to solicit comments and complaints in order to help companies learn of operational problems.[75] For the most part, these types of internal grievance mechanisms drew minimal academic focus, discussion, or analysis, although business school textbooks recognized the need to prepare

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73. OGMs can be understood as a mechanism involving a process (and thus serving the function of being a procedural remedy) that leads to some substantive, remedial outcome (such as reparations). In practice, the term "remedy" is often used interchangeably to refer to both this procedural aspect and a substantive aspect. For more discussion, see George & Laplante, *supra* note 42, at 394–97.

74. Int'l Fin. Corp., Good Practice Note: Addressing Grievances from Project-Affected Communities 4 (Motoko Aizawa et al. eds., 2009), https://www.ifc.org/wps/wcm/connect/f9019c05-0651-4ff5-9496-c46b66dbeedb/IFC%2BGrievance%2BMechanisms.pdf ?MOD=AJPERES&CACHEID=ROOTWORKSPACE-f9019c05-0651-4ff5-9496-c46b66dbeedb-jkD0-.g [https://perma.cc/QG6G-R6L5] [hereinafter IFC, Addressing Grievances] (describing operational-level grievance mechanisms as "a process for receiving, evaluating, and addressing project-related grievances from affected communities at the level of the company, or project"); Christina Hill, Oxfam Austl., Community–Company Grievance Resolution: A Guide for the Australian Mining Industry 7 (Sarah Marlowe ed., 2010), https://www.oxfam.org.au/wp-content/uploads/2011/11/OAus-GrievanceMechanisms-0410.pdf [https://perma.cc/RMA5-GCKN] (describing company-level grievance mechanisms as "a company-supported, locally based and formalised method, pathway or process to prevent and resolve community concerns with, or grievances about, the performance or behavior of a company, its contractors or employees"); Int'l Council Mining & Metals, Human Rights in the Mining & Metals Industry: Handling and Resolving Local Level Concerns and Grievances 4 (2009), https://www.icmm.com/website/publications/pdfs/social-performance/2009/guidance_local-level-concerns-grievances.pdf [https://perma.cc/5YCM-NBHG] (defining "complaints mechanism[s]" as a "set of processes that a company may have in place to deal with local-level concerns and grievances").

75. Grama, *supra* note 64, at 73.

managers for resolving disputes brought by employees.[76] Companies rarely, if ever, explicitly presented these processes as means for resolving human rights disputes, especially those presented by external stakeholders such as surrounding communities.[77] In 2013, the U.N. Working Group on Business and Human Rights convened an "expert workshop" to discuss grievance mechanisms. At that meeting, a "general impression" among participants was that OGMs were still "not yet part of the mainstream" and that "[b]uy-in for establishing operational-level grievance mechanisms [was] still often lacking."[78]

This trend started changing thanks to Ruggie's exploration and recognition of company-level grievance mechanisms.[79] Today, a little more than a decade after the approval of the UNGPs, one sees a significant uptick in companies establishing or adapting existing grievance mechanisms to resolve human rights claims, often as part of their general effort to comply with new pressures to take responsibility for negative human rights impacts that their business operations, services or goods might cause for individuals and communities, as directed by the UNGPs.[80]

The next section shares an overview of early efforts to track the development of OGMs, which suggests that the UNGPs inspired a new movement of company-led redress efforts and thus eventually normalized the practice of establishing OGMs to resolve human rights issues. Data from the Operational-level Grievance Mechanism Research Project, founded and overseen by the Author, further confirms this trend, while also offering a deeper look at some concerning trends related to this new company practice.

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76. Grama presents a timeline of publications on company-level grievance mechanisms, noting that the first one appeared in 2009, coinciding with Ruggie's focus on these mechanisms. *Id.* at 74. For an example of a textbook, see AVID B. LIPSKY, RONALD L. SEEBER & RICHARD D. FINCHER, EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT: LESSONS FROM AMERICAN CORPORATIONS FOR MANAGERS AND DISPUTE RESOLUTION PROFESSIONALS (2003).

77. Grama, *supra* note 64, at 74; *see also* Katharina Häusler, Karin Lukas & Julia Planitzer, *Non-Judicial Remedies: Company-based Grievance Mechanisms and International Arbitration*, *in* HUMAN RIGHTS IN BUSINESS: REMOVAL OF BARRIERS TO ACCESS TO JUSTICE IN THE EUROPEAN UNION 78, 81–82 (Juan José Álvarez Rubio & Katerina Yiannibas eds., 2017) (noting that companies only started to develop these mechanisms in the last decade in the course of trying to implement the U.N. Guiding Principles on Business and Human Rights).

78. Hum. Rts. Council, *Report from an Expert Workshop Entitled "Business Impacts and Non-Judicial Access to Remedy: Emerging Global Experience"*, ¶ 17, U.N. Doc A/HRC/26/25/Add.3 (Apr. 28, 2014). The Human Rights Council established "a Working Group on the issue of human rights and transnational corporations and other business enterprises" to "continue to explore options and make recommendations at the national, regional and international levels for enhancing access to effective remedies available to those whose human rights are affected by corporate activities, including those in conflict areas." Hum. Rts. Council Res. 17/4, U.N. Doc. A/HRC/RES/17/4, at 2–3 (June 16, 2011).

79. See *supra* note 51–62 and accompanying text.

80. Principle 15(c) calls for "processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute." UNGPS, *supra* note 5, princ. 15(c), at 16. Principle 22 indicates: "Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes." *Id.* princ. 22, at 24.

1. *Early Mapping of OGMs: Tracking a Trend*

As discussed above, certain industries responded relatively quickly to the idea planted by Ruggie that companies could, and perhaps should, establish localized remedies to resolve human rights issues.[81] However, it was not until after the UNGPs were approved in 2011 that one sees external efforts to systematically track the existence of these private grievance mechanisms. For example, in 2013, CSR Europe, a prominent European business network for corporate sustainability and responsibility, reported that 87% of its approximately 10,000 members indicated having a mechanism for workforce complaints, and 40% reported that they were "starting" to address "complaints from communities in a systematic way."[82] That same year, the International Institute for Environment and Development conducted desktop research of the extractive industries and found "a growing number of grievance mechanisms" within the twenty companies studied.[83] The authors speculated that given the growth trend, the real number was likely greater.[84]

In 2017, Katharina Häusler and her colleagues examined European companies, finding that while there was a trend towards establishing grievance procedures, many of these mechanisms were not fully developed.[85] That same year, NYU's Stern School of Business conducted a study of 369 companies listed by the Business & Human Rights Resource Center. Out of these companies, all of which had made public commitments to human rights, 272 had some type of grievance mechanism while only thirty publicly disclosed information about grievances filed.[86] The researchers estimated that fewer than 0.5% of an estimated 80,000 active multinationals had made public commitments to human rights, though often without substantial incorporation into their business operations.[87] The same study found that a quarter of the studied companies had no grievance process in place to handle human rights complaints, and over half offered what the researchers considered "ineffective" remedies.[88]

In 2019, the Corporate Human Rights Benchmark ("CHRB") began to track grievance mechanisms, which represented an expansion of its more

81. *See supra* Section I.A.; Rees, Piloting Principles, *supra* note 58, at 7–8.

82. CSR Europe, Assessing the Effectiveness of Company Grievance Mechanisms: CSR Europe's Management of Complaints Assessment (MOC-A) Results 4 (2013), https://static1.squarespace.com/static/5df776f6866c14507f2df68a/t/5e666810b7c6ef5fcd9bf296/1583769622168/MOC-A+Report.pdf [https://perma.cc/95FS-WQNW].

83. David Vermijs, *Overview of Company-Community Grievance Mechanisms*, *in* Dispute or Dialogue, *supra* note 47, at 22.

84. *Id.* at 14–16.

85. Häusler et al., *supra* note 77, at 113–14.

86. NYU Stern Ctr. for Bus. & Hum. Rts., Research Brief: No Rights Without Remedies—An Assessment of Corporate Remedy Channels 2 (2017), https://issuu.com/nyusternncenterforbusinessandhumanri/docs/3-nyu-research-brief-oct17_60a5a7e903962d [https://perma.cc/6H8K-TCFL].

87. *Id.* at 1.

88. *Id.*

general focus on human rights compliance when founded in 2018.[89] CHRB's 2020 report assessed the agricultural products, apparel, automotive manufacturing, extractives, and information and communication technology manufacturing industries against thirteen indicators, of which three pertained to grievance mechanisms that received complaints from workers and communities.[90] They designed these indicia to evaluate how companies redressed the most serious adverse impacts.[91] Notably, CHRB found that of all its indicators, "public commitments to respect human rights" and "grievance channels for external individuals and communities" appeared to see the most improvement.[92] However, it concluded that its findings from 2019 held fast, showing "a clear gap between companies responding to serious allegations and actually engaging with affected stakeholders to provide effective remedy."[93] Only 4% of the 225 allegations reviewed revealed that companies provided a remedy that the victims felt was satisfactory.[94]

Most recently, in 2021, the Fashion Revolution's Fashion Transparency Index, which evaluates top fashion brands and retailers based on their public disclosures, noted a detectable increase in the number of companies requiring grievance mechanisms in their supply chains. Fashion Revolution thus tightened its own requirements to better evaluate companies' oversight of their supply chains.[95] In a 2017 report, they had indicated that twenty-nine out of 100 brands included references to grievance mechanisms in their supplier codes of conduct, including Gap Inc., M&S, Nestlé, Mars, and Sodexo.[96] By 2021, the Index had evaluated 250 of the world's biggest fashion brands and retailers, finding that 66% of the companies studied required suppliers to provide a process for remediating human rights harms.[97] Calling it "positive news," the Index celebrated a steady increase in major brands disclosing information about confidential grievance mechanisms available to

89. The World Benchmarking Alliance was launched in 2018 to assess 2,000 of the world's most influential companies, ranking and measuring them on their contributions to the Sustainable Development Goals. *See* World Benchmarking All., Corporate Human Rights Benchmark (2022), https://assets.worldbenchmarkingalliance.org/app/uploads/2022/11/2022-CHRB-Insights-Report_FINAL_23.11.22.pdf [https://perma.cc/5JY4-B8XC].

90. World Benchmarking All., Corporate Human Rights Benchmark: Across Sectors: Agricultural Products, Apparel, Automotive Manufacturing, Extractives & ICT Manufacturing 7 (2020), https://assets.worldbenchmarkingalliance.org/app/uploads/2020/11/WBA-2020-CHRB-Key-Findings-Report.pdf [https://perma.cc/LM76-KY37] [hereinafter CHRB Benchmark].

91. *Id.* at 26 n.91.

92. *Id.* at 9.

93. *Id.* at 36. (The benchmark considered 225 serious allegations of human rights abuse that met its internal "severity" threshold, finding that of 229 companies, 104 had at least one serious allegation connected to them.)

94. *Id.*

95. Fashion Revolution, Fashion Transparency Index: 2021 Edition 72 (2021), https://issuu.com/fashionrevolution/docs/fashiontransparencyindex_2021 [https://perma.cc/3928-WMS3] [hereinafter Fashion Transparency Index 2021].

96. Fashion Revolution, Fashion Transparency Index 18, 43–44 (2017), https://issuu.com/fashionrevolution/docs/fr_fashiontransparencyindex2017?e=25766662/47726047 [https://perma.cc/M45N-DE6V] [hereinafter Fashion Transparency Index 2017].

97. Fashion Transparency Index 2021, *supra* note 95, at 72.

their own employees (62% in 2021, up from 59% in 2020) as well as a significant increase in grievance mechanisms for workers in the supply chain (52% in 2021, up from 40% in 2020).[98] They also indicate that one out of four brands had started to disclose data about the number of reported violations or grievances filed by workers, increasing from sixteen percent the previous year.[99]

Read together, these tracking projects indicate momentum in companies establishing grievance mechanisms for a range of stakeholders, thus suggesting a correlation between the UNGPs' novel focus on these mechanisms and their normalization through company practices that contribute to an industry custom. However, many of these tracking efforts are based on small sample sizes and provide only a very superficial look at OGMs as one of many indicators, resulting in the need for further, and deeper study.

Part of the challenge of studying OGMs is the difficulty of ascertaining the true nature and operation of these mechanisms. Much of the information collected thus far relies on self-reporting. Furthermore, desktop research is complicated by the fact that company websites are often difficult to navigate and lack specificity, making it hard to discern whether grievance mechanisms are indeed intended for reporting human rights issues. Yet another obstacle is the lack of a uniform practice of situating such processes within a company's structure and organigram. For example, they may be housed within departments for community relations, external affairs, human resources, environmental management, general counsel, marketing and sales, quality management, risk management or compliance, labor relations, social responsibility, or even ethics.[100]

For instance, Adidas established an OGM within its Social and Environmental Affairs Department to oversee its supply chain, whereas Wilmar's international grievance mechanism for supply chain operations involves a full-time Grievance Coordinator within a dedicated Grievance Unit located in its Sustainability Department.[101] In contrast, the supply chain grievance system of PepsiCo is not located in a specific department, but instead con-

98. *Id.*

99. *Id.*

100. Off. of the Compliance Advisor/Ombudsman, A Guide to Designing and Implementing Grievance Mechanisms for Development Projects 21, 46 (2008), https://www.cao-ombudsman.org/sites/default/files/2021-06/implemgrieveng.pdf [https://perma.cc/2ANF-CF52]; Stefan Zagelmeyer et al., Non-State Based Non-Judicial Grievance Mechanisms (NSBGM): An Exploratory Analysis 9 (2018), https://www.ohchr.org/sites/default/files/Documents/Issues/Business/ARP/ManchesterStudy.pdf [https://perma.cc/UC63-S9LV].

101. *See Sustainability: Human Rights,* Adidas, https://www.adidas-group.com/en/sustainability/social-impacts/human-rights/ [https://perma.cc/ZS3J-HWVH] (last visited Aug. 21, 2022); *see also Grievance Procedure,* Wilmar, https://www.wilmar-international.com/sustainability/grievance-procedure [https://perma.cc/CCN3-CQ4Z] (last visited Aug. 21, 2022).

sists of a working group with representatives from the procurement, human rights, sustainable agriculture, and public policy teams.[102]

Some differences in structure depend on how the grievance mechanism may be linked to social performance standards, human rights policies, or even health, safety, security, and environment frameworks.[103] Furthermore, not all grievance mechanisms look alike. They may take the form of whistleblower or ethics hotlines, an employee ombudsman or human resources officer, an Open Door or Speak-Up channel, trade unions and industrial relations processes, consumer complaint mechanisms, or be linked to audit and due diligence processes or stakeholder engagement processes.[104] At the end of the day, despite the seeming explosion of company-level grievance mechanisms, they can be hard to track down and thus elude full study and evaluation.

2. *Operational-Level Grievance Mechanism Research Project Findings: To Be or Not to Be a Private Human Rights Grievance Mechanism*

Given the challenges that stand in the way of gaining systematic knowledge about these company innovations, the Author founded the Operational-Level Grievance Mechanism Research Project (the "OGM Research Project" or "Project") in 2016 to follow the development of company-level grievance mechanisms, specifically to study if and how companies use such mechanisms to resolve human rights related issues.[105] The project focuses primarily on companies that have adopted human rights policy statements, as required by Principle 16 of the UNGPs.

The research quickly found that locating grievance mechanisms created or adapted to handle human rights issues was difficult because few companies include "human rights" in the title of their internal grievance mechanisms. In fact, only two companies in the OGM Research Project database, NEC[106]

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102. Laura Curtze & Steve Gibbons, Ergon Assocs., Access to Remedy—Operational Grievance Mechanisms 32 (2017), https://www.ethicaltrade.org/sites/default/files/shared_resources/ergon_-_issues_paper_on_access_to_remedy_and_operational_grievance_mechanims_-_revised_draft.pdf [https://perma.cc/9953-EGNQ]; *see also Human Rights*, PepsiCo, https://www.pepsico.com/our-impact/esg-topics-a-z/human-rights [https://perma.cc/QRH8-WU3Q] (last visited Aug. 21, 2022).

103. Belanger & Tsui, *supra* note 17, at 7.

104. Shift, Remediation, Grievance Mechanisms and the Corporate Responsibility to Respect Human Rights 4 (2014), https://shiftproject.org/wp-content/uploads/2014/05/Shift_remediationUNGPs_2014.pdf [https://perma.cc/N6TY-52XK].

105. The OGM project uses desktop research to provide information regarding a company's ability and willingness to respond to human rights-based claims through private remedies. The project operates through the Center for International Law and Policy, which the Author directs. *See generally* Olivia Belanger & Lisa Laplante, Ctr. for Int'l L. & Pol'y, Trends and General Practices of Company Operational-Level Grievance Mechanisms 8 (2021), https://www.nesl.edu/docs/default-source/default-document-library/ogm-project-trend-analysis-spring-2021.pdf?sfvrsn=74967ca0_2 [https://perma.cc/228B-LXH9].

106. NEC, Sustainability Report 2021 (2021), https://www.nec.com/en/global/csr/pdf/2021_report.pdf [https://perma.cc/GM8K-KDZL].

and Posco,[107] include the term "human rights" in the titles of their OGM systems. Absent such explicit references in the titles, it is possible to discern a human rights focus through other indicators that suggest a company is willing to receive claims implicating human rights, such as cross references to other company guidelines and policies. Thus, the project developed a more comprehensive set of indicators to ensure more accurate tracking of whether a company's grievance mechanism can be viewed as a human rights grievance mechanism.[108]

Based on ongoing research, the Project has issued several trends reports to capture an overview of the world of private company-level grievance mechanisms and has confirmed the steady increase in the number of OGMs poised to handle human rights issues. As of December 2022, the OGM Research Project reviewed 559 companies across 24 industries, 88.2% representing multinational corporations.[109] The most common industries include manufacturing and distribution, banking and finance, mining, and gas, oil, and energy, most of which operate on a multinational scale.[110] Of these companies, 91% (559) had an identifiable grievance mechanism poised to handle human rights claims, as indicated in Table 1.[111]

107. Posco, Corporate Citizen Report 2020 (2021), https://www.posco.co.kr/docs/eng6/jsp/dn/irinfo/posco_report_2020.pdf [https://perma.cc/FPT9-PTZK].

108. The OGM Research Project identifies grievance mechanisms that may handle human rights claims using the following inquiries:

1) Does the grievance mechanism include the terms "human rights" in its title;
2) Does the grievance mechanism refer to the term "human rights" among the types of claims it accepts;
3) Does the grievance mechanism accept claims related to the company's human rights policy;
4) Does the grievance mechanism accept claims for categories of problems that raise human rights issues (such as health and safety issues, discrimination, freedom of association, and other recognized rights as found in human rights treaties);
5) Does the grievance mechanism accept claims that relate to its ethics code or code of conduct which in turn includes some type of reference to human rights;
6) Does the grievance mechanism present open-ended grievance mechanisms that accept any type of claim, suggesting a human rights claim could be brought to it.

109. Lisa Laplante, Brianna Tsui & Nicole Symonds, Ctr. for Int'l L. & Pol'y, 2022 Trends and General Practices of Company Operational-Level Grievance Mechanisms (forthcoming 2023).

110. Belanger & Tsui, *supra* note 17, at 6.

111. *Id.* at 8.

Table 1: Breakdown of Human Rights Company-Level Grievance Mechanisms as of December 2022

	Number of Companies	Percentage of Total Companies Researched with Grievance Mechanisms
Explicit reference to human rights claims	54	10%
Reference to human rights policy	49	9%
Allegations amounting to human rights claims	63	11%
Reference to ethics or code of conduct policy	274	49%
Open-ended grievances	70	12%
No information available	49	9%

Although the Project does not offer any qualitative assessments or evaluations of how these mechanisms work in practice, given that it relies solely on desktop sources found in the company's website and has not conducted fieldwork, it nevertheless developed a system for categorizing the various mechanisms according to common features. The categories are:

- **Most Advanced Grievance Mechanisms:** Companies that fit into this category are identified as having: (1) a publicized grievance mechanism, (2) a grievance mechanism publicly available for use by any stakeholder, (3) published procedural information on how to file a claim and how the mechanism reviews complaints, and (4) mediation, dialogue, facilitation, and/or capacity building as part of the complaint review process.
- **Well-Developed Grievance Mechanisms:** Companies in this category are identified as having: (1) a publicized grievance mechanism, (2) a grievance mechanism publicly available for use by any stakeholder and (3) published procedural information on how to file a claim and how the mechanism reviews complaints.
- **Baseline Grievance Mechanisms:** Companies belonging to this category are identified as having, at least, an ethics hotline, whether it is a third-party hotline or otherwise. Included are companies that have

mentioned their grievance mechanisms but have not published their details.[112]

- **No Identifiable Grievance Mechanism:** Companies in this category have an identifiable human rights policy but lack an identifiable operational-level grievance mechanism.

For the most part, the primary difference between "well-developed" mechanisms and the "most advanced" mechanisms is that the latter offers alternative dispute resolution mechanisms such as mediation, dialogue, facilitation and/or capacity building during the grievance process as required by Principle 31(h) of the UNGPs. Both of these categories offer publicly available information about their grievance mechanisms, including published procedures on how to submit a claim as well as information about outcomes, thus increasing transparency. As indicated in Table 2, only thirteen percent of such mechanisms fall into these two categories.

TABLE 2: BREAKDOWN OF CATEGORIES OF HUMAN RIGHTS GRIEVANCE MECHANISMS AS OF DECEMBER 2022

	Number of Companies	Percentage of Total Companies Researched with Grievance Mechanisms
Most Advanced Grievance Mechanism	7	1%
Well-Developed Grievance Mechanism	65	12%
Baseline Grievance Mechanism	434	78%
No Identifiable Grievance Mechanism	53	9%

Companies with the most advanced grievance mechanisms include Adidas,[113] Diageo,[114] Lydian International,[115] Marks & Spencer,[116] OMV,[117]

112. Project researches companies falling into this category to track any new developments when annual re-research is completed.

113. ADIDAS GRP., SUMMARY OF THIRD-PARTY COMPLAINT PROCESS, https://www.adidas-group.com/media/filer_public/49/b3/49b3e456-5a3d-4439-a3cb-c37fe4c9e2f0/summary_of_third_party_complaint_process_adidasgroup_march_2017.pdf [https://perma.cc/Z5DZ-YFK9] (last visited Feb. 28, 2022).

114. *Human Rights*, DIAGEO, https://www.diageo.com/en/esg/doing-business-the-right-way-from-grain-to-glass/human-rights [https://perma.cc/M4Z3-5LF7] (last visited Mar. 29, 2023).

115. LYDIAN INTERNATIONAL, SOCIAL POLICY https://www.lydianinternational.co.uk/images/pdf/policies/2018/Social_Policy.pdf [https://perma.cc/P95K-6MH8] (last visited June 16, 2021).

Reebok,[118] and Repsol.[119] Significantly, only three of these companies published any information regarding the types of reparations their processes may offer as well as examples of reparations resulting from previous grievance processes.[120] The research from this project confirms an undeniable trend towards mainstreaming these innovative approaches to private remedy; however, few operate with the transparency and effectiveness envisioned by the UNGPs.

II. Trending Private Remedies: Tracking Private and Public Pressures on Companies to Create OGMs

To understand the significant increase of company-level human rights grievance mechanisms, the OGM Research Project has also begun to identify the internal and external pressures that push companies towards establishing such remedies. Certainly, there are many "reputational drivers or market incentives" for companies to establish an OGM to handle human rights issues.[121] Companies may view OGMs as a means for managing social risks, avoiding organizational costs, or heading off drawn-out, expensive litigation in both home and host states, among other practical business considerations.[122] For example, companies operating in states with poor governance structures, including weak judiciaries, may seek to establish grievance mechanisms to respond to the lack of official channels for aggrieved individuals and communities to voice and resolve their complaints. This strategy may help avoid social unrest that can sometimes turn violent and even lead to outright opposition to projects.[123] Such opposition poses

116. *Human Rights & Our Supply Chain*, Marks & Spencer, https://corporate.marksandspencer.com/sustainability/human-rights-our-supply-chain [https://perma.cc/MJ4E-5BST] (last visited June 16, 2021).

117. *Our Dialogue-Based Approach to Handling Community Grievances*, OMV, https://www.omv.com/en/sustainability/our-approach/ethical-principles/community-grievance-mechanism-process [https://perma.cc/N7HU-AG9Y] (last visited Feb. 24, 2022).

118. *Id.*

119. *Grievance Mechanisms*, Repsol, https://www.repsol.com/en/sustainability/human-rights/operational-grievance-mechanisms/index.cshtml [https://perma.cc/HNU6-CA88] (last visited June 16, 2021).

120. Belanger & Tsui, *supra* note 17, at 18–19.

121. U.N. High Comm'r for Hum. Rts., Accountability and Remedy Project Part III: Non-State-based Grievance Mechanisms—Enhancing Effectiveness of Non-State-Based Grievance Mechanisms in Cases of Business-Related Human Rights Abuses (2019), https://www.ohchr.org/sites/default/files/Documents/Issues/Business/ARP/ARPIII_Discussion_Paper_Nov2019.pdf [https://perma.cc/HZ25-WP43] [hereinafter Accountability and Remedy Project].

122. IPIECA, Community Grievance Mechanisms in the Oil and Gas Industry 14 (2015), https://www.ipieca.org/resources/good-practice/community-grievance-mechanisms-in-the-oil-and-gas-industry/ [https://perma.cc/9QNV-AWMK] [hereinafter IPIECA, Community Grievance Mechanisms]; Knuckey & Jenkin, *infra* note 202, at 15 (viewing OGMs as a way to avoid "embarrassing and reputation-harming litigation" or "minimize[e] the risk of potentially more expensive and unpredictable court orders, settlements, or negotiated/arbitrated remedies").

123. Off. of the Compliance Advisor/Ombudsman, *supra* note 100, at 20–26. *See also* Rachel Davis & Daniel M. Franks, The Cost of Conflict With Local Communities in The Extrac-

clear reputational risks such as negative publicity which can have significant, direct, and damaging impacts on a business and undermine a company's social license to operate.[124] In short, companies may gain business advantages when they proactively establish these mechanisms, especially if they also publicly commit to adopting human rights policies and commitments.[125]

At the same time, companies face new pressures from a wide range of private and public sources. Namely, there is a growing cottage industry of voluntary codes, guidelines, regulations, and other sources that exert new demands on companies to establish OGMs as a means of ensuring respect for human rights and complying with the UNGPs.[126] These external pressures help explain, in part, the steady uptick of companies adopting or adapting internal grievance mechanisms to resolve human rights claims. The following offers just a sampling of these sources, with select examples, to demonstrate the striking range of sources that require or strongly recommend the establishment of OGMs.

A. Legal Settlements and Judgments

Some companies develop OGMs as a result of litigation or other legal processes that conclude with a settlement or judgment that calls on companies to establish internal grievance mechanisms to handle future human rights issues. For example, in 2019, Gemfields, a leading London-based supplier of gemstones, agreed to the establishment of an independent OGM as part of a settlement between the company and 273 Mozambicans alleging human rights abuses related to the operation of the Montepuez Ruby Mining Limitada's mine in Northern Mozambique, a joint venture in which Gemfields is the majority stakeholder.[127]

TIVE INDUSTRY 9 (2011), https://www.csrm.uq.edu.au/media/docs/145/Cost_of_Conflict_with_Local_Communities_in_Extractive_Industry_Davis_Franks_2011.pdf [https://perma.cc/NAT7-272Y].

124. IFC, ADDRESSING GRIEVANCES, *supra* note 74, at 6 ("Protests, road and bridge blockages, violence, suspension of operations, and plant closures are just a few examples of how the unsatisfactory handling of community concerns can directly affect a business's bottom line."). *See also* INT'L COUNCIL ON MINING & METALS, ADAPTING TO A CHANGING CLIMATE 3 (2019), https://www.icmm.com/website/publications/pdfs/environmental-stewardship/2019/guidance_changing-climate.pdf [https://perma.cc/767Y-XUBY].

125. Ana Čertanec, *The Impact of Corporate Respect for Human Rights on the Competitiveness and Long-Term Business Stability*, 1 INT'L J. CONTEMP. BUS. & ENTREPRENEURSHIP 13, 23, 26 (2020); *see generally* BAŞAK BAĞLAYAN ET AL., GOOD BUSINESS: THE ECONOMIC CASE FOR PROTECTING HUMAN RIGHTS (2018) https://icar.ngo/wp-content/uploads/2020/01/GoodBusinessReport_Dec18-2018.pdf [https://perma.cc/NBR9-6LR6].

126. Damiano de Felice, *Business and Human Rights Indicators to Measure the Corporate Responsibility to Respect: Challenges and Opportunities,* 37 HUM. RTS. Q. 511, 513–15 (2015).

127. *Statement by Leigh Day in Relation to the Settlement of the Human Rights Claims Against Gemfields Ltd,* LEIGH DAY (Jan. 29, 2019), https://www.leighday.co.uk/news/news/2019-news/statement-by-leigh-day-in-relation-to-the-settlement-of-the-human-rights-claims-against-gemfields-ltd/ [https://perma.cc/T4PU-MHEK].

Similar agreements have been reached through non-judicial mechanisms at both the national and international level, such as through National Contact Points ("NCPs") established through the OECD.[128] One such example is the EC and IDI vs. Australia and New Zealand Banking Group complaint, which alleged that 681 families had been forcibly displaced and dispossessed of their land and property during the creation of the Phnom Penh Sugar Co. Ltd. Sugar plantation and refinery financed by Australia and New Zealand Banking Group ("ANZ").[129] As one of its recommendations to ANZ, the Australian NCP called on the company to "establish[ ] a grievance resolution mechanism (including publication of outcomes) to support the effective operation of its corporate standards in relation to human rights – and as a way of demonstrating that its actions are consistent with community expectations around the accountability of multinational enterprises operating in this field."[130]

B. Development and Finance Institutions ("DFIs")

Following the last example, financial institutions and export credit agencies increasingly include requirements that their clients implement effective grievance mechanisms as a condition for receiving funding, since such mechanisms are perceived to build good stakeholder relationships and community relations systems.[131] In fact, as early as 2002, the International Finance Corporation ("IFC") required companies that received funding to create some form of internal grievance mechanism for social and environmental issues, although not framing them in terms of human rights per se.[132] Notably, the IFC's experience informed the work of Ruggie when he began to conceptualize the OGM model.[133] Today, the IFC's Performance Standards on Social

128. OECD member governments are required to set up NCPs as mechanisms that enterprises and their stakeholders can use to seek mediation and conciliation for issues that arise from the implementation of the Guidelines. *See generally* OECD, Implementing the OECD Guidelines for Multinational Enterprises: The National Contact Points from 2000 to 2015 (2016), https://mneguidelines.oecd.org/oecd-report-15-years-national-contact-points.pdf [https://perma.cc/P2ZB-EP67]; *see also National Contact Points for the OECD Guidelines Multinational Enterprises,* OECD, https://www.oecd.org/corporate/mne/ncps.htm [https://perma.cc/R5QC-VKDF] (last visited Apr. 5, 2022).

129. *EC and IDI vs. Austl. & N.Z. Banking Grp., ANZ's Role in Displacing & Dispossessing Cambodian Families*, OECD Watch, https://www.oecdwatch.org/complaint/ec-and-idi-vs-australia-and-new-zealand-banking-group/ [https://perma.cc/HX56-X3ZS] (last visited Apr. 5, 2022).

130. *See also* Austl. Nat'l Contact Point for the OECD Guidelines for Multinational Enters., Final Statement ¶ 48 (2018), https://cdn.tspace.gov.au/uploads/sites/112/2018/10/11_AusNCP_Final_Statement.pdf [https://perma.cc/U9CM-FDUH].

131. IPIECA, Community Grievance Mechanisms, *supra* note 122, at 14.

132. *See generally* Int'l Fin. Corp., Overview of Performance Standards on Environmental and Social Sustainability (2012), https://www.ifc.org/wps/wcm/connect/8804e6fb-bd51-4822-92cf-3dfd8221be28/PS1_English_2012.pdf?MOD=AJPERES&CVID=JIVQIfe [https://perma.cc/3BJX-78BH]; *see also* Int'l Fin. Corp., Performance Standards on Social & Environmental Sustainability 5 (2006), https://www.ifc.org/wps/wcm/connect/3f3419f4-6043-4984-a42a-36f3cfaf38fd/IFC%2BPerformance%2BStandards.pdf?MOD=AJPERES&CVID=jkC.Eka&id=1322803957411 [https://perma.cc/P64P-8WZS] [hereinafter IFC, Performance Standards].

133. E-mail from Caroline Rees to Lisa Laplante, *supra* note 14.

and Environmental Sustainability require clients to "establish a grievance mechanism to receive and facilitate resolution of the affected communities and grievances about the client's environmental and social performance."[134]

Notably, the Equator Principles, voluntary guidelines for DFIs to manage the environmental and social impacts they fund, also require the establishment of grievance mechanisms. Specifically, EP4 Principle 6 directs lending institutions to require clients to establish "effective grievance mechanisms which are designed for use by Affected Communities and Workers, as appropriate, to receive and facilitate resolution of concerns and grievances about the Project's environmental and social performance."[135] In October 2022, the Equator Principles Association issued new tools to enhance its grievance mechanism requirement for DFI projects, signaling the importance of complying with this norm.[136]

C. Other International Institutions

Pressure to establish grievance mechanisms also arise through the Organization for Economic Co-Operation and Development ("OECD"), which is an intergovernmental organization with 38 member countries that works to establish standards to address social, economic, and environmental challenges. The OECD produced the first international instrument that integrated the UNGPs through its GUIDELINES FOR MULTINATIONAL ENTERPRISES, which referenced the importance of including OGMs.[137]

The International Labour Organization, which is the only tripartite U.N. agency to bring together governments, employers, and workers, has long recognized the need for effective mechanisms for handling workers' grievances.[138] Through its Better Work Program, the ILO collaborated with the NGO Shift, which is composed of many of the experts that worked closely with Ruggie, to develop tools for promoting the establishment of factory-level grievance mechanisms to support the ability of workers to raise con-

134. IFC, PERFORMANCE STANDARDS, *supra* note 132.

135. EQUATOR PRINCIPLES, THE EQUATOR PRINCIPLES: EP4, 13 (2020), https://equator-principles.com/app/uploads/The-Equator-Principles_EP4_July2020.pdf [https://perma.cc/4CLL-X8DD].

136. *Operationalizing Remedy for Financial Institutions with the Equator Principles Association*, SHIFT (Nov. 2022), https://shiftproject.org/operationalizing-remedy/ [https://perma.cc/K488-Z5DR].

137. OECD, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 34 (2011), https://www.oecd-ilibrary.org/docserver/9789264115415-en.pdf?expires=1677986060&id=id&accname=guest&checksum=E6B7BB297BFEC80F48877155EAA1D635 [https://perma.cc/C6D7-WPAX] ("[O]perational-level grievance mechanisms for those potentially impacted by enterprises' activities can be an effective means of providing for such processes when they meet the core criteria of: legitimacy, accessibility, predictability, equitability, compatibility with the *Guidelines* and transparency, and are based on dialogue and engagement with a view to seeking agreed solutions.").

138. *Examination of Grievances Recommendation, 1967 (No. 130)*, INT'L LAB. ORG. (June 29, 1967) https://www.ilo.org/dyn/normlex/en/f?pNºRMLEXPUB:12100:0::NO::P12100_ILO_CODE:R130 [https://perma.cc/UAG7-XL52]. *See generally* INT'L LAB. OFF., FACTSHEET NO. 5: GRIEVANCE HANDLING (2018), https://www.ilo.org/wcmsp5/groups/public/—-ed_protect/—-protrav/—-travail/documents/publication/wcms_622209.pdf [https://perma.cc/289G-TZM6].

cerns related to human rights.[139] Notably, the ILO has more recently adopted the UNGP concept of "operational-level grievance mechanism[s]" to call for grievance mechanisms in supply chains, especially to detect forced labor.[140]

D. Multi-Stakeholder Initiatives

Multi-stakeholder initiatives ("MSIs") have become a popular mechanism in the BHR field for creating better engagement between business, civil society, and other stakeholders to address human rights concerns.[141] Some may strongly suggest—or even require—companies to establish grievance mechanisms. One such example includes Amfori, a global business association dedicated to promoting open and sustainable trade whose membership includes "2,400 retailers, importers, brands, and associations from more than 40 countries."[142] The Amfori Code of Conduct requires businesses to create OGMs in order to "prevent, identify and mitigate harm to young workers."[143] Some MSIs may not necessarily require the establishment of grievance mechanisms, but nonetheless issue guidance and strong recommendations for establishing them. For example, the Ethical Trading Initiative, which engages companies, trade unions, and NGOs to improve working conditions in global supply chains, has issued its own guidance on establishing effective company-level grievance mechanisms in order to comply with the UNGPs.[144]

E. Voluntary Codes and Certification Programs

There has been a proliferation of voluntary codes and certification programs, some of which may also be viewed as MSIs, that are designed to help regulate business products and operations to adhere to baseline values that

139. *Supporting Effective Factory-Level Grievance Mechanisms with the Better Work Programme*, SHIFT (Dec. 2013), https://shiftproject.org/resource/supporting-effective-factory-level-grievance-mechanisms-with-the-better-work-programme/ [https://perma.cc/BC24-DMXG].

140. INT'L LAB. ORG., MEETING OF THE TRIPARTITE WORKING GROUP ON OPTIONS TO ENSURE DECENT WORK IN SUPPLY CHAINS 26 (2022), https://www.ilo.org/wcmsp5/groups/public/—-dgreports/—-dcomm/documents/meetingdocument/wcms_858677.pdf [https://perma.cc/2QBS-EJAN] ("[T]he ILO [is] to consider normative and non-normative action to establish effective grievance mechanisms throughout global supply chains, including bringing constituents together for an effective operational-level grievance mechanism to ensure access to justice and remedy throughout supply chains.").

141. Dorothée Baumann-Pauly et. al., *Industry-Specific Multi-Stakeholder Initiatives that Govern Corporate Human Rights Standards: Legitimacy Assessments of the Fair Labor Association and the Global Network Initiative*, 143 J. BUS. ETHICS 771, 771–73 (2017).

142. *About Amfori,* AMFORI, https://www.amfori.org/content/about-amfori [https://perma.cc/4K9X-8J8B].

143. AMFORI, AMFORI BSCI CODE OF CONDUCT 7 (2017), https://www.amfori.org/sites/default/files/amfori%20BSCI%20COC%20UK_0.pdf [https://perma.cc/5SDB-7ECU].

144. ETHICAL TRADING INITIATIVE, ACCESS TO REMEDY: PRACTICAL GUIDANCE FOR COMPANIES 22 (2019), https://www.ethicaltrade.org/sites/default/files/shared_resources/Access%20to%20remedy_0.pdf [https://perma.cc/LQ46-2ENA].

often include human rights.[145] Some have begun requiring members to establish grievance mechanisms.[146] An early example of this type of program is the U.N. Global Compact, which includes in its annual self-assessment forms (the "Communication on Progress") information on "[o]perational-level grievance mechanisms for those potentially impacted by the company's activities."[147]

There are also many industry-specific voluntary code programs, such as the Aluminum Stewardship Initiative Performance Standard, which defines sixty-two environmental, social, and governance principles and criteria to address sustainability issues in the aluminum value chain, including human rights.[148] It calls for the establishment of "Complaints Resolution Mechanisms" to provide a formal process for all types of stakeholders (individuals, communities, workers, and civil society groups) to file grievances, including human rights concerns, directly with a company.[149] Another example is the Fair Wear Foundation Brand Performance Check Guide, which requires member companies to include complaints procedures.[150] Similarly, the Initiative for Responsible Mining Assurance is an independent verification and certification program that requires mining companies to create OGMs to handle human rights complaints.[151] As part of its periodic reporting requirements, companies must share details about the operation of OGMs.[152]

These programs are usually entirely voluntary. Nevertheless, companies that sign up to participate subject themselves to public scrutiny when they fall short of their own commitments. As recognized by Michelle Law,

> [T]here is pressure on companies to establish OGMs due to the strengthened international normative framework, which has led to more rigorous international, domestic and sector specific certification standards requiring OGMs, despite the fact that domestic legal pressure remains weak. . . . Companies also feel pressure to

145. Grama, *supra* note 64, at 73–74.

146. *See* Tori Loven Kirkebø & Malcolm Langford, *The Commitment Curve: Global Regulation of Business and Human Rights*, 3 Bus. & Hum. Rts. J. 157 (2018).

147. U.N. Glob. Compact, GC Advanced COP Self-Assessment 8 (2016) https://d306pr3pise04h.cloudfront.net/docs/communication_on_progress%2FGC_Advanced_COP_selfassessment.pdf [https://perma.cc/79TH-X9SU].

148. *See* Aluminum Stewardship Initiative, ASI Performance Standard V3 (2022), https://aluminium-stewardship.org/wp-content/uploads/2023/03/ASI-Performance-Standard-V3-May2022.pdf [https://perma.cc/F3XZ-Z8CM].

149. *Id.* at 11, 23.

150. Fair Wear Found., Brand Performance Check Guide 69 (2015), https://api.fairwear.org/wp-content/uploads/2011/12/online-brand-performance-check-guide-2016.pdf [https://perma.cc/32A5-YAM6].

151. Initiative for Responsible Mining Assurance, IRMA Standard for Responsible Mining IRMA-STD-001 31 (2018), https://responsiblemining.net/wp-content/uploads/2018/07/IRMA_STANDARD_v.1.0_FINAL_2018.pdf [https://perma.cc/W6ZV-5S6P].

152. *Id.* at 33.

> provide OGMs where they have signed up to other domestic or sector specific codes of conduct.[153]

Such voluntary programs incentivize companies to begin to create grievance mechanisms that eventually become an industry expectation.

F. Member-Based Industry Associations

Certain industries have taken noticeable steps to promote the UNGPs and include a focus on grievance mechanisms through their member associations. Some MSIs like Amfori, mentioned above, can also be viewed as such. This initiative especially occurs in sectors that more readily find themselves on the hotbed of human rights issues, such as the extractive industries, which engaged early on with Ruggie's team and even began to issue its own OGM guidelines.[154] This engagement helped the International Petroleum Industry Environmental Conservation Association ("IPIECA") become one of the first industry associations to integrate a human rights focus into its social responsibility work and produced one of the first and only guides on OGMs.[155] Following the approval of the UNGPs, IPIECA also launched a three-year initiative focused on OGMs through field testing, collaborative learning, and engagement with a range of stakeholders to produce further guidance tailored specifically to the oil and gas industries.[156] Similarly, the International Council on Mining and Minerals ("ICMM") requires companies to commit to their ten principles for sustainable development and thirty-eight performance expectations, which include taking steps to implement the UNGPs and "provid[ing] local stakeholders with access to effective mechanisms for seeking resolution of grievances related to the company and its activities."[157]

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153. Michele Law, *Can Operational Grievance Mechanisms Address Slavery? Innovation Issues – Summary of a Talk to the Nexus Working Group on Human Trafficking*, LinkedIn (June 15, 2017), https://www.linkedin.com/pulse/can-operational-grievance-mechanisms-address-slavery-innovation-law/ [https://perma.cc/SZ5G-SECH].

154. For example, the ICMM updated its 2009 guidelines on grievance mechanisms and included a direct reference to the UNGPs: "The UN Guiding Principles on Business and Human Rights (UNGPs) have made clear that having an effective operational-level grievance mechanism is a key part of all companies' responsibility to respect human rights and cooperate in remediation where a company has caused or contributed to harm. These principles set out eight criteria for effective operational-level grievance mechanisms, around which this guidance is structured." Int'l Council on Mining & Metals, *supra* note 124, at 9.

155. IPIECA, Operational Level Grievance Mechanisms: IPIECA Good Practice Survey 1 (2012), https://commdev.org/wp-content/uploads/pdf/publications/Operational-level-grievance-mechanisms.pdf [https://perma.cc/P43Q-GBP5].

156. IPIECA, Indigenous Peoples and the Oil and Gas Industry 34 (2012), https://www.ipieca.org/resources/indigenous-peoples-and-the-oil-and-gas-industry-context-issues-and-emerging-good-practice [https://perma.cc/BL6Q-UC52].

157. Often, industry guidance points out that "even those managed to the highest standards – community grievances are inevitable. . . . And it is right and responsible for companies to have an effective operational-level grievance mechanism in place to systematically handle and resolve the grievances that arise." Int'l Council on Mining & Metals, Handling and Resolving Local-Level Concerns

G. Benchmarks, Indexes, Ratings, and other Indicators

The UNGPs have inspired the development of business and human rights benchmarks, indicators, ratings, and indexes to track business compliance with human rights norms that also monitor the development of company grievance mechanisms.[158] In her book INCORPORATING RIGHTS, George surveys a wide range of business and human rights indicators and argues that they "play an important role in solidifying emerging soft law standards and in strengthening corporate self-regulation."[159] Some of these sources were also discussed in Part I.B.1 as part of the effort to track the development of OGMs.

For example, the World Benchmarking Alliance, which was launched in 2018 to track business compliance with the Sustainable Development Goals, includes the "Corporate Human Rights Benchmark," which follows the implementation of the UNGPs, including operational-level grievance mechanisms.[160] Similarly, the Global Reporting Initiative ("GRI") establishes sustainability standards for companies of any size, type, sector, or geographic location and tracks the development of grievance mechanisms.[161] The GRI also reports on human rights grievances resolved by its members.[162] Specialized indexes within particular industries also track company grievance mechanisms. For example, the Fashion Revolution's Fashion Transparency Index publishes the brands that create grievance mechanisms.[163] By measuring and ranking companies and making those findings public, such projects exert pressures on companies to create OGMs, especially if they feel more subject to consumer and investor scrutiny.[164]

H. Buyers and Multinational Supply Chains

Undoubtedly as a direct result of all the above mentioned pressures, more retailers and brands, such as Sodexo, have begun to revise their codes of conduct to include the requirement that suppliers establish grievance mech-

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AND GRIEVANCES 1, 9 (2019), https://www.icmm.com/website/publications/pdfs/social-performance/2019/guidance_grievance-mechanism.pdf?cb=20860 [https://perma.cc/MTB7-5E2F].

158. de Felice, *supra* note 126, at 513–15.

159. ERIKA GEORGE, INCORPORATING RIGHTS: STRATEGIES TO ADVANCE CORPORATE ACCOUNTABILITY 147 (2021).

160. *See generally* CHRB BENCHMARK, *supra* note 90.

161. *See* GRI STANDARDS, GRI 2: GENERAL DISCLOSURES 2021 (2022), https://www.globalreporting.org/pdf.ashx?id=12358 [https://perma.cc/5NBZ-ZH86].

162. *See* GLOB. SUSTAINABILITY STANDARDS BD., ITEM 07 – RECOMMENDATIONS OF THE GRI TECHNICAL COMMITTEE ON HUMAN RIGHTS DISCLOSURE (2019), https://www.globalreporting.org/standards/media/2191/item_07_-_recommendations_of_the_gri_technical_committee_on_human_rights_disclosure.pdf [https://perma.cc/M4RZ-J9NE].

163. FASHION TRANSPARENCY INDEX 2021, *supra* note 95, at 14.

164. Christopher Wright & Alexis Rwabizambuga, *Institutional Pressures, Corporate Reputation, and Voluntary Codes of Conduct: An Examination of the Equator Principles*, 111 BUS. & SOC'Y REV. 89, 89 (2006).

anisms.[165] In some instances, companies, such as Utz, eventually outsource this grievance process to a third-party certification process.[166] Similarly, the American clothing company PVH Corporation (formerly known as the Phillips-Van Heusen Corporation), which owns brands like Tommy Hilfiger, Calvin Klein, and Warner's, requires auditors to review grievances filed by factory workers.[167] It also requires its suppliers to train workers on a supplier's grievance policy.[168]

In response to new demands from corporate buyers, the American Bar Association has created model contract clauses to promote compliance with human rights standards in the supply chain.[169] Working in coordination with this project, Snyder, Maslow, and Dadush have developed model contract clauses that include specific references to the establishment of operational-level grievance mechanisms.[170]

I. National Action Plans

While most of the examples shared above relate to voluntary private initiatives, there is now a growing movement of state policy and law that provides incentive for companies to establish internal grievance mechanisms that can handle human rights claims. In 2014, the U.N. Human Rights Council urged member states to implement National Action Plans ("NAPs") to provide policy guidance on the practical implementation of the UNGPs, including on the provision of effective remedies.[171] Of twenty-five NAPs that were published in English and reviewed by the OGM Research Project, twenty-two include some reference to requiring or strongly recommending that companies establish grievance mechanisms.[172]

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165. Sodexo, Supplier Code of Conduct (2017), https://www.sodexorise.com/files/live/sites/com-global/files/02%20PDF/Sodexo-Supplier-Code-of-Conduct_EN.pdf [https://perma.cc/Q9DD-FG4N]; Marks & Spencer, Global Sourcing Principles (Aug. 2018), https://corporate.marksandspencer.com/sites/marksandspencer/files/marks-spencer/global-sourcing-principles-new-1.pdf [https://perma.cc/29H7-LXNP]; *See also* Zagelmeyer, *supra* note 100.

166. *UTZ Certification (Now Part of the Rainforest Alliance),* Rainforest Alliance (2015), https://www.rainforest-alliance.org/utz/ [https://perma.cc/P9UX-ND3N].

167. PVH, Corporate Responsibility: Supply Chain Standards and Guidelines for Meeting PVH's Shared Commitment 62 (Jul. 2022), https://pvh.com/-/media/Files/pvh/responsibility/PVH-CR-Supply-Guidelines.pdf [https://perma.cc/N2VW-6CYE].

168. *Id.* at 37.

169. *Contractual Clauses Project*, Am. Bar Ass'n, https://www.americanbar.org/groups/human_rights/business-human-rights-initiative/contractual-clauses-project/ [https://perma.cc/6YW3-3T2E] (last visited Apr. 7, 2022).

170. David V. Snyder et al., *Balancing Buyer and Supplier Responsibilities: Model Contract Clauses to Protect Workers in International Supply Chains,* 77 Bus. Law. 115, 137–38 (2021–22).

171. *See National Action Plans on Business and Human Rights*, U.N. High Comm'r for Hum. Rts., https://www.ohchr.org/en/special-procedures/wg-business/national-action-plans-business-and-human-rights [https://perma.cc/6PLQ-93CA]; U.N. Working Grp. on Bus. & Hum. Rts., Guidance on National Action Plans on Business and Human Rights (2016), https://www.ohchr.org/sites/default/files/Documents/Issues/Business/UNWG_NAPGuidance.pdf [https://perma.cc/K6YR-REY4].

172. Operational-Level Grievance Mechanisms Rsch. Project, Ctr. For Int'l L. & Pol'y, Access to Remedy: Recommendations for Including Operational-Level Grievance Mechanisms in Business and Human Rights National Action Plans 2 (2022) (on file with author).

For example, in December 2016, Germany adopted a NAP that specifically provides guidance on the implementation of OGMs. [173] Similarly, France's NAP states that "business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted."[174] Colombia launched its original NAP in December 2015, and adopted an updated NAP on December 10, 2020.[175] In the "Corporate Human Rights Due Diligence" section, the Colombian NAP states that it created a Task Force on Business and Human Rights to provide greater understanding of the due diligence process, including determining the best manner in which enterprises can "establish easy-to-access, transparent and effective complaint and claims offices or mechanisms for prevention and mitigation and remedy of adverse human rights effects as may be caused by their activities."[176] This Task Force would, in theory, assist companies "[in] receiving and diligently managing the citizen and community claims" arising from "the adverse effects caused by their operations."[177]

J. National Due Diligence and Reporting Laws

A growing number of local and national governments have begun enacting laws to ensure corporate compliance with human rights norms (such as by establishing OGMs), in large part inspired by the UNGPs.[178] For example, in 2017, the French Parliament adopted the Corporate Duty of Vigilance Law, which applies to the country's largest companies, requiring them to address adverse impacts linked to their activities as well as their suppliers and subcontractors.[179] The law requires the establishment of an alert and

173. *See* Fed. Republic of Germany, National Action Plan: Implementation of the U.N. Guiding Principles on Business and Human Rights (2016), https://globalnaps.org/wp-content/uploads/2018/04/germany-national-action-plan-business-and-human-rights.pdf [https://perma.cc/CHN6-ZLMJ].

174. Republic of France, National Action Plan for the Implementation of the United Nations Guiding Principles on Business and Human Rights 1, 11 (2013), https://globalnaps.org/wp-content/uploads/2017/11/france-nap-english.pdf [https://perma.cc/BCQ7-LWGN].

175. *See* Republic of Colombia, Plan de Acción Nacional de Estado Abierto (2020), https://www.opengovpartnership.org/wp-content/uploads/2020/12/Colombia_Action-Plan_2020-2022.pdf [https://perma.cc/N6XF-H8VC].

176. *Id.* at 19.

177. *Id.* at 19.

178. *See* Chiara Macchi and Claire Bright, *Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislation*, *in* Legal Sources in Business and Human Rights—Evolving Dynamics in International and European Law 218 (M. Buscemi, N. Lazzerini, & L. Magi eds., 2020).

179. *See* Law 2017-399, *supra* note 7; *see also* Sherpa, Vigilance Plans Reference Guidance 51–52, 80 (2019), https://www.asso-sherpa.org/wp-content/uploads/2019/02/Sherpa_VPRG_EN_WEB-VF-compressed.pdf [https://perma.cc/9UAL-XV5M] (explaining that the Vigilance Plan requires "Any company that employs, by the end of two consecutive financial years, at least five thousand employees itself and in its direct or indirect subsidiaries, whose registered office is located within the French territory or at least ten thousand employees itself and in its direct or indirect subsidiaries whose registered office is located within the French territory or abroad, shall establish and implement a[n effective] vigilance plan.").

complaint mechanism for the company to receive information of risks posed by the company.[180] The organization Sherpa recently published a guide on the Corporate Duty of Vigilance Law, calling upon companies to develop alert mechanisms that would fall in line with the UNGPs' effectiveness principles related to OGMs.[181]

More recently, in 2022, the European Parliament adopted the EU Directive on Mandatory Human Rights, Environmental and Good Governance Due Diligence ("Directive"). The Directive sets the European Commission on course to draft a formal legislative proposal to ensure more uniformity of human rights due diligence requirements imposed on companies operating in the European Union.[182] The law would impose a basic obligation on member states to ensure that companies conduct human rights and environmental due diligence and include the establishment of complaints procedures.[183] Article 9 of the Directive calls on members states to:

> [E]nsure that companies provide the possibility for persons and organisations . . . to submit complaints to them where they have legitimate concerns regarding actual or potential adverse human rights impacts and adverse environmental impacts with respect to their own operations, the operations of their subsidiaries and their value chains . . . .[184]

Similarly, in 2021 the German Legislature adopted the Act on Corporate Due Diligence in Supply Chains, which entered into force in January 2023.[185] Section 9 of the law requires companies to set up complaints procedures for reporting human rights risks and problems as they relate to "the economic actions of indirect suppliers."[186]

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180. See SHERPA, *supra* note 179, at 64–69.

181. *Id.* at 68.

182. *Proposal for a Directive of the European Parliament and of the Council amending Directive 2019/1937/EU on Corporate Sustainability Due Diligence,* COM (2022) 71 final (Feb. 23, 2022), https://eur-lex.europa.eu/resource.html?uri=Cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0001.02/DOC_1&format=PDF [https://perma.cc/PP48-NZSW]. The Directive sets out mandatory human rights and environmental due diligence obligations for corporations. The draft directive will undergo further review and debate, with the expectation of adoption by the European Parliament closer to 2027. Clare Connellan et al., *European Commission Issues Major Proposal on Due Diligence Obligations to Protect Human Rights and the Environment Across Supply Chains*, WHITE & CASE (Feb. 24, 2022), https://www.whitecase.com/insight-alert/european-commission-issues-major-proposal-due-diligence-obligations-protect-human [https://perma.cc/9GNA-27G2].

183. *Id.* at 53.

184. *Id.* at 58.

185. Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten [Act on Corporate Due Diligence Obligations in Supply Chains], July 16, 2021, BGBL. I at 2959 (Ger.), https://www.bmas.de/SharedDocs/Downloads/DE/Internationales/act-corporate-due-diligence-obligations-supply-chains.pdf?__blob=publicationFile&v=3 [https://perma.cc/DEJ6-7WQX].

186. *Id.* § 9(1).

III. A Cause for Celebration or a Concern For Individuals and Communities? The Mixed Views on Private Remedies

In a strikingly brief amount of time, companies have come under a wide range of pressures to implement private grievance mechanisms to prove to the world that they are good corporate citizens because they seek to redress human rights harms they contribute to or cause, at least according to their publicly facing profiles. Yet, despite the proliferation of private remedies established to handle human rights claims, often at the direction of norm-setting institutions like the U.N. and governments, this practice has still drawn relatively minimal public attention or scrutiny and appears to rarely raise objections. On the contrary, a general sentiment exists that company-level grievance mechanisms are a good thing and are even extolled.[187]

BHR scholars recognize many benefits of "decentralized, dialogue-based approaches to address violations of human rights by corporations and other business enterprises."[188] This view has also been adopted by influential lenders, such as the International Finance Corporation, which promoted company grievance mechanisms as supposedly offering "efficient, timely and low-cost forms of conflict resolution for all concerned parties" early on during Ruggie's mandate.[189] In particular, these mechanisms are seen as more likely to produce "locally tailored solutions" that better accommodate different groups within communities, especially more vulnerable populations like women, minorities, and marginalized groups.[190] Moreover, given that government mechanisms can be costly, slow, and not always apt to solve problems, communities may welcome a "free, locally based, speedy, and satisfactory resolution."[191]

For the most part, a review of the relatively limited literature on these mechanisms reflects a general acceptance of OGMs as relatively harmless corporate creations, implicitly adopting the premise that private grievance mechanisms are necessary for companies to comply with their responsibility to remediate harms they cause as required by Principle 22 of the UNGPs.[192] From that starting point, most publications provide descriptive accounts of

187. Mariana Aparecida Vilmondes Turke, *Business and Human Rights in Brazil: Exploring Human Rights Due Diligence and Operational-Level Grievance Mechanisms in the Case of Kinross Paracatu Gold Mine*, 15 Braz. J. Int'l L. 222, 223 (2018) (stating that operational-level grievance mechanisms, "[i]f conducted efficiently[,] . . . enable the realization of human rights" and support "respect to civil, economic, cultural, social, environmental human rights").

188. Kishanthi Parella, *The Stewardship of Trust in the Global Value Chain,* 56 Va. J. Int'l L. 585, 589 (2016).

189. IFC, Addressing Grievances*, supra* note 74, at 6.

190. *Id.*

191. *Id.*

192. *Doing Business with Respect for Human Rights: Remediation and Grievance Mechanisms*, Glob. Perspectives Project, https://www.businessrespecthumanrights.org/en/page/349/remediation-and-grievance-mechanisms [https://perma.cc/3VFA-FQMH] (last visited Aug. 25 at 6 PM) [hereinafter Glob. Perspectives Project].

case studies conducted by think tanks or NGOs that show general trends, although often based on a limited number of cases.[193] As discovered by Zagelmeyer et al. when conducting a literature review in 2018 on company grievance mechanisms, the literature tended to be "patchy" and largely consisted of descriptive case studies.[194] Most analyses of OGMs tend to be theoretical or offer guidance on what is perceived to be a legitimate and effective grievance mechanism in terms of procedures and outcomes.[195]

Overall, there exists limited critical study of these private remedies or even exploration on the possible, and necessary, limits on their use when involving claims implicating human rights issues. While some more critical commentary does center on ensuring those private grievances conform to the effectiveness criteria established in Principle 31 of the UNGPs, there seems to be an assumption that if companies follow these criteria, then their grievance processes should be acceptable.[196] In part, the current gap in critical analysis and push for oversight may arise out of the relative newness of these mechanisms and the still minimal number of empirical studies on their ef-

193. *See, e.g.*, Emma Wilson & Emma Blackmore, *Introduction* to Dispute or Dialogue, *supra* note 47, at 13. *See also* Dr. Deanna Kemp & Nora Gotzmann, Community Grievance Mechanisms and Australian Mining Companies Offshore: An Industry Discussion Paper (2008), https://www.csrm.uq.edu.au/media/docs/391/community_grievance_mechanisms_australian_mining_companies_offshore.pdf [https://perma.cc/U95D-W8UN]; Zagelmeyer, *supra* note 100, at 20; Barbara Linder, Karin Lukas & Astrid Steinkellner, Ludwig Boltzmann Inst. Hum. Rts., The Right to Remedy: Extrajudicial Complaint Mechanisms for Resolving Conflicts of Interest Between Business Actors and Those Affected by Their Operations 47 (2013), https://gmr.lbg.ac.at/wp-content/uploads/sites/12/2021/09/Right-to-Remedy_Extrajudicial-Complaint-Mechanisms_2013.pdf [https://perma.cc/MVA7-8LDL]; Dr. Kate Macdonald & Dr. Samantha Balaton-Chrimes, Corp. Accountability Rsch., Human Rights Grievance-Handling in the Indian Tea Sector (2016), https://corporateaccountabilityresearch.net/njm-report-vi-indiantea [https://perma.cc/SK5N-ZHN8]; Stuart Bell et al., Learning Legacy, Complaint and Dispute Resolution Process to Deal with Breaches of the Sustainable Sourcing Code: Lessons Learned Planning and Staging the London 2012 Games (2012), https://webarchive.nationalarchives.gov.uk/ukgwa/20130403014434/http://learninglegacy.independent.gov.uk/publications/complaint-and-dispute-resolution-process-to-deal-with-br.php [https://perma.cc/N8CU-D4FX]; Caroline Rees, Learning Legacy, Establishing a Stakeholder Oversight Group to Support a Supply Chain Grievance Mechanism, Lessons Learned From Planning and Staging the London 2012 Games (2013), https://webarchive.nationalarchives.gov.uk/ukgwa/20130403014410/http://learninglegacy.independent.gov.uk/publications/establishing-a-stakeholder-oversight-group-to-support-a-.php [https://perma.cc/2HET-BUQG].

194. Zagelmeyer et al., *supra* note 100, at 20–21. *See also* Vermijs, *supra* note 83, at 14 (writing in 2013 that "the existing literature on company-community grievance mechanisms is fairly limited").

195. *See, e.g.*, Maximilian J. L. Schormair & Lara M. Gerlach, *Corporate Remediation of Human Rights Violations: A Restorative Justice Framework*, 167 J. Bus. Ethics 475, 476, 478–80 (2019) (writing that there is an "urgent need for developing and implementing comprehensive and legitimate business processes that enable companies to take responsibility in providing remedy for human rights violations" and advocating for OGMs to meet that need). *See also* Benjamin Thompson, *Determining Criteria to Evaluate Outcomes of Businesses' Provision of Remedy: Applying a Human Rights-Based Approach*, 2 Bus. & Hum. Rts. J. 55 (2016) (offering a theoretical framework for ensuring the effectiveness of the outcomes of operational-level grievance mechanisms through a human rights-based approach). Civil Society also seems focused on this angle. *See, e.g.*, Glob. Perspectives Project, *supra* note 192.

196. *See generally* Martijn Scheltema, *Assessing the Effectiveness of Remedy Outcomes of Non-Judicial Mechanisms,* 4 Dovenschmidt Q. 197 (2014).

fectiveness.[197] The apparent lack of exploration may not be all that surprising, given that the entire topic of redress has gone largely neglected in the field, leading one commentator to refer to Pillar III as the "forgotten pillar."[198]

Only a handful of commentators have taken a more critical stance to call attention to the risks associated with private remedies.[199] In his recent comprehensive review of the literature covering OGMs, Grama found that out of the 117 articles discussing the topic of OGMs, only sixteen challenged the idea of their representing an "exercise of private power."[200] Significantly, of these sixteen articles, half referred to one of the only high-profile cases of an OGM, namely that associated with the Barrick Gold Corporation.[201] Indeed, the topic of OGMs remained relatively uncontroversial until 2012, when Barrick Gold created an OGM to handle claims by a significant number of women who alleged they were sexually assaulted by Barrick Gold security guards in Papua New Guinea.[202] Ironically perhaps, the Barrick Gold experience faced such public backlash mostly because the company chose to publicize its experience, even showcasing itself as "among the first companies to put into practice the Guiding Principle of the 'right to remedy' since the U.N. Human Rights Council approved the Principles in 2011."[203] With

197. In general, and no doubt due to its relative newness, there is a general lack of "empirical testing" of normative claims in the field of business and human rights, including on the topic of OGMs. Surya Deva et al., *Editorial: Business and Human Rights Scholarship: Past Trends and Future Directions,* 4 Bus. & Hum. Rts. J. 201, 202 (2019).

198. Glob. Bus. Initiative on Hum. Rts. & Clifford Chance LLP, Access to Remedy: The Next Frontier 1 (2017), https://gbihr.org/images/general/Access-to-Remedy-The-Next-Frontier.pdf [https://perma.cc/W5J7-QGTU].

199. *E.g.*, Miller-Dawkins et al., *supra* note 3, at 14 (noting that there is a "paucity of in-depth examinations of the effects of different forms of non-judicial grievance mechanisms in delivering an individual remedy and systemic change in business practices").

200. Grama, *supra* note 64, at 104 (criticizing the use of OGMs to stifle community mobilization and cut off access to more legitimate means of justice).

201. *Id.*

202. *See generally* Colum. L. Sch. Hum. Rts. Clinic & Harv. L. Sch. Int'l Hum. Rts. Clinic, Righting Wrongs? Barrick Gold's Remedy Mechanism for Sexual Violence in Papua New Guinea: Key Concerns and Lessons Learned (2015), https://static1.squarespace.com/static/562e6123e4b016122951595f/t/565a12cde4b0060cdb69c6c6/1448743629669/Righting+Wrongs.pdf [https://perma.cc/8JNQ-LKMG] [hereinafter Righting Wrongs?]; *See also* Sarah Knuckey & Eleanor Jenkin, *Company-created Remedy Mechanisms for Serious Human Rights Abuses: A Promising New Frontier for the Right to Remedy?*, 19 Int'l J. Hum. Rts. 801 (2015) (presenting the case of Barrick Gold to question the development of private remedies for human rights claims).

203. Barrick Gold Corp., Barrick Corrects False Claims Concerning Remediation Program at Porgera (2013), http://s25.q4cdn.com/322814910/files/doc_downloads/operations/porgera/Barrick-corrects-false-claims-concerning-Remediation-Program-at-Porgera.pdf [https://perma.cc/34FG-5RMW]. Barrick created a similar OGM to handle human rights grievances in Tanzania. *See* Letter from Catherine Coumans, Co-Manager, MiningWatch Canada, & Patricia Feeney, Exec. Dir., Rts. & Accountability in Dev., to Jamie C. Sokalsky, President & CEO, Barrick Gold (Feb. 21, 2014), https://miningwatch.ca/sites/default/files/lettertobarrickregardingnorthmara2014-02-21.pdf [https://perma.cc/JZ7V-BT9R]; Press Release, African Barrick Gold, Update on the North Mara Sexual Assault Allegations (Dec. 20, 2013), https://web.archive.org/web/20140104044045/http://www.africanbarrickgold.com/~/media/Files/A/African-Barrick-Gold/Attachments/press-releases/2013/abg-update-north-mara-sexual-assault-allegations_20122013.pdf [https://perma.cc/93WU-4CVH]; Press release, CORE,

such a declaration and good intentions, the company embarked on what came to be a controversial undertaking.

As will be discussed next, this one case generated a large number of critical reports and studies, and even involved the OHCHR. To date, it remains one of the only well-known examples of a company-level grievance mechanism that handled serious human rights claims. Given that scholars and practitioners have thoroughly discussed the case of Barrick Gold, the following section draws from their work only to present a brief overview of the facts as needed to explore how this high-profile case still left unclear whether any normative framework exists to limit the scope of operations of private remedies in handling human rights claims.

A. Igniting Controversy: The Barrick Gold Case

Barrick Gold established the *Olgeta Meri Igat Raits* ("All Women Have Rights") mechanism following years of investigations and pressure from international NGOs and local victims' groups to respond to the allegations that private security guards hired from state military ranks had sexually assaulted women at the Porgera Joint Venture ("PJV") gold mine in Papua New Guinea.[204] The company hired third-party mediators to receive claims, determine eligibility, and reach a negotiated reparation package with a standardized amount of local currency.[205] The mediators were instructed to look for benchmark measures to set a minimum payment to victims that would reflect the highest compensation package paid in Papua New Guinea and included a business grant, school fees, counseling, and medical costs.[206]

By June 2015, the claims of 137 women had been deemed eligible, and 119 claims had been settled through the remedy mechanism.[207] If a complainant accepted this reparation package, she was required to sign a waiver which foreclosed any future resort to civil litigation. Ultimately, fourteen

Corporate Abuse Victims Sign Away Rights Under UK Company Complaint Process (Jan. 20 2014), https://corporatejusticecoalition.org/wp-content/uploads/2014/01/ABG-greivance-mech-PR_140127_final.pdf [https://perma.cc/PNE2-AMZ3].

204. Barrick Gold Corp., Olgeta Meri Igat Raits "All Women Have Rights": A Framework of Remediation Initiatives in Response to Violence Against Women in the Porgera Valley (2012), https://miningwatch.ca/sites/default/files/framework_of_remediation.pdf [https://perma.cc/656X-MVU5].

205. Yousuf Aftab, Enodo Rights, Pillar III on the Ground: An Independent Assessment of the Porgera Remedy Framework 13 (2016), https://www.enodorights.com/assets/pdf/pillar-III-on-the-ground-assessment.pdf [https://perma.cc/KR53-YNLS].

206. The value of individual components of the packages was not entirely clear from Barrick's public materials, although EarthRights International ("ERI"), which represents some of the alleged victims, has published some of the agreements. The typical package included a "business grant" of 15,000 kina (at that time, approximately U.S.$5,620) along with medical costs, counselling, business training, school fees, and a modest financial supplement. ERI estimated the final package at 21,320 kina (or around U.S.$8,176). *See* Press Release, EarthRights International, Survivors of Rape by Barrick Gold Security Guards Offered "Business Grants" and "Training" in Exchange for Waiving Legal Rights (Nov. 21, 2014) https://earthrights.org/media_release/survivors-of-rape-by-barrick-gold-security-guards-offered-business-grants-and-training-in-exchange-for-waiving-legal-rights/ [https://perma.cc/2ZJM-FHVD].

207. Knuckey & Jenkin, *supra* note 202, at 2.

victims refused to accept this proposed remedy and instead sought a judicial remedy in U.S. courts with legal representation from EarthRights International, which resulted in a more generous settlement.[208] Reportedly, the company then adjusted the original package of those who participated in the OGM process to match the award won by those who pursued litigation.[209]

Barrick Gold came under intense scrutiny for numerous aspects of its grievance mechanism, but in particular the requirement that victims sign waivers, thus foreclosing future access to any state-based remedies to review the same claim.[210] An investigation conducted through the Global Justice Clinic at New York University School of Law, the International Human Rights Clinic at Harvard Law School, and the Human Rights Clinic at Columbia Law School helped to illuminate the many problems with the mechanism used by Barrick Gold to resolve serious human rights claims.[211] Principal investigators Knuckey and Jenkin shared some general takeaways from the investigation in an academic article in which they reached a general conclusion that the possibility of settlement through some type of mediation process may never escape amounting to "a coercive or unequal process because of the uneven distribution of resources between the parties."[212] Certainly, a company, especially one that is a large multinational corporation, will have a more sophisticated legal department and will inevitably control much of the process given that it holds more power than the poorer, less educated rights-holders who usually come from marginalized, disempowered communities, thus creating an inherent imbalance of power.[213] This situation is especially true where large western transnational corporations operate in remote regions of countries in the Global South. Hence, there may be flaws in smoothly analogizing OGMs with other types of arbitration or mediation experiences where each party generally enjoys an "equality of arms."[214]

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208. *See* Press Release, Barrick Gold Corp., Statement from Barrick Gold Corporation and EarthRights International (Apr. 3, 2015), https://www.barrick.com/English/news/news-details/2015/Statement-from-Barrick-Gold-Corporation-and-EarthRights-International/default.aspx [https://perma.cc/3MFB-ERWB]; Karen McVeigh, *Canada Mining Firm Compensates Papua New Guinea Women After Alleged Rapes,* GUARDIAN (Apr. 3, 2015), https://www.theguardian.com/world/2015/apr/03/canada-barrick-gold-mining-compensates-papua-new-guinea-women-rape [https://perma.cc/8LX2-VT4T].

209. Knuckey and Jenkin report that in June 2015, they were informed by Barrick's Senior Vice President of Corporate Affairs that each claimant would receive an additional sum of 30,000 kina (U.S.$10,905). Knuckey & Jenkin, *supra* note 202, at 802.

210. *See* Grama, *supra* note 64, at 138; Letter from Multiple Organizations to Dr. Navanethem Pillay, U.N. High Comm'r for Hum. Rts. (May 14, 2013), https://miningwatch.ca/sites/default/files/ltr_to_unhchr_may_14_2013_re_porgera_sign-on.pdf [https://perma.cc/D4M8-AR34]; RIGHTING WRONGS?, *supra* note 202, at 109–16; CATHERINE COUMANS, MININGWATCH CANADA, BRIEF ON CONCERNS RELATED TO PROJECT-LEVEL NON-JUDICIAL GRIEVANCE MECHANISMS (2014), https://miningwatch.ca/sites/default/files/briefonnjgmsaccessmeetingapril2014.pdf [https://perma.cc/ZF2J-EQ4E].

211. *See generally* RIGHTING WRONGS?, *supra* note 202.

212. Knuckey & Jenkin, *supra* note 202, at 812.

213. RIGHTING WRONGS?, *supra* note 202, at 3–4.

214. A recent report issued by Office of the High Commissioner's Access to Remedy III project recognizes that "the lack of 'equality of arms' between companies and affected people remains an intrac-

Even if a company does not purposefully exploit this power imbalance, it can nevertheless result in an unfair process given that victims may not have advocacy skills or an understanding of their rights; may not enjoy adequate legal representation or third-party monitors to ensure a fair process, often due to geographic isolation or insecurity; or otherwise are not in a position to demand a fair process that would lead to adequate and appropriate reparation.[215] On this last point, Knuckey and Jenkin found that victims will often settle for whatever they can get given their own dire circumstances, whether or not the reparations are fair, adequate and appropriate.[216]

Overall, based on the extreme example of Barrick Gold, some critics argue that an OGM process can never be truly fair if left only to the discretion of the company, especially if handling severe human rights claims presented by vulnerable populations.[217] Knuckey and Jenkin reached this conclusion when considering all of the "company's potentially conflicting motivations" in striving for these goals given that they may take an adversarial, defensive approach to shield themselves from any liability.[218] As a result, they urge "a very strong presumption against" the practice of waivers and suggest that they may be acceptable only with sufficient safeguards to ensure substantive and procedural justice for rights-holders that show "clear demonstration of equality of arms, fully informed claimant consent and provision of comprehensive legal advice, and strict compliance with human rights principles and the effectiveness criteria."[219] Although they suggest that an independent third body should be involved in oversight of these mechanisms, they do not delve into what that arrangement might look like or whether it would involve the state.[220]

Importantly, the Barrick Gold case puts us on notice that companies seeking to come into compliance with the UNGPs might transform "ordinary" complaint mechanisms designed for less serious disputes into extraordinary quasi-judicial mechanisms for some of the more serious human rights claims. Knuckey and Jenkin argue that the Barrick Remediation Framework signals "a new type of process" even if categorized as the type of OGM

table problem in many (if not most) cases." Accountability and Remedy Project, *supra* note 121, at 22. In her early work, Caroline Rees recognized that "one of the most common inadequacies of grievance mechanisms is that they are structured to leave the company in a position of power and the complainant in a position of dependency." Caroline Rees, Rights-Compatible Grievance Mechanisms: A Guidance Tool for Companies and Their Stakeholders 32 Harv. Kennedy Sch. Corp. Soc. Resp. Initiative (2008), https://media.business-humanrights.org/media/documents/files/reports-and-materials/Grievance-mechanisms-principles-Jan-2008.pdf [https://perma.cc/6PZR-VZP5].

215. Effective Operational-Level Grievance Mechanisms, Int'l Comm'n of Jurists 57, 80 (2019), https://www.icj.org/wp-content/uploads/2019/11/Universal-Grievance-Mechanisms-Publications-Reports-Thematic-reports-2019-ENG.pdf [https://perma.cc/ZNP3-DJJ6].

216. Knuckey and Jenkin report that one woman they interviewed explained, "I don't think it's enough. But I have to get it. Some people died, waiting." Knuckey & Jenkin, *supra* note 202, at 810.

217. *Id.* at 815.

218. *Id.* at 816.

219. *Id.*

220. *Id.* at 814–17.

contemplated by the UNGPs.[221] The authors even offer a new term for understanding this adaption: a "company-created human rights abuse remedy mechanism" ("CHRM").[222]

B. *Behind Closed Doors and Beyond Public Oversight: The Wild West of Private Mechanisms for Resolving Human Rights Claims*

Barrick Gold's experience serves as one of the only examples to draw from to understand some of the serious risks that can arise when allowing companies to resort to OGMs to handle serious human rights harms, such as sexual violence. Indeed, no other company has shared their experience so publicly, perhaps because they have not attempted to implement a private human rights remedy to the same extent as Barrick Gold did; or alternatively, they have done so, but learned to keep a low profile to avoid the same negative publicity.[223]

Yet, the seemingly low number of comparative cases should not lead to the conclusion that similar situations do not exist, or that Barrick Gold is simply an outlier. Indeed, the mapping projects shared in Part I.B reveal that companies in fact view OGMs as legitimate venues for resolving human rights claims, especially as they come under increasing state and non-state pressures to establish such mechanisms.[224] However, in comparison to Barrick Gold, this growth of private remedies occurs with little fanfare and only minimal voluntary reporting, leaving this arena unregulated and virtually unknown. Remarkably, the OGM Research Project found that of the companies identified as having a human rights grievance mechanisms, only one percent could be considered fully transparent in disclosing the procedures and outcomes of their OGMs.[225]

Perhaps due to the lack of more controversial cases, there seems to be relatively little debate on the question of whether allowing private remedies for human rights claims is such a good idea, at least not without some official oversight to ensure they comply with baseline standards. Notably, even though much of the discussion surrounding the controversy of Barrick Gold was critical, it rarely went so far as to suggest OGMs should never be used for serious violations, or alternatively, that they should only be used with state oversight. More remarkably, no argument has yet been presented that

221. *Id.* at 801.

222. *Id.*

223. E-mail from John Sherman, Gen. Couns., Shift, to Lisa J. Laplante, Professor of L., New England L. Boston (Feb. 11, 2022) (on file with author). *See also* Knuckey & Jenkin, *supra* note 202, at 819 n.3 ("OGMs include violations of human rights within their eligibility criteria, and so it is possible that isolated incidents of grave abuses have been dealt with through OGMs in the past. We are, however, aware of only two OGMs designed specifically to deal with large numbers of grave violations of human rights abuses in this fashion and following the UN Guiding Principles. These include the mechanism discussed in this article, and a mechanism which has been instituted at African Barrick Gold's (a subsidiary of Barrick Gold Corporation) North Mara mine in Tanzania.").

224. *See supra* Part II.

225. BELANGER & TSUI, *supra* note 17, at 9.

would provide the normative framework to require such oversight, even in cases of lower-level human rights issues that may nevertheless have serious impacts for victims.[226] While Knuckey and Jenkin offer policy reasons to caution against using these non-judicial mechanisms for human rights claims, they do not rely on any legal basis to give teeth to make such limits more than voluntary and discretionary, resulting in a situation that amounts to corporate self-accountability.

This reality may result in part from some ambiguities in the UNGPs on whether these purely private mechanisms can or should be available for resolving human rights issues, especially those considered to be the most serious. As already discussed in section Part I.A, the commentary to Principle 29 only specifies that these private mechanisms "need not require that a complaint or grievance amount to an alleged human rights abuse before it can be raised," but neither does it preclude the possibility of human rights complaints. The only possible limit to their use in these situations may be found in the commentary to Principle 22, which suggests that "some situations, in particular where crimes are alleged, typically will require cooperation with judicial mechanisms."[227] But this dictate does not include guidance on what "cooperation" entails, or whether the reference to judicial mechanisms would result in a full stop to the availability of private civil remedies for such crimes. Moreover, a bright-line rule that victims should be able to access judicial remedies does not necessarily suggest that a state must regulate, review, or provide oversight of private remedies that are resolving human rights claims of any type, whether serious or not. Indeed, in states where official channels are unavailable or ineffective, such as in post-conflict communities, there would never be any check whatsoever.

Yet, while the UNGPs may appear silent on the question of state oversight of OGMs, they do encourage states to promote and facilitate the development of OGMs.[228] Indeed, the commentary to Principle 28 notes that "States can play a helpful role in raising awareness of, or otherwise facilitating access to, such options, alongside the mechanisms provided by States themselves."[229] It further instructs states to "consider ways to facilitate access to effective non-state-based grievance mechanisms dealing with business-related human rights harms."[230]

226. While it perhaps may be useful to distinguish the "severity" of a human rights claim and even draw some bright lines when companies should never handle those related to the most dire examples (such as rape, torture, and killing), "less severe" human rights harms may still warrant some form of oversight as they directly impact people in a manner that feels serious, such as pollution of important water sources affecting health and even life, lost wages, unsafe working conditions, etc.

227. UNGPs, *supra* note 5, princ. 22 cmt., at 25.

228. Report of the Human Rights Council on its Forty-Sixth Session, U.N. Doc. A/HRC/46/2 (Oct. 18, 2021).

229. UNGPs, *supra* note 5, princ. 28 cmt., at 31.

230. John Ruggie (Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Guiding Principles on Business and Human Rights: Implementing the*

A plain reading of these UNGPs may be interpreted by companies to suggest that they may view internal company remedies as a legitimate avenue for resolving human rights claims, including serious ones. Moreover, subsequent guidance on the role of OGMs in the UNGP framework seems to also follow this reading. For example, in 2017, the U.N. Working Group on Business and Human Rights issued a report in which it unpacked the concept of access to effective remedies and adopted an "all roads to remedy" approach to resolving human rights claims, which includes company-level grievance mechanisms.[231]

Yet, importantly, Ruggie did recognize that there may be special concerns with using OGMs for grievances for human rights abuses when the company is "closely involved in their design and administration, which can raise questions of bias or the critique that they are illegitimate sources of remedy."[232] Thus, his team worked on approaches to ameliorate the possibility of companies being "the sole judge of their own actions."[233] Indeed, the UNGPs include a separate principle to provide benchmarks against which OGMs should be scrutinized within the more general "Effectiveness Criteria for Non-judicial Grievance Mechanisms" found in Principle 31, which also applies in part to state-based non-judicial grievance mechanisms.[234] In particular, the UNGPs posit that to be effective, these mechanisms must be legitimate,[235] accessible,[236] predictable,[237] equitable,[238] transparent,[239] rights-compatible,[240] and a source of continuous learning.[241] The provisions

United Nations "Protect, Respect and Remedy" Framework, at 24–25, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).

231. Rep. of Working Grp., *supra* note 40, ¶¶ 55–56 (referring to the range of judicial and non-judicial (including private) mechanisms that can be used to seek a resolution to a human rights claim).

232. JUST BUSINESS, *supra* note 32, at 154.

233. *Id.* at 104.

234. UNGPs, *supra* note 5, princ. 31, at 33–35.

235. *Id.* princ. 31(a), at 33 ("[E]nabling trust from the stakeholder groups for whose use they are intended and being accountable for the fair conduct of grievance processes.").

236. *Id.* princ. 31(b), at 33 ("[B]eing known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access."). The Commentary speaks to barriers to access. *Id.* Principle 31 cmt., at 34; *id.* Principle 26, at 28–30.

237. *Id.* princ. 31(c), at 33 ("[P]roviding 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."). The Commentary conflates trust and predictability, suggesting that the mechanisms should "provide public information about the procedure it offers. Timeframes for each stage should be respected wherever possible, while allowing that flexibility may sometimes be needed." *Id.* Principle 31 cmt., at 34.

238. *Id.* princ. 31(d), at 33 ("[S]eeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms.").

239. *Id.* princ. 31(e), at 33 ("[K]eeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake.").

240. *Id.* princ. 31(f), at 34 ("[E]nsuring that its outcomes and remedies accord with internationally recognized human rights standards.").

241. *Id.* princ. 31(g), at 34 ("[D]rawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms.").

in Principle 31(h) target OGMs by calling for engagement and dialogue with the individuals or communities that will use these channels to resolve disputes.[242]

Principle 31, in theory, was put in place to help to avoid some of the potential pitfalls associated with using non-judicial remedies, including private remedies, for resolving human rights claims.[243] Yet, although Principle 28 of the UNGPs assumes that states will encourage access to "effective" non-state-based grievance mechanisms, there are no explicit directives on how a state will evaluate or ensure that these private remedies are in fact effective, and whether that assessment will occur through formal regulation or oversight. Certainly, as a non-binding authoritative source, the drafters of the UNGPs would not be in a position to dictate how, exactly, states should ensure such "effectiveness" of OGMs.

In the absence of such clear directives, one sees minimal action on the part of states to oversee the development and operation of OGMs, as recognized by a discussion paper issued in 2019 by the Office of the High Commissioner for Human Rights as part of its Access to Remedy Project III.[244] Based on a comprehensive scoping exercise, they report that:

> [T]here appears to be a general disengagement by State agencies in the activities of private grievance mechanisms relevant to business and human rights, despite the regulatory implications. One survey respondent observed that regulatory agencies can sometimes be unsure of their proper role; while they may wish to support the creation of more options for obtaining private remedies, they are wary of interfering too much and blurring the lines between "official" and private activities.[245]

The OHCHR found a state of complacency or deference to private mechanisms, and "[g]iven the primacy of States as guarantors of human rights under international law, this is obviously of great concern."[246] To the knowledge of the Author at the time of writing, there is no example of a state actively regulating or overseeing OGMs to ensure compliance with the UNGP Principle 31 benchmarks. Rather, the current practice sees a reliance on companies themselves to use their own discretion and motivation to reach these guidelines.

And yet, the Corporate Human Rights Benchmark observed in its 2020 report that only four of the 229 global companies it tracked took measures

242. *Id.* princ. 31(h), at 34 ("F]ocusing on processes of direct and/or mediated dialogue to seek agreed solutions, and leaving adjudication to independent third-party mechanisms, whether judicial or non-judicial.").

243. Juho Saloranta, *Establishing a Corporate Responsibility Ombudsman: Enhancing Remedy Through State-based Non-judicial Mechanisms?*, 28 Maastricht J. Eur. & Compar. L. 102, 113 (2021).

244. Accountability and Remedy Project, *supra* note 121, at 19.

245. *Id.*

246. *Id.*

to evaluate the effectiveness of their OGMs.[247] Indeed, most commentaries and guidelines urging companies to ensure compliance with Principle 31 guidelines carry implicit assumptions that first, companies will choose to follow these guidelines; and second, in doing so, they will have the capacity to fulfill them fully without any oversight or guidance from the state.

Perhaps most concerning is that while there is language suggesting that the processes and outcomes of OGMs must be "rights compatible," to date there is still little guidance on how to measure compliance with this standard, never mind how it should be enforced.[248] Certainly, there is no clear arrangement for ensuring OGMs are held accountable for not complying with the UNGP Principle 31 guidelines, or worse, for causing new harms through the operation of their OGMs. As of late, the only "stick of accountability" for companies that fall out of compliance with voluntary initiatives is to revoke their membership and publish a voluntary initiative's findings with the hope that public scrutiny will push companies to fix the issue. Even with the slow development of due diligence laws that require grievance mechanisms, these laws offer minimal assurance that these private mechanisms are effective, fair, and in compliance with human rights norms.

States also lack clear guidance on their role on ensuring the "effectiveness" criteria of OGMs that may otherwise come from the monitoring bodies charged with overseeing the implementation of the UNGPs. For example, although the U.N. Working Group on Business and Human Rights in its report on access to remedy urges that OGMs "satisfy all effectiveness criteria stipulated in Guiding Principle 31," it proposes no clear path to ensuring such compliance.[249] Without further stipulation, the current situation suggests that companies are the ultimate judges of whether they operate their private remedies in an effective and rights-compatible manner.

Thus, ultimately, unlike public judicial and state non-judicial remedies that operate within a normative framework that ensures accountability, it often feels as though OGMs operate in a Wild West of self-accountability, leaving the victims of human rights often at the mercy of companies to ensure their right to an effective and adequate remedy. A general lack of normative guidance on the appropriate scope and application of OGMs leaves unclear the legal boundaries that limit their use. Worse, it may even appear that there are no boundaries at all. Without any oversight or normative regulations on whether and how these private remedies may operate,

247. CHRB Benchmark, *supra* note 90, at 29.

248. Specifically, the commentary to UNGP Principle 28 refers to "culturally appropriate and rights[-]compatible" processes. UNGPs, *supra* note 5, princ. 28, at 31. Principle 31(f) emphasizes that "[g]rievances are frequently not framed in terms of human rights and many do not initially raise human rights concerns. Regardless, where outcomes have implications for human rights, care should be taken to ensure that they are in line with internationally recognized human rights." *Id.* princ. 31, at 34.

249. Rep. of Working Grp., *supra* note 40, ¶ 71.

there is always the risk that victims will not receive just and fair redress, which ultimately undermines the aim of full corporate accountability.

Ultimately, current practice suggests the perpetration of the same "permissive environment for wrongful acts by companies without adequate sanctions or reparations" that Ruggie sought to address in the first place.[250] The idea of corporate remedies existing outside the boundaries of the law is all the more concerning when they relate to the most serious human rights claims, such as torture, rape, killings, and other forms of coercion and violence condoned or ordered by companies.[251] At the end of the day, in settings where there is no active government involvement in ensuring an effective remedy, this arrangement returns corporate accountability to former approaches of self-regulation, where it is left to the good faith of companies to ensure rights-compatible remedial processes and outcomes.

C. Uncharted Territory: Searching for Normative Boundaries of Private Remedies

The lack of clear guidance on the normative boundaries of OGMs traces back to the Barrick Gold controversy, which presented the first opportunity to question whether such boundaries existed, and if not, whether they should exist. Notably, the controversial case prompted a unique intervention by the U.N. Office of the High Commissioner for Human Rights in 2013 when it was asked by civil society to issue an opinion regarding aspects of Barrick Gold's use of an OGM.[252] Yet, this opinion did not form any hard normative boundaries for companies employing private grievance mechanisms, but instead left open the need for further legal guidance on such limits. Moreover, the OHCHR chose not to clarify the proper role of the state regarding private remedies.[253]

In analyzing the use of waivers as part of the settlement brokered by Barrick Gold's OGM, the OHCHR recognized the lack of international legal guidance on the question before them.[254] Finding no international law prohibiting such waivers, the OHCHR adopts what could be best described as a policy position in support of the waiver program—due in large part to the fact that business enterprises seek predictability and finality—analogous to ordinary settlement practices in law.[255] Notably, the opinion displays re-

250. JUST BUSINESS, *supra* note 32, at xxiii.

251. *See supra* note 26–30 and accompanying text for discussion.

252. RE: ALLEGATIONS, *supra* note 22.

253. *Id.* at 1 ("The opinion letter therefore does not address the obligations of the Government of Papua New Guinea under international human rights law and standards to ensure reparation for victims and accountability of the perpetrators of the sexual violence that underlies the establishment of the Porgera remediation framework.").

254. *Id.* at 9–10.

255. *Id.* at 8.

luctance to reach an absolute endorsement of waivers, and instead recommends that they be used minimally and carefully.[256]

Interestingly, the OHCHR justifies its policy position by analogizing OGMs to state-based reparation programs often associated with post-conflict recovery.[257] In doing so, the OHCHR suggests that "for state-based remediation frameworks there is no consistent practice or jurisprudence on the issue from regional and national courts" to provide any firm normative boundaries for the use of non-judicial reparation programs.[258] The opinion focuses on the fact that contextual factors play a significant role in determining the scope of reparation programs in these post-conflict settings, observing practice variance in whether these programs are final in their determination of reparations for victims of human rights violations.[259] In drawing this analogy, the OHCHR focused on the fact that national governments must consider policy choices in designing their reparation programs given "over-stretched national budgets, unwieldy numbers of potential claims which might overwhelm national courts, and the need for broad social reconciliation."[260]

In analyzing the OHCHR's opinion concerning the Barrick Gold case, Knuckey and Jenkin accept that perhaps CHRMs (the new adaptions of OGMs to handle human rights claims) may deviate from traditional avenues of redress and instead have "more in common with some transitional justice or state-based reparations processes, or structured settlements."[261] However, they question "whether there is a legal basis for transplanting legal standards from post-conflict state-based reparations schemes directly to CHRMs."[262] For that reason, they recognize the value of considering "how principles of law and practice emerging from these processes may assist in the interpretation of the Guiding Principles, and provide guidance where the Guiding Principles are silent."[263]

In responding to this call for further examination, the next section provides a deeper look at existing human rights law which guides, and even limits, the development of administrative reparation programs in post-conflict settings, which are often discussed through the lens of transitional justice.[264] The next section argues that the OHCHR's use of an analogy with

256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*
260. Knuckey & Jenkin, *supra* note 202, at 811.
261. *Id.* at 817.
262. *Id.* at 811.
263. *Id.* at 817.
264. *See generally* Paige Author, *How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice*, 31 HUM. RTS. Q. 321 (2009) (offering an overview of the historical origins of the transitional justice field). Roht-Arriaza takes this approach to defining transitional justice as a "set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law."

these programs is incomplete, and even flawed. The Author suggests that this comparative approach would even provide strong justifications for erecting more legal limits on purely private remedies employed to resolve human rights claims and be subject to some form of oversight to be truly "rights compatible," as urged by Principle 31 of the UNGPs.

IV. An Argument For Regulation: The Analogy Between Post-Conflict Reparation Programs and Private Remedies

To fully understand the relevance of state administrative reparation plans erected as part of transitional justice programs, it is helpful to first understand their historical development before discussing how they have come to be reviewed by international human rights bodies.

A. Administrative Reparation Programs in Transitional Justice Settings

Similar to the topic of OGMs, administrative reparation programs flew under the radar for many years despite their growth in countries seeking to ensure redress for periods of war, repression, apartheid, and other situations that led to widespread and serious human rights violations.[265] According to the Transitional Justice Research Collaborative, in the last several decades there have been approximately forty-five reparation programs across thirty-one countries, often following the recommendations of a truth commission's investigations.[266] These reparation programs exist as a non-judicial alternative to provide redress to a large number of victims, who often experience the most serious types of human rights violations, such as extrajudicial killings, torture, rape, disappearances, and other acts of political violence.[267] Notably, these abuses also constitute crimes under international law.[268]

Despite the seriousness of these claims, alternative approaches to remedies are often justified by the fact that the often fractured societies using reparation programs possess weakened legal and political infrastructure that is not

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Naomi Roht-Arriaza, *The New Landscape of Transitional Justice*, *in* Transitional Justice In The Twenty-First Century 2 (Naomi Roht-Arriaza & Javier Mariezcurrena eds., 2006). *See also* Ruti Teitel, *Transitional Justice in a New Era*, 26 Fordham Int'l L.J. 893, 893 (2003).

265. Priscilla Hayner, in her updated authoritative text on truth commissions, comments that only in the previous decade was there more study of reparation programs to respond to the increasing resort to them by governments. Priscilla B. Hayner, Unspeakable Truths: Transitional Justice And The Challenge Of Truth Commissions 164 (2d ed. 2011). Hayner notes that this attention is seen through the "significant expansion in the literature on the subject of reparations." *Id.* Falk also notes that there has been a general lack of extensive study of reparations until recently. *See* Richard Falk, *Reparations, International Law, and Global Justice: A New Frontier*, *in* Handbook of Reparations 478, 484–85 (Pablo De Greiff ed., 2006) (discussing international law developments showing a "wider interest in reparations").

266. Geoff Dancy et al., *Download,* Transitional Justice Research Collaborative, https://tjrc.tulane.edu/download/ [https://perma.cc/2EC2-FDVJ] (last accessed Oct. 17, 2021).

267. *See* Duncan Pedersen, *Political Violence, Ethnic Conflict and Contemporary Wars: Broad Implications For Health and Social Well-being*, 55 Soc. Sci. & Med. 175, 176–77 (2002).

268. Carla Edelenbos, *Human Rights Violations: A Duty to Prosecute?*, 7 Leiden J. Int'l L. 5, 6 (1994).

capable of responding to the many victims harmed during periods of unrest.[269] Indeed, the breakdown of the rule of law usually forecloses the possibility of quick redress through "ordinary" judicial recourse, especially when there are too many claims to handle effectively.[270] These are often the same types of settings that prompt some to promote the use of OGMs to offer remedies when the state fails to do so.[271]

However, states resorting to administrative reparation programs in transitional justice settings do not operate beyond all legal boundaries and with complete discretion in determining the effectiveness of their reparations. Instead, they must try to approximate conventional legal principles of ensuring adequate remedies, although in a more flexible (non-judicial) manner to accommodate the extraordinary nature of the context.[272] For example, governments use legal criteria to register victims, determine reparation packages, and ensure fair distributions of damages.[273] In some circumstances, given the wide range of claims held by so many victims, it might be that these reparation programs do not always directly respond to the specific damages arising out of the harms caused by the rights violations, but rather reflect an average calculation corresponding to an average standard for determining damages found in national law.[274] Ultimately, most of these programs include a wide range of remedies such as compensation, restitution, rehabilitation, satisfaction, and guarantees of non-repetition.[275] Victims who have received reparations elsewhere, or opt for a judicial remedy, may be excluded from the administrative reparation program, but always reserve the right to challenge such exclusion.[276]

It is these contextual aspects of transitional justice reparation programs, processes, and outcomes that led the OHCHR to view them as a transferable model for testing the legal limits of company-level grievance mechanisms. With both the OGM and the transitional justice approach, human rights claims that would otherwise go through civil litigation are instead handled administratively due to the inability to rely on traditional judicial avenues of redress, either because they are unavailable or ineffective. However, as will be explored next, the key difference between purely private remedies and those implemented as part of a transitional justice program is that the latter

269. Laplante, *Just Repair*, *supra* note 42, at 521.

270. *See* Jamal Benomar, *Justice after Transitions*, *in* TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES 32, 41 (Neil J. Kritz ed., 1995); Carla Hesse & Robert Post, *Introduction, in* HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA 13, 20–21 (1999).

271. *See supra* Part III.

272. Laplante, *Just Repair*, *supra* note 42, at 577.

273. *See generally* Lisa J. Laplante, *Negotiating Reparation Rights: The Participatory and Symbolic Quotients*, 19 BUFFALO HUM. RTS. L. REV. 217 (2012).

274. *See generally id.*

275. *See* U.N. Basic princ., *infra* note 279, Principle 18, at 7.

276. *See generally* Lisa J. Laplante, *The Law of Remedies and the Clean Hands Doctrine: Exclusionary Reparation Policies in Peru's Political Transition*, 23 AM. U. INT'L L. REV. 51 (2007).

can be, and are, subject to external review and operate within clear legal boundaries largely shaped by international human rights law.[277]

B. The Legal Boundaries of Administrative Reparation Programs

One of the ways to distinguish transitional justice reparation programs from OGMs is that they are non-judicial, *state-based* programs that are unique creations of a government, and therefore public. In contrast, OGMs are created by companies and operated by purely private administrators. Thus, the former can be held accountable for failing to be rights-compatible, whereas currently it seems the latter may escape such scrutiny. Thus, contrary to the suggestion made in the OHCHR opinion, RE: ALLEGATIONS REGARDING THE PORGERA JOINT VENTURE REMEDY FRAMEWORK, discussed in Part III.C, these administrative reparation plans instituted by governments are not completely flexible, but rather operate within hard legal borders that guide their development.

As official undertakings by governments, administrative reparation programs can be subject to national government scrutiny or review (e.g. an ombudsman, a Minister's office, or parliamentary body) as well as international review by a human rights enforcement body. This oversight arises out of the fact that merely implementing *any* type of reparation policy may not adequately fulfill the state's international obligation—there is not an "anything goes" policy just because it is part of a transitional justice setting.[278] Instead, the government needs to strive to meet the minimum criteria established by Principle 2(c) of the U.N. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ("U.N. Basic Principles"), which states that reparations must be "adequate, effective, prompt and appropriate."[279]

States parties to human rights treaties may also be held to these standards by international human rights enforcement bodies. For example, an individual may appeal to international enforcement mechanisms established by a human rights treaty and argue that her government failed to provide an adequate and appropriate remedy for the violation of a primary, substantive right, such as the right to be free from torture.[280] The international body very may well decide that the state party did in fact violate its international obligations to provide adequate and appropriate remedies and order the state

277. Laplante, *Just Repair*, *supra* note 42, at 516.

278. *Id.*

279. *See* G.A. Res. 60/147, Principle 2(c), at 4, U.N. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Mar. 21, 2006) [hereinafter U.N. Basic Principles].

280. Laplante, *Just Repair*, *supra* note 42, at 525.

defendant to provide reparations to the petitioner.[281] Such a review process may occur even when a government offers reparations through non-judicial reparation programs. In fact, this type of review has already occurred in the Inter-American Court of Human Rights ("IACtHR"), which has contentious jurisdiction to receive complaints against member states of the American Convention of Human Rights. Given the prevalence of reparation programs in the Latin American region, these rulings have established important baseline rules for domestic reparation programs.[282]

For example, in 2006, the IACtHR recognized and applauded Chile's efforts to return to democracy through a policy of reparations for human rights violations that occurred during its military dictatorship.[283] While the facts were not disputed that the victim's next of kin had been adequately redressed through this program, the court nevertheless made clear that

> [States must undertake] positive measures . . . to guarantee that injurious acts like the ones of the instant case do not occur again. The duty to make reparations, governed by International Law in all of its aspects (scope, nature, modality, and the determination of beneficiaries) may not be altered or breached by the respondent State by invoking domestic legal provisions.[284]

The court applied this normative framework the same year in the Vargas v. Colombia case and the Gomes Lund v. Brazil case, noting in both that "[i]f national mechanisms exist to determine forms of reparation, these procedures should be evaluated and encouraged" and that, to this end, it should be considered whether they are objective, reasonable, and effective.[285] In particular, the court viewed this review as falling within its exercise of "subsidiary and complementary competence" to order reparations if the domestic programs fall short of this analysis.[286] This approach was further developed

281. In 1989, the Inter-American Court clarified this point in its advisory opinion in which it declared, "the absence of an effective remedy for violations of the rights recognized by the Convention *is itself a violation of the Convention* by the State Party in which the remedy is lacking." Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8 American Convention on Human Rights), Advisory Opinion OC-9/87, Inter-Am. Ct. H.R. (ser. A) No. 9, ¶ 24 (1987) (emphasis added).

282. For discussion, see Clara Sandoval, *Two Steps Forward, One Step Back: Reflections on the Jurisprudential Turn of the Inter-American Court of Human Rights on Domestic Reparation Programmes*, 22 INT'L J. HUM. RTS. 1192, 1192–208 (2017).

283. Almonacid Arellano v. Chile, Preliminary Objections, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 138 (Sept. 26, 2006) ("The Court celebrates the steps taken by the State and highlights the work of the *Comisión Nacional de Verdad y Reconciliación* (National Truth and Reconciliation Commission), the *Corporación Nacional de Reparación y Reconciliación* (National Reparation and Reconciliation Corporation) and the *Comisión Nacional sobre Prisión Política y Tortura* (National Commission on Political Imprisonment and Torture).").

284. *Id.* ¶ 136.

285. Manuel Cepeda Vargas v. Colombia, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 213, ¶ 246 (May 26, 2010); Gomes Lund v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 219, ¶ 303 (Nov. 24, 2010).

286. *Id.*

in 2013 when the IACtHR reviewed Peru's administrative reparation programs in the Tenorio Roca case.[287] In analyzing the benefits provided through Peru's *Plan Integral de Reparaciones*, which had been created on the country's truth commission's recommendation, the court determined that there was not sufficient evidence for it to determine if the state effectively delivered reparations.[288] Thus, the court proceeded to order reparations for the victims who had allegedly been included in the administrative reparation program.[289] This precedent helped establish a presumption that a state must prove that its program could meet baseline criteria of ensuring effective remedies to avoid additional liability for reparations.

Building on this precedent, that same year the court was tasked again in the García Lucero case with evaluating a reparation program connected with the Chilean National Truth and Reconciliation Commission, also known as the Rettig Commission.[290] The court declared that "the existence of administrative programs of reparation must be compatible with the State's obligations under the American Convention [on Human Rights] and other international norms."[291] Furthermore, the IACtHR referred to the evaluative criteria set forth by the U.N. Basic Principles to evaluate whether Chile's national reparation program was "[a]dequate, effective, and prompt."[292] In referring to this criteria the court established that administrative reparation programs should take "account of individual circumstances" and be "appropriate and proportional to the gravity of the violation and circumstances of each case" in order to provide "full and effective reparation."[293] They also include within the concept of reparations medical and psychological care, legal and social services,[294] and the fullest rehabilitation possible.[295]

Notably, the court has even gone beyond guidelines established by the U.N. Basic Principles to carve out additional factors that may be used to

287. Rigoberto Tenorio Roca v. Perú, Excepciones Preliminares, Fondo, Reparaciones y Costas, Inter-Am. Ct. H.R. (ser. C) No. 314, ¶ 277 (June 22, 2016).

288. *Id.* ¶ 279.

289. *Id.*

290. García Lucero v. Chile, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 267, ¶¶ 3, 66 (Aug. 28, 2013).

291. *Id.* ¶ 190. The court indicated that non-compliance would constitute a breach of "the State's duty to ensure the 'free and full exercise' of the rights to judicial guarantees and protection, in keeping with Articles 1(1), 25(1) and 8(1) of the [American] Convention [on Human Rights], respectively." *Id.*

292. *Id.* ¶ 183 n.186. The court refers to General Comment No. 3 issued by the Committee Against Torture which stated: "Reparation must be adequate, effective and comprehensive. States parties are reminded that in the determination of redress and reparative measures provided or awarded to a victim of torture or ill-treatment, the specificities and circumstances of each case must be taken into consideration and redress should be tailored to the particular needs of the victim and be proportionate to the gravity of the violations committed against them." *Id.* ¶ 188.

293. *Id.* ¶ 196 (citing U.N. Basic Principles, *supra* note 279, princ. 18, at 7).

294. *Id.* (citing U.N. Basic Principles, *supra* note 279, princs. 18, 20, 21, at 7–8).

295. *Id.* (citing Hum. Rts. Comm., General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), ¶ 15, U.N. Doc. HRI/GEN/1/Rev.7 (Mar. 10, 1992)).

assess a domestic reparation plan through its review of Colombia's National Plan of Assistance and Integral Reparation for Victims of the Colombian Armed Conflict, *Prosperidad para Todos* ("PNARIV").[296] For example, in Marino López v. Colombia, the court was willing to accept that a domestic reparation program would suffice to provide effective remedies and reparations. Nevertheless, the court took an expansive view of what constituted appropriate remedies and ordered additional reparations, including more access to rehabilitative services to avoid any type of obstacle to accessing these reparations.[297] Similarly, the Court also expanded the notion of adequate reparations to include other measures of truth and justice, victim participation in the process, and reasonableness and proportionality, among other considerations.[298]

Ultimately, the IACtHR's jurisprudence demonstrates that a government does not enjoy free license to operate its non-judicial reparation programs during transitional justice processes in any manner it desires. It is thus not left entirely to the state's discretion to ensure that its non-judicial remedial programs are rights-compatible. Rather, the government may be held to account for failing to guarantee the right to an adequate remedy for the beneficiaries of these programs. Notably, the IACtHR developed much of this jurisprudence just as the OHCHR itself struggled with understanding the possible normative limitations to non-judicial remedy programs set up by companies in its opinion on Barrick Gold.

Had the OHCHR chosen to explore the role of the state, it would have better recognized the normative limitations that should be placed on OGMs as well. In particular, this line of inquiry would lead to the eventual conclusion that administrative reparation programs within transitional justice processes are set up not on a whim or as an act of charity, but rather as a

296. The PNARIV aims for "integral reparation of the victims of the armed conflict through: (a) restitution; (b) compensation; (c) rehabilitation; (d) satisfaction, and (e) guarantees of non-repetition" and consists of an extensive combination of pre-existing reparation laws, including the Victims and Land Restitution Law, the Program for the Psychosocial Care and Integral Health of the Victims under Law, and programs related to comprehensive care for victims of sexual crimes. *See* Operation Genesis, *infra* note 298, ¶ 460 n.733.

297. Marino López v. Colombia, Case No. 12.573, Inter-Am. Comm'n H.R., Report No. 64/11, Recommendations ¶ 7 (2011).

298. Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 270, ¶¶ 470–71 (Nov. 20, 2013) [hereinafter Operation Genesis] ("[Transitional justice reparation programs] must be understood in conjunction with other measures of truth and justice, provided that they meet a series of related requirements, including their legitimacy – especially, based on the consultation with and participation of the victims; their adoption in good faith; the degree of social inclusion they allow; the reasonableness and proportionality of the pecuniary measures; the type of reasons given to provide reparations by family group and not individually; the distribution criteria among members of a family (succession order or percentages); parameters for a fair distribution that take into account the position of the women among the members of the family or other differentiated aspects, such as whether the land and other means of production are owned collectively . . . . Furthermore, in the case of pecuniary reparations, a criterion of justice should include aspects that, in the specific context, do not become illusory or derisory, and make a real contribution to helping the victim deal with the negative consequences of the human rights violations on his life.").

direct means of a government seeking to fulfill its obligation to protect the right to effective remedies and reparations.[299] Indeed, these positive state duties are why state administrative reparation programs are subject to judicial review. As will be discussed next, these same positive duties support the proposition that private remedies like OGMs should also be subject to regulation and oversight.

V. Patrolling the Borders of Corporate Accountability: Limiting the Reach of Private Remedies through International Human Rights Law

As will be explained in this Part, states have a positive duty to ensure private OGMs comply with international human rights standards. This duty explains not only why states' own reparation programs can become subject to review, but also why they must better regulate and oversee the operation of private OGMs that handle human rights claims.

Even when a company bears the primary responsibility for human rights harms caused by its operations, services, or goods, the government also incurs legal responsibility for failing to prevent these human rights harms, and consequently, failing to protect the fundamental rights of people within their jurisdiction.[300] The state incurs this liability regardless of whether the perpetrator is a non-state actor, such as a private company.[301] In essence, the private and public responsibility for these harms run parallel to one another. Thus, the state's responsibility is not extinguished when a human rights claim is resolved by a private OGM, but rather continues to exist.

Importantly, when states fail to protect human rights, a second obligation arises: to ensure that victims have access to effective and adequate remedies, including reparations.[302] Thus, when the state defers, acquiesces, or otherwise tolerates a situation in which a company fails to provides a private remedy to resolve human rights claims and victims are left without an effec-

299. Dinah Shelton, Remedies in International Human Rights Law 60 (2d ed., 2006). *See also* Operation Genesis, *supra* note 298, ¶ 470 ("In relation to the measures of reparation, the Court underlines that international law establishes the individual entitlement of the right to reparation. Despite this, the court indicates that, in scenarios of transitional justice in which States must assume their obligations to make reparation on a massive scale to numerous victims, which significantly exceeds the capacities and possibilities of the domestic courts, administrative programs of reparation constitute one of the legitimate ways of satisfying the right to reparation."). Principle 12 of the U.N. Basic Principles also recognizes that an effective judicial remedy may involve administrative and other bodies *"as well as mechanisms, modalities, and proceedings conducted in accordance with domestic law."* U.N. Basic Principles, *supra* note 279, princ. 12, at 6 (emphasis added).

300. Velásquez Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 304 (July 29, 1988) (the court arrives at this recognition through its interpretation of reading together Articles 25 and 8(1) and Article 1(1) of the American Convention).

301. *Id.*

302. U.N. Basic Principles, *supra* note 279, princ. I(2)(b)–(d), at 4. For discussion see George & Laplante, *supra* note 42, at 377.

tive remedy, it could potentially be liable for flaws in that private redress process.

The case of Barrick Gold illustrates this "dual-level" positive state responsibility. In that case, although employees of a privately owned mine were the alleged perpetrators of sexual violence, the state of Papua New Guinea failed to protect the victims, thus incurring its own responsibility for these human rights violations under international law.[303] The state's failure to prevent the abuse and protect the villagers also triggered its obligation to provide the victims access to an effective remedy, whether judicial or non-judicial. The state's remedial responsibility was not extinguished when it permitted the company to establish an OGM to resolve these serious human rights claims. Rather, the government could still face claims brought by sexual assault victims alleging the state had failed to protect their right to a remedy, especially if they had no other option but to work with the OGM. Importantly, this dual level of responsibility firmly establishes that a state cannot delegate—or essentially privatize—its positive duties to protect and remedy human rights violations.

As will be discussed in the next Section, international human rights jurisprudence, drawn from the Inter-American and European human rights systems, provides the normative framework for this dual-level of state responsibility and supports the proposition that a state must regulate and oversee OGMs used to resolve human rights claims. Significantly, these same human rights principles are recognized in Pillar I of the UNGPs; for this reason, jurisprudence emanating from the Inter-American system in particular has begun to engage directly with the UNGPs in setting these normative borders. Importantly, these recent jurisprudential developments underscore that the UNGPs can be interpreted to support the argument that states have an obligation to ensure the effective operation of OGMs that handle human rights claims.

A. The Positive Duty of States to Protect Human Rights

A foundational principle of human rights law recognizes that states have a positive duty to prevent the violation of fundamental rights, regardless of the identity of the perpetrator. The Inter-American Court of Human Rights ("IACtHR") first recognized this positive duty in relation to private parties in a contentious 1988 case, establishing that

> An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to

303. *See supra* Part III.A.

> prevent the violation or to respond to it as required by the Convention.[304]

Importantly, this same duty can be found in Pillar I of the UNGPs and corresponds with the "duty to protect."[305] Building off this foundation, Principle 12 of the UNGPs recognizes the dual-level duties to protect and respect human rights that arise out of existing treaties such as the International Covenant on Civil and Political Rights.[306] This dual-level of responsibility also appears in the commentary to Principle 1 of the UNGPs which indicates:

> [S]tates are not per se responsible for human rights abuse by private actors. However, States may breach their international human rights law obligations where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actor's abuse.[307]

Similarly, in 2003, the IACtHR recognized this principle in its advisory opinion on the Juridical Condition and Rights of Undocumented Migrants, in which it emphasized:

> [T]he positive obligation of the State to ensure the effectiveness of the protected human rights gives rise to effects in relation to third parties (*erga omnes*). This obligation has been developed in legal writings, and particularly by the *Drittwirkung* theory, according to which fundamental rights must be respected by both the public authorities and by individuals with regard to other individuals.[308]

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304. Honduras, *supra* note 300, ¶ 172.

305. *See* UNGPs, *supra* note 5, at 1.

306. *Id.* princ. 12, at 13–14.

307. *Id.* princ. 1 cmt., at 3. (requiring States to "protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.").

308. Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 140 (Sept. 17, 2003). The court has also recognized this principle in subsequent cases related to non-state actors engaged in internal armed conflict, such as paramilitary groups. *See* Mapiripán Massacre v. Colombia, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C), No. 134, ¶ 111 (Sept. 15, 2005) ("Said international responsibility may also be generated by acts of private individuals not attributable in principle to the State. The States Party to the Convention have *erga omnes* obligations to respect protective provisions and to ensure the effectiveness of the rights set forth therein under any circumstances and regarding all persons. The effect of these obligations of the State goes beyond the relationship between its agents and the persons under its jurisdiction, as it is also reflected in the positive obligation of the State to take such steps as may be necessary to ensure effective protection of human rights in relations amongst individuals. The State may be found responsible for acts by private individuals in cases in which, through actions or omissions by its agents when they are in the position of guarantors, the State does not fulfill these *erga omnes* obligations embodied in Articles 1(1) and 2 of the Convention.").

More recently, the court generated judgments further recognizing the positive duty of states to regulate private companies in the 2016 Hacienda Brasil Verde Workers v. Brazil case, which involved eighty-five workers who had been enslaved through human trafficking to work on a private farm.[309] Finding that the state failed to prove its policies were sufficient and effective in preventing the company's unlawful activities and to act with due diligence upon receiving complaints, the court ultimately held the state responsible for harms caused by the private entity.[310]

Significantly, the IACtHR has also invoked the positive obligation standard while noting how this obligation mirrors the requirements of the UNGPs. For example, in 2015, it issued a judgment in the Kaliña and Lokono Indigenous Peoples of the Lower Marowijne River case, which centered around Suriname's failure to recognize the collective property title of eight communities when granting mining concessions and licenses to an extractive company that interfered with three nature reserves located on indigenous ancestral territory.[311] The company also failed to comply with standards related to the procedural requirement of free, prior, and informed consent.[312] Notably, the IACtHR found that the state's "failure to supervise an environmental impact assessment," leaving it instead to a private entity that was never monitored by state agencies, violated international standards.[313]

While this case builds off the court's notably strong jurisprudence protecting indigenous rights, it is the first time it explicitly recognized the relevance of the UNGPs in its conclusions.[314] Specifically, the IACtHR not only recognized the state obligations in Principle 1 of the UNGPs, but also that "businesses must respect and protect human rights, as well as prevent, mitigate, and accept responsibility for the adverse human rights impacts directly linked to their activities."[315] In this way, the court began to recognize the parallel responsibility of the state and private entities, while ultimately holding the state accountable for failing to ensure a private actor, the company, complied with these norms.

The court continued to reinforce this principle in subsequent judgments. In the 2020 Employees of the Fireworks Factory of Santo Antônio de Jesus v. Brazil case, which involved workers who were killed during an explosion, the court recalled that "the State had the obligation to ensure the rights

309. *See* Hacienda Brasil Verde Workers v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 318 (Oct. 20, 2016).

310. *Id.* ¶¶ 323, 328.

311. Kaliña and Lokono Peoples v. Suriname, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 309, ¶1 (Nov. 25, 2015).

312. *Id.*

313. *Id.*

314. For more background, see Thomas M. Antkowiak, *A Dark Side of Virtue: The Inter-American Court and Reparations for Indigenous People*, 25 DUKE J. COMPAR. & INT'L L. 1 (2015).

315. Kaliña and Lokono Peoples, *supra* note 311, ¶ 224.

recognized in the American Convention," which "entailed the adoption of the necessary measures to prevent possible violations" and thus ensure positive obligations.[316] The court made clear that this duty extends beyond "state agents and the persons subject to their jurisdiction and encompasses the duty to prevent third parties, in the private sphere, from violating the protected rights."[317] The court indicated that, at a minimum, states "have the duty to regulate, supervise and monitor the implementation of dangerous activities that entail significant risks for the life and integrity of the persons subject to their jurisdiction, as a measure to protect and preserve their rights."[318] In considering the failures in the factory's operations, the IACtHR analyzed the regulations in place at the time and whether the state engaged in "omissive conduct" that impacted human rights.[319]

In this case, the IACtHR once again recognized that its holding "reinforce[d]" the same principle found in the UNGPs, specifically citing to Principle 3 which provides that: "In meeting their duty to protect, States should . . . enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically . . . assess the adequacy of such laws and address any gaps."[320] The IACtHR also references the Guidelines Concerning Corporate Social Responsibility in the Field of Human Rights and the Environment in the Americas to reinforce the state's positive duty to ensure private enterprises comply with labor rights, human rights, and environmental protection laws.[321] Most recently, in the 2021 Miskito Divers v. Honduras case, the court recognized the established rule that attribution of responsibility may flow to states that fail to "prevent third parties, in the private sphere, from violating the protected rights."[322]

Similarly, the United Nations Committee on Economic, Social and Cultural Rights has also recognized the state's positive duty in this arena, and notes that any omission amounts to "the failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to health of others."[323] The Committee also called for a legal frame-

316. Workers of the Fireworks Factory in Santo Antônio de Jesus and Their Families v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 407, ¶ 149 (July 15, 2020). The case involved an explosion in a fireworks factory in Santo Antônio de Jesus on December 11, 1998, in which 64 persons died, including 20 children, and six survived. *Id.* ¶¶ 1, 41.

317. *Id.* ¶ 117.

318. *Id.* ¶ 149.

319. *Id.* ¶ 138.

320. *Id.* ¶ 150 (citing UNGPs, *supra* note 5, princ. 3, at 4).

321. Org. of Amer. States, *Guidelines Concerning Corporate Social Responsibility in the Area of Human Rights and Environment in the Americas*, ¶ j (Aug. 14, 2022), https://www.oas.org/en/sla/iajc/docs/Guidelines_Concerning_Corporate_Social_Responsibility.pdf [https://perma.cc/99ND-66EA].

322. Miskito Divers v. Honduras, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 432, ¶ 44 (Aug. 31, 2021) (reviewing a friendly settlement between the parties regarding the state's failure to regulate the diving industries resulting in Miskito divers suffering sometimes fatal accidents as a result of deep dives).

323. Comm. on Econ., Soc. & Cultural Rts., General Comment No. 14: The Right to the Highest Attainable Standard of Health, ¶ 51, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000). *See generally* Comm. on Econ., Soc. & Cultural Rts., General Comment No. 24 on State Obligations Under the International

work that requires due diligence to identify, prevent, and mitigate threats against human rights, as well as "to account for the negative impacts caused or contributed to by [private actor] decisions and operations and those of entities they control."[324]

In sum, the recognition of a positive duty to protect human rights, regardless of the identity of the wrongdoer, helps avoid the absurdity of leaving people unprotected when harm to dignity occurs at the hands of private actors.[325] On this point, the Inter-American Commission in its 2019 report, *Business and Human Rights: Inter-American Standards*, issued by Soledad García Muñoz (Special Rapporteur on Economic, Social, Cultural, and Environmental Rights), explains that the positive duty ensures that "the object and purpose of international human rights treaties do not run the risk of being substituted, debilitated, or subordinated, in practice, to voluntary decisions or to well-intentioned manifestations of corporate actors."[326] Similarly, the commentary to Principle 25 of the UNGPs recognizes that "[u]nless States take appropriate steps to investigate, punish and redress business-related human rights abuses when they do occur, the State duty to protect can be rendered weak or even meaningless."[327]

Returning to the concept of dual-level responsibility, when states violate this initial positive duty to regulate private conduct, especially that of companies, they then incur a second positive duty to ensure the right to access an effective remedy. Significantly, even if international human rights monitoring bodies cannot rule directly on the responsibility of private actors, they can, in essence, still hold the state vicariously responsible for corporate actions as a result of its failure to properly regulate.[328] As will be explored in the next section, this duty exists independent of the company's liability, and is not extinguished if the private company also seeks to voluntarily redress such harms through its own grievance mechanisms.

B. The Positive State Duty to Guarantee the Right to Remedy

The same treaties that direct states parties to protect the fundamental rights of individuals also require them to provide a prompt and effective

Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, ¶ 14, U.N. Doc. E/C.12/GC/24 (Aug. 10, 2017) [hereinafter CESR General Comment No. 24].

324. CESR General Comment No. 24, *supra* note 323, ¶ 16. S*ee also* Hum. Rts. Comm., Views Adopted by the Committee Under Article 5(4) of the Optional Protocol, Concerning Communication No. 2751/2016, U.N. Doc. CCPR/C/126/D/2751/2016 (Sept. 20, 2019) (finding Paraguay agencies responsible for failing to adequately supervise companies carrying out fumigation with agrochemicals).

325. Laplante, *Human Torts, supra* note 4, at 252–53.

326. Soledad García Muñoz (Special Rapporteur on Economic, Social, Cultural, and Environmental Rights), *Business and Human Rights: Inter-American Standards*, ¶ 194, OEA/Ser.L/V/II (Nov. 1, 2019).

327. UNGPs, *supra* note 5, princ. 25 cmt., at 27.

328. Muñoz, *supra* note 327, ¶ 194 ("A comprehensive and reasonable assessment of the foregoing allows the competent international bodies to refer to the effects that may arise from said internationally recognized rights for private actors, even if they lack the powers to legally rule on these actors' international liability.").

remedy in the event these rights are violated.[329] This positive state obligation corresponds to the right of individuals to access remedy, as recognized by all major international human rights treaties, and mirrors the language in the Universal Declaration of Human Rights: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."[330] The right to remedy has also been recognized through international human rights jurisprudence.[331] Some specialized treaties even refer explicitly to the right to reparations, the outcome of a guaranteed remedial procedure implemented through judicial or non-judicial venues.[332]

For this reason, the approval of the U.N. Basic Principles recognizes that treaty and customary law impose a positive duty on states to guarantee the right to an adequate and effective remedy through judicial, administrative, or other appropriate government venues.[333] Moreover, where states could once foreclose investigation and prosecution of serious human rights violations through amnesties, statutes of limitations, and other procedural hurdles, human rights law curtails such discretion based on this right to a remedy.[334]

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329. *See* G.A. Res. 2200 (XXI), International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights (Dec. 6, 1966).

330. *See* Christopher C. Joyner, *Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability*, 26 DENV. J. INT'L L. & POL'Y 591, 591 (1998). For an exhaustive list of international human rights treaties which include an "effective remedy" provision, see U.N. Basic Principles, *supra* note 279, at 2–4.

331. Velásquez-Rodríguez v. Honduras, *supra* note 300, ¶ 25 (citing Factory at Chorzów (Ger. v. Pol.), Judgment, 1928 P.C.I.J. (ser. A) No. 17, at 29 (Feb. 8)). According to the IACHR, the Factory at Chorzów decision establishes:

> [W]henever a right established in any rule of international law is violated by act or omission, a new legal relationship automatically arises. This relationship is established between the subject to whom the act can be imputed, who must 'respond' by means of adequate reparation, and the subject who has the right to claim the reparation owing to failure to comply with the obligation. In this regard, the Permanent Court of International Justice indicated in paragraph 73 of the said decision that '[i]t is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation. . . . Reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself.

Garcia Lucero et. al. v. Chile, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 627 (Aug. 28, 2013), ¶ 182 n.176. *See also* DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW (3rd ed., 2015).

332. G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination, art. 6 (Dec. 21, 1965) (calling on states parties to ensure that everyone within their jurisdiction have the right to seek "just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination").

333. *See* U.N. Basic Principles, *supra* note 279 (providing a framework predicated on a growing body of jurisprudence arising out of both treaty and customary international law, laying out specific legal contours of the right to reparations). U.N. Basic Principle 18 stipulates the right of victims to "full and effective" reparation." *Id.* at 7.

334. *See* Lisa J. Laplante, *Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes*, 49 VA. J. INT'L L. 915 (2009).

In contrast, while the UNGPs include "access to remedy" as a core pillar, nowhere do they include explicit recognition that such remedies correspond to a victim's stand-alone right.[335] Rather, the focus in Principle 25, as mentioned above, implies that redress serves only a utilitarian function, stating that if states do not take positive steps to redress business-related human rights abuses, then "the State duty to protect can be rendered weak or even meaningless."[336] Without Pillar III more clearly recognizing the positive duty of states to ensure the fundamental rights of victims to remedy, there is the risk that they can be interpreted to support state tolerance of and acquiescence to the practice of providing private remedies without full oversight. However, a contrary conclusion must be reached when the UNGPs are read together with the U.N. Basic Principles.

Indeed, with the dual-level of state responsibilities, the right to an effective remedy forms the basis for the state's obligation to correct failures to protect human rights in the first place. If the state fails to guarantee such a remedy, then the unprotected victim has yet another human rights claim and the state may incur further liability.[337] As stated by the IACtHR,

> States are bound by a general duty to guarantee the free and full exercise of the rights recognized in the Convention to any person subject to their jurisdiction. In accordance with the American Convention, one of the affirmative measures that States Parties *are required to take to fulfill their guaranteed obligation consists in providing effective judicial remedies in line with the rules of due process, and seeking the restoration of the violated right, if possible, and reparation of any damage caused*.[338]

Put simply by the court: "upon the occurrence of an internationally wrongful act attributable to a State, the international liability of such State arises, with the consequent duty to make reparations and to have the consequences of the violation remedied."[339]

This positive obligation goes beyond merely ensuring the mere existence of remedies, but rather requires making sure remedies are effective enough to actually provide redress.[340] Moreover, "the obligation to provide reparations, which is governed in every aspect (i.e., scope, nature, form, and deter-

335. The commentary to Principle 25 sets up the basic idea that remedies are included within the state duty to protect, but do not articulate a direct connection to this duty arising out of the substantive right of victims to this remedy. UNGPs, *supra* note 5, princ. 25, at 27–28.

336. *Id.* princ. 25 cmt., at 27.

337. Kaliña and Lokono Peoples, *supra* note 311, ¶ 237 ("The inexistence of an effective remedy for the violations of the rights recognized in the Convention entails a violation of the Convention by the State Party in which this situation occurs.").

338. Albán Cornejo v. Ecuador, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 171, ¶ 61 (Nov. 22, 2007) (emphasis added).

339. Ximenes-Lopes v. Brazil, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 149, ¶ 208–09 (July 4, 2006) [hereinafter, Ximenes-Lopes].

340. Kaliña and Lokono Peoples, *supra* note 311, ¶ 238.

mination of the beneficiaries) by international law, must not be altered or breached by the respondent on the basis of its domestic law."[341] Reparations generally must entail "full compensation" which the court terms "*restitutio in integrum*" to either restore the victim to his or her original prior condition, or alternatively, take measures that may include compensation, rehabilitation, moral damages, or guarantees of non-repetition, among other forms of reparations.[342]

Like the positive duty analysis in the last section, the duty to provide an effective remedy exists notwithstanding the identity of the harm's perpetrator. Indeed, the obligation to repair may result from the action of state agents *or* the state's omission to protect individuals and communities from third parties (non-state actors).[343] As the IACtHR has recognized,

> Due to the international liability incurred by the State, the latter has a new legal duty: the obligation to make reparations . . . . Therefore, the fact that a civil action for damages has been filed against private individuals with domestic courts is not an impediment for the Court to order monetary reparation [. . .] for violations of the American Convention. It is up to the State, acting within its jurisdiction, to address the consequences of the civil action for damages filed by [the plaintiff] in the domestic courts.[344]

A state may incur this responsibility even through omissive conduct that amounts to "acquiescence or tolerance" of a third-party's actions.[345] Furthermore, in cases of omissive behavior, the state still becomes responsible for "redress, individually and collectively."[346]

Notably, in cases involving private businesses, the court has evaluated whether remedies were effective. In the Workers of the Fireworks Factory case, discussed above, the IACtHR indicated that for "the right of petition" to be effective, there must be a "prompt, coherent, complete and detailed response to the matters indicated in the petition."[347] Furthermore, the effectiveness of the remedies must be assessed in each case, taking into account

341. Ximenes-Lopes, *supra* note 339, ¶ 209.

342. Id. ¶ 209 ("The reparation of the damage caused by the violation of an international obligation involves, whenever possible, full compensation (*restitutio in integrum*), which consists of the restoration to the original condition existing prior to the violation. If this is not feasible, the international court shall determine the measures to be ordered to protect the rights that were affected, as well as to make reparations for the consequences of the infringements and shall determine a compensation for the damage caused or other kind of relief.").

343. Rodríguez v. Honduras, *supra* note 304, ¶ 172.

344. Ximenes-Lopes, *supra* note 339, ¶ 232.

345. Kaliña and Lokono Peoples, *supra* note 311, ¶ 2.

346. *Id.*

347. *Id.* ¶ 246 ("[T]he court recalls that Article 24 of the American Declaration of the Rights and Duties of Man establishes that: '[e]very person has the right to submit respectful petitions to any competent authority, for reasons of either general or private interest, and the right to obtain a prompt decision thereon.'").

whether "domestic remedies existed that guaranteed true access to justice to claim reparation of the violation."[348]

Importantly, Pillar III of the UNGPs incorporates the provision of an adequate and effective remedy as a foundational principle. Principle 25 directs states "to take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy."[349] The IACtHR cites to Principle 25 in the case of the Miskito Divers when determining "the scope of the human rights obligations of States and business enterprises."[350] In that case, the court instructed states to adopt measures ensuring companies not only have policies to protect human rights, but also "processes that allow businesses to remedy human rights violations that result from their activities, especially when these affect people living in poverty or belonging to vulnerable groups."[351]

Thus, by being responsible for ensuring companies implement such remedial processes, the state still bears the onus to make sure such remedies are effective in redressing human rights violations. Failure to do so through proper regulation and oversight may result in liability. While such a case has yet to be decided by a human rights monitoring body, the IACtHR helped lay the foundation for such a possibility in the Miskito Divers case when instructing states to oversee companies to not only prevent and mitigate risks caused by their activities "in consideration of their resources and possibilities," but to use "accountability mechanisms to remedy any damage caused."[352] Significantly, the court clarified that "this obligation must be assumed by companies *and regulated by the State*."[353]

C. Privatization and Non-delegable Duties: The Obligation of Regulation and Oversight

The recent international jurisprudence discussed in the last Section supports the principle that states cannot entirely forfeit or foreclose their ongoing obligations to ensure effective remedies or reparations to victims of serious human rights violations, regardless of who causes those harms. Similarly, states cannot simply delegate the right to an effective remedy to a private entity, such as through an OGM. If it does so, it may be responsible if those remedies fall short of international human rights standards.

Indeed, the positive duties attributable to states to both protect human rights, and ensure an effective remedy in the event that this protection fails, support a principle of non-delegation. Importantly, this principle provides a

348. Workers of the Fireworks Factory, *supra* note 316, ¶ 217 n.310.
349. UNGPs, *supra* note 5, princ. 25, at 27.
350. Miskito Divers, *supra* note 322, ¶ 47.
351. *Id.* ¶ 49.
352. *Id.* ¶ 52.
353. *Id.* (emphasis added).

hard boundary to privatization. Reframing company-level grievance mechanisms as a form of privatization helps highlight the importance, and even necessity, of regulation and oversight. It may not be the case that states are explicitly or fully delegating the duty to provide adequate remedies to private entities, as is the case in the traditional approach to understanding privatization. Nevertheless, the growing trend of companies establishing such mechanisms can be viewed as a form of *de facto* delegation, or at least a form of governmental acquiescence to the practice. Certainly, governments have tolerated companies enjoying full discretion on whether and in what manner to respond to human rights claims within their internal grievance mechanisms.

It is helpful to situate the discussion of private company-level remedies within a developing line of scholarship and caselaw challenging the practice of privatizing the provision of goods and services that form the basis of fundamental human rights. Certainly, one can hear loud alarm bells sounding in recent years as the practice of privatization expands.[354] As Nowak observes, "[u]nfortunately, the history of privatization during the last thirty years, in both highly developed and less developed countries, illustrates too many examples where privatization has led to growing inequality and significant deterioration of human rights."[355]

International human rights jurisprudence provides bright-line limits to this practice. Notably, if states seek, or otherwise permit, the privatization of public functions that implicate serious public interests, they must do so with sufficient regulation and oversight. For example, in the 2015 Gonzalez Lluy v. Ecuador case concerning oversight of the Red Cross handling blood donations to avoid infections, the IACtHR clarifies,

> Rendering public services implies the protection of public interests, which is one of the objectives of the State. Though the States may delegate the rendering of such services, through the so-called outsourcing, they continue being responsible for providing such public services and for protecting the public interest concerned. Delegating the performance of such services to private institutions requires as an essential element the responsibility of the States to

354. *See generally* Si Kahn, et al., The Fox in the Henhouse: How Privatization Threatens Democracy (2022); Lindsey Cameron, The Privatization of Peacekeeping: Exploring Limits and Responsibilities Under International Law (2017); Vandana Shiva, Water Wars: Privatization, Pollution, and Profit (2016); Jon. D. Michaels, Constitutional Coup: Privatization's Threat to the American Republic (2017); Donald Cohen & Allen Mikaelian, Privatization of Everything: How The Plunder of Public Goods Transformed America and How We Can Fight Back (2021); Alex Friedman & Christian Parenti, Capitalist Punishment: Prison Privatization and Human Rights (2008).

355. Manfred Nowak, Human Rights or Global Capitalism: The Limits of Privatization 52 (2016).

> supervise their performance in order to guarantee the effective protection of the human rights of the individuals.[356]

The IACtHR further concluded that the National Blood Secretariat, as the auxiliary body of the Red Cross, was responsible for enforcing sanctions for non-compliance with internal regulations, but that such an "implied delegation of the functions of monitoring and supervision to the same private entity" was problematic.[357] In particular, this situation resulted in less than adequate levels of supervision, monitoring, and control of functions that should instead be performed by the state.[358]

Similarly, the European Court of Human Rights ("ECtHR") has also recognized the principle of non-delegation in cases relating to privatization, holding in 2005 that the state "cannot completely absolve itself of its responsibility by delegating its obligations in this sphere to private bodies or individuals," and remains under an obligation to supervise and control.[359] Thus, the ECtHR has recognized this positive duty for states in relation to private entities, particularly in cases relating to private health[360] and educa-

356. Gonzales Lluy v. Ecuador, Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 298, ¶ 96 (Sept. 1, 2015). *See also* Ximenes-Lopes, *supra* note 339, ¶ 89; Albán Cornejo, *supra* note 337, ¶ 119 ("The assumptions of the State's liability can be generated when a body or state authority or a public institution, can affect unlawfully, either by acts or omissions, some of the legal interests protected by the American Convention. It also may by generated from actions carried out by private parties, such as when a State excludes to prevent conducts of third parties from impairing those legal interests. By this order of considerations, when related to the essential jurisdiction of the supervision and regulation of rendering the services of public interest, such as health, by private or public entities (as is the case of a private hospital), the state responsibility is generated by the omission of the duty to supervise the rendering of the public service to protect the mentioned right.").

357. Gonzales Lluy, *supra* note 356, ¶ 186.

358. *Id.*

359. In Storck v. Germany, the European Court established that: "The State is under an obligation to secure to it citizens their right to physical integrity under Article 8 of the [European Convention on Human Rights]. For this purpose, there are hospitals run by the State which coexist with private hospitals. The State cannot completely absolve itself of its responsibility by delegating its obligations in this sphere to private bodies or individuals . . . . The State remains under a duty to exercise supervision and control over private [ ] institutions. Such institutions [ ] need not only a license, but also competent supervision on a regular basis of whether the confinement and medical treatment is justified." Storck v. Germany, No. 61603/00, ¶ 103 (June 16, 2005) Eur. Ct. H.R., https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-69374%22]} [https://perma.cc/X2HU-KHTF].

360. Oyal v. Turkey, No. 4864/05 (Mar. 23, 2010) Eur. Ct. H.R., https://hudoc.echr.coe.int/Eng#{%22itemid%22:[%22001-97848%22]} [https://perma.cc/5WH8-EB63] (finding a violation of the right to life and affirming the state responsibility for the actions of a Turkish Red Cross collecting contaminated blood donations that led to a baby being infected with HIV after a blood and plasma). The Court has indicated that "[f]or a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate danger to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that danger." Osman v. United Kingdom, No. 87/1997/871/1083, ¶ 115–16 (Oct. 28, 1998) Eur. Ct. H.R., https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58257%22]} [https://perma.cc/87WL-ZT9Z]. See also Kiliç v. Turkey, No. 22492/93, ¶ 62–63 (Mar. 28, 2000) Eur. Ct. H.R., https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58524%22]} [https://perma.cc/GD5N-ZHML].

tional entities.[361] Part of the rationale rests on the fact that these activities are of special public interest.[362]

This same concept has been adopted by the Inter-American Commission, as evidenced in the *Inter-American's Standards for Business and Human Rights* report.[363] The report confirms,

> States may not exempt themselves from their obligations in this area by involving non-state actors or business entities in the provision of services of this nature. Regardless of private actors' liability in these contexts, the State continues to be the main duty bearer in terms of the exercise of the human rights at stake, in light of the general duties to respect and ensure human rights.[364]

While the report primarily discusses the types of services typically relegated to the state, such as police, health, and education, such a positive duty also extends to other areas of business activity that have potential for serious human rights harms. Specifically, the report further clarifies that,

> States must establish clear regulatory frameworks and policies based on the contents of the rights at stake. They must also subject private providers to full accountability for their operations and to rigorous examination under transparent and efficient systems for oversight, providing for effective sanctions and adequate reparations for cases of non-compliance . . . .[365]

At first glance, these directives may not appear to extend to a government's tolerance of or acquiescence to company-level grievance mechanisms to resolve human rights claims, especially as the practice may not immediately resemble the privatization of goods and services related to typical public functions. However, remedying human rights violations constitutes an essential public service as a positive duty of states, as explained above. Even if states are not purposefully delegating these essential services, they are doing so in a *de facto or default* manner that entrusts private companies with guaranteeing a right that is normally an essential state service.

361. O'Keeffe v. Ireland, No. 35810/09, ¶ 144–52 (Jan. 28, 2014) Eur. Ct. H.R., https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-140235%22]} [https://perma.cc/P5M9-L6RV].

362. Osman, *supra* note 360, ¶ 115 ("The Court notes that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.") (cleaned up).

363. *See* Muñoz, *supra* note 325.

364. *Id.* ¶ 231.

365. *Id.* ¶¶ 231–32.

Simple common sense justifies extending the paradigm of privatization to grievance mechanisms. Specifically, given that remedial processes are in themselves the key to ensuring accountability for the violation of all rights, it would carve out an odd exception to exclude them from the human rights limits of privatization. Certainly, it would be paradoxical to require government oversight when privatizing substantive rights and yet leave the private redress mechanism used to remedy such violations outside the scope of government regulation and scrutiny. Ultimately, such a situation would undermine corporate accountability, which is not only the overarching purpose of the UNGPs, but also the "central issue" generally associated with privatization.[366]

D. On Ensuring Accountability of the Private Accountability Mechanisms

General scholarship on the accountability issues raised by privatization further supports the proposal that OGMs should be subject to public oversight if they are to handle human rights claims. On this point, Martha Minow points out that "[p]rivatization creates possibilities of weakening or avoiding public norms that attach, in the legal sense, to 'state action' or conduct by government."[367] She explains that normally, "accountability in this sense means being answerable to authority that can mandate desirable conduct and sanction conduct that breaches identified obligations."[368] In particular, accountability often becomes relevant when protecting the most vulnerable and those without political power.[369]

While accountability often appears as an ill-defined value, Dickinson argues for disaggregating the concept into two forms: first, accountability concerns redress for those who have been wronged; second, it concerns managerial oversight.[370] She clarifies:

> In the first form of accountability, an authoritative individual or entity imposes a penalty if a person or organization has failed to comply with a particular rule or standard. This form of accountability is essentially backward-looking, involves a specific sanction, and occurs at a relatively discrete moment in time (though it could have deterrent effects in the future). When people speak of accountability, they often mean it in this sense: the idea that there

366. Ellen Dannin, *Red Tape or Accountability: Privatization, Publicization, and Public Values*, 15 CORNELL J.L. & PUB. POL'Y 111, 116 (2005) (observing that "the central issue for privatization is accountability").

367. Martha Minow, *Public and Private Partnerships: Accounting for the New Religion,* 116 HARV. L. REV. 1229, 1246 (2003).

368. *Id.* at 1260.

369. Dannin, *supra* note 366, at 126 ("A major concern of accountability is the need to protect those who are the most vulnerable, those without political power who also rely heavily on government services.").

370. Laura A. Dickinson, *Regulating the Privatized Security Industry: The Promise of Public/Private Governance*, 63 EMORY L.J. 417, 435 (2013).

> is somewhere to go after the fact to punish wrongdoers and "hold them accountable."[371]

She further clarifies that the second form of accountability entails "an authoritative individual or entity evaluat[ing] the performance of a person or organization and encourage[ing] that person to observe a particular rule or standard."[372] Because this form of accountability does not involve sanctions or penalties, it is considered to be forward-looking. Hence, it entails ongoing scrutiny to ensure compliance with expected and specific purposes.[373]

Dickinson's approach to understanding accountability helps highlight why guaranteeing the right to an effective remedy is essential, and thus cannot be abdicated by the state or left to the discretion of the very actors whose conduct must be corralled. Protecting the right to remedy becomes essential for ensuring compliance with normative frameworks, including bringing companies into conformity with the UNGPs. On this point, Grant and Keohane explain that the concept of accountability "implies that some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these responsibilities have not been met."[374] This standard-setting function may address past deviations, yet also helps shape future behavior and prevent future deviations.[375]

Considering the important function of accountability underscores the whole UNGP project. Holding businesses accountable for negative human rights impacts ideally contributes to the prevention of new harms. Redress serves as a principal means of achieving this accountability. When the only redress available comes through OGMs and depends on the company responsible for the violation itself to be effective and rights-compatible, the result fully compromises the goal of accountability.

E. Erecting Borders around OGMs: Returning to the Intended Role of OGMs as Low-Level Dispute Resolution Mechanisms

Proposing a limit to the reach of private remedies may seem controversial given their growing popularity, but in fact, calling for clearer legal boundaries neatly aligns with the original intended purpose of OGMs. The recent innovation of using ordinary grievance mechanisms as "company-created human rights abuse remedy mechanisms," as identified as Knuckey and Jenkin, may be viewed as perhaps an unintended and even unanticipated consequence of Ruggie's particular focus on OGMs in the UNGPs.[376]

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371. *Id.*
372. *Id.* at 436.
373. *Id.*
374. Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29, 29 (2005).
375. *Id.*
376. *See* Knuckey & Jenkin, *supra* note 202, at 802.

A more comprehensive and close reading of the UNGPs, along with revisiting the UNGPs' drafting history, confirms that OGMs were *never* meant to handle the most serious human rights violations. Nor were they intended to foreclose state regulation and oversight of these mechanisms, especially when they involve the worst cases of harm. Rather, the concept of an OGM was created to serve the function of a low-level dispute resolution mechanism that handles smaller grievances *early*, before they escalate into more serious harms.[377] Certainly, it was the "early" advantage of company remedies that made Ruggie take an interest in them as an untapped resource for resolving conflicts before they escalated into bigger problems. One sees this view in his memoir of the drafting process, in which he shares:

> [M]y own research indicated that serious human-rights-related confrontations between companies and individuals or communities frequently began as lesser grievances that companies ignored or dismissed, and which then escalated. . ..To make it possible for such grievances to be addressed early and remediated directly, the Framework recommends that company establish or participate in operational-level grievance mechanisms. . ..[378]

The emphasis on "early" intervention is also more consistent with the other requirements found in Pillar II. Indeed, the commentary to Principle 22 mentions that OGMs are an important means for companies to meet the requirement of ongoing due diligence to prevent and mitigate human rights abuses.[379] Since they serve as a source of continuous monitoring, companies can adjust operations accordingly to avoid serious harmful impacts.[380] The commentary to Principle 20 further indicates that once these grievances are identified, they should be "addressed and [] adverse impacts [should] be remediated early and directly by the business enterprise, thereby *preventing* harms from compounding and grievances from *escalating*."[381] Certainly, the emphasis on "early" was the approach also initially recognized by the United Nations bodies offering interpretations of the UNGPs.[382] Again,

377. *See* UNGPs, *supra* note 5, princ. 29, at 31 (stating that OGMs should "make it possible for grievances to be addressed *early* and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted") (emphasis added). The UNGP Commentary views this early intervention as "preventing harms from compounding and grievances from escalating." *Id.* princ. 29 cmt., at 32.

378. JUST BUSINESS, *supra* note 32, at 104.

379. UNGPs, *supra* note 5, princ. 22 cmt., at 24–25.

380. *See id.* For discussion, see Lisa J. Laplante, *Making the Connection: Operational-Level Grievance Mechanisms and Human Rights Due Diligence*, A GUIDE TO HUMAN RIGHTS DUE DILIGENCE FOR LAWYERS 195 (Corinne Elizabeth Lewis & Constance Z. Wagner eds., 2023).

381. UNGPs, *supra* note 5, princ. 20 cmt., at 23 (emphasis added).

382. *See, e.g.*, U.N. HIGH COMM'R FOR HUM. RTS., THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS: AN INTERPRETIVE GUIDE 58 (2012) ("In sum, their primary purpose is to provide an early point of recourse to identify and address the concerns of directly affected stakeholders before they escalate or lead to otherwise preventable harm."); Cristina Cedillo, *Better Access to Remedy in Company-Community Conflicts in the field of CSR: A Model for Company-Based Grievance Mechanisms*, 4 DOVENSCHMIDT

Ruggie's own reflections on the development of OGMs emphasizes this interpretation as to the two key functions of company remedies:

> [The first is] early-stage recourse which would serve as an early warning system making it possible for grievances against the company to be addressed and remediated before they escalate, thereby preventing them from compounding. The second is as a feedback loop, providing the company with information about its current or potential adverse human rights impacts. By analyzing trends and patterns in complaints, companies can identify systematic problems and adapt their practices accordingly.[383]

Overall, OGMs offer a tool for companies to fulfill their general obligation to respect human rights, but should *not* replace state-level adjudication processes for resolving serious human rights claims. Ruggie viewed this early warning system as a complement to more formal remedies: "[A]s an initial priority, I deliberately stressed *preventative* measures and alternative dispute resolution techniques, *as a complement to, not a substitute for*, judicial measures."[384] Other members of Ruggie's team also stressed this intended role of OGMs, noting they were not conceived to be the appropriate remedy for handling the most serious human rights violations.[385]

As discussed in Section II.B, some confusion may have arisen due to some sections of the UNGPs which, if read in isolation, support the current practice of OGMs being used to resolve human rights claims.[386] Nevertheless, read holistically, the UNGP framework mirrors the international human rights jurisprudence shared in Part V.A–B, recognizing that the state has a positive duty to protect human rights and ensure the right to adequate and effective remedies.[387] Such is the "system of remedy" imagined by Ruggie, with its hierarchy of responsibilities between states, companies, and other

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Q. 198, 199 (2013) ("The objective of company-based grievance mechanisms should be providing an early-stage recourse and possible resolution."); IPIECA, *supra* note 155, at 6 (highlighting "early identification and resolution" and "reduc[ing] the potential for complaints to escalate" as key effects of a good OGM).

383. JUST BUSINESS, *supra* note 32, at 153–54. Ruggie also stated this rationale in official reports. *See* John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Business and Human Rights: Further Steps Toward the Operationalization of the "Protect, Respect and Remedy" Framework*, ¶ 92, U.N. Doc A/HRC/14/27 (Apr. 9, 2010) ("[G]rievance mechanisms perform two key functions regarding the corporate responsibility to respect. First, they serve as early warning systems, providing companies with ongoing information about their current or potential human rights impacts from those impacted. By analyzing trends and patterns in complaints, companies can identify systemic problems and adapt their practices accordingly. Second, these mechanisms make it possible for grievances to be addressed and remediated directly, thereby preventing harm from being compounded and grievances from escalating.").

384. JUST BUSINESS, *supra* note 32, at 153–54.

385. E-mail from Caroline Rees, President & Co-Founder, Shift, to Lisa J. Laplante, Professor of L., New England Sch. of L. Bos. (Aug. 23, 2022) (on file with author).

386. *See supra* Part I.B.

387. UNGPs, *supra* note 5, princ. 1, at 3 ("States must protect against human rights abuse within their territory," and take "appropriate steps to . . . investigate, punish and redress such abuse.").

entities.[388] In this eco-system of remedies, Ruggie clearly envisioned state-based judicial and non-judicial grievance mechanisms forming the foundation, reflecting the state's positive duty to protect human rights (and to provide an adequate remedy if it fails).[389] This hierarchy situates state-level grievance mechanisms as primary and corporate grievance mechanisms as secondary and supplemental. At the end of the day, the OGM model was never intended to handle the hardest cases of human rights violations.

Indeed, practice would clearly caution against such an approach. Practitioners communicated as much to the U.N. Working Group on Business and Human Rights at an expert meeting in 2013, on non-state grievance mechanisms, which the Author attended. During the discussions, the workshop participants "highlighted that some types of abuse might not be suited for non-judicial grievance mechanisms. . .[such as] human rights abuses amounting to crimes under domestic or international law."[390] Participants even "emphasized the need to be cautious about focusing heavily on the potential of operational-level grievance mechanisms."[391] And yet, a decade later, both practice and commentary has done just that, and time has obscured the original, relatively modest, intent of private remedies.

VI. Conclusion: Proposal for Ensuring Regulation and Oversight of Operational Grievance Mechanisms

Despite the serious concerns that arise when private company grievance mechanisms are empowered to resolve human rights claims, especially the gravest ones, the solution may not be to eliminate them altogether. The paradox of this conclusion arises out of the reality that OGMs may sometimes be the only remedy available to individuals and communities in need of redress. As already acknowledged, one of the reasons company-level remedies are championed is in response to the dismal reality of state remedies that are often ill-equipped to respond to serious human rights claims. Yet, more and more companies operating in countries where such a bright line rule prohibiting the use of OGMs for human rights harms, especially those with the most serious consequences, may not even be possible. Eliminating OGMs would leave many victims without any remedy—reinforcing the very remedy "gap" that inspired Ruggie's work on private remedies in the first place. On the contrary, if properly regulated, some private company remedies may indeed fill such a need. Truly effective OGMs could potentially

388. *See id.* princ. 25 cmt., at 28 ("State-based judicial and non-judicial grievance mechanisms should form the foundation of a wider system of remedy. Within such a system, operational-level grievance mechanisms can provide early-stage recourse and resolution. State-based and operational-level mechanisms, in turn, can be supplemented or enhanced by the remedial functions of collaborative initiatives as well as those of international and regional human rights mechanisms.").

389. *Id.*

390. Hum. Rts. Council, *supra* note 78, ¶ 15.

391. *Id.* ¶ 41(c).

provide a more efficient and convenient recourse than lengthy and expensive litigation to provide much needed compensation and other reparations.

Nevertheless, accepting the reality that OGMs may play an important role in ensuring access to remedies requires careful consideration of what is the best approach to regulation and oversight that would guarantee that their procedures and outcomes align with human rights law—that is, to make them truly "rights-compatible" as called for in Principle 31 of the UNGP.[392] Early guidance offered by Caroline Rees indicates that "where disputes raise issues related to the application of human rights law or other domestic law and regulations, state authorities should have an interest and a role to play."[393] She acknowledges that this role may be easier to achieve in countries with strong regulatory and oversight institutions, but even in weaker states, "bringing appropriate officials into the operational-level grievance process, whether as observers or as active parties," helps ensure compliance with national and international obligations.[394]

Yet, since the UNGPs were approved, there has been minimal practical guidance or actual practice from which to ascertain what type of state engagement should be expected or on what type of regulations or oversight is even required. Recognizing this situation, the OHCHR's Access to Remedy Project III set an agenda in its 2020 report for understanding what it means for states to create "an enabling legal and policy environment for non-State based grievance mechanisms that is consistent with the state's international legal obligations and policy commitments and responsive to local needs."[395] Recognizing the complexity of this undertaking, they present a model "terms of reference" for establishing a suitable review body for overseeing of private remedies.[396] This review body would be charged with investigating and reporting on, among other matters:

> (a) How do non-state-based grievance mechanisms established in, or active in, the jurisdiction currently complement the effective implementation of the state's international legal obligations and policy commitments with regard to accountability and remedy for business-related human rights harm?
>
> (b) How do non-state-based grievance mechanisms contribute to the effectiveness of domestic law and policy relevant to the corporate responsibility to respect human rights?

However, the terms of reference do not appear to include actual regulatory or oversight functions, although the OCHR also recommends "building in

392. UNGPs, *supra* note 5, princ. 31, at 34.

393. Rees, *supra* note 214, at 27.

394. *Id.*

395. U.N. High Comm'r. for Hum. Rts., *Improving Accountability & Access to Remedy for Victims of Business-Related Human Rights Abuse Through Non-State-based Grievance Mechanisms: Explanatory Notes*, ¶ 5, U.N. Doc. A/HRC/44/31/Add.1 (June 3, 2020).

396. *Id.* ¶ 6, fig. 1, at 4 (listing guiding questions for this review body).

systems for accountability of mechanisms for their remedial outcomes as an important aspect of rights-compatibility."[397]

Significantly, in March 2021, the Directive of the European Parliament and of the Council on Corporate Due Diligence and Corporate Accountability issued a list of recommendations wherein it recognized that private operational grievance mechanisms "should be closely regulated by public authorities."[398] The recommendation is based on the dual-level positive obligations discussed in Part V:

> The primary duty to protect human rights and provide access to justice lies with States, and the lack of public judicial mechanisms to hold undertakings liable for damages occurring in their value chains should not and cannot adequately be compensated by the development of private operational grievance mechanisms. Whereas such mechanisms are useful in providing emergency relief and fast compensation for small damages, they should be closely regulated by public authorities and should not undermine the right of victims to access justice and the right to a fair trial before public courts.

Although the appearance of this language, unique so far, may be a hopeful sign of the growing recognition of the need to pay closer attention to private remedies, the recommendations still provide limited guidance on how to operationalize this oversight, should it be adopted into law.

Thus, as the UNGPs now enter their second decade of existence, a conversation on what accountability of private accountability mechanisms would look like is pending. Of course, the greatest challenge is that these mechanisms may operate in already weakened countries; the solution may therefore require creativity and collaboration among states, and even international bodies. Indeed, it is important to begin with the question of *which government* must perform such oversight, and in what manner? In generating approaches to ensuring that private grievance mechanisms are rights-compatible, the ultimate goals must be kept in sight—to ensure that victims have adequate and effective processes and outcomes, and to create true corporate accountability within the borders of the law.

397. *Id.* ¶ 67.

398. European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability, EUR. PARL. DOC. P9_TA(2021)0073, ¶ 5 (2021).