Determining Criteria to Evaluate Outcomes of Businesses' Provision of Remedy: Applying a Human Rights-Based Approach

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Abstract

The UN Guiding Principles on Business and Human Rights (GPs) expect businesses to participate in operational-level, non-judicial mechanisms to address the grievances of communities affected by their activities. While there is guidance on operational-level grievance mechanisms as to what constitutes an effective process, inquiries into the effectiveness of outcomes have been met with less success. This article identifies three key incongruities within the GPs regarding effective outcomes: (1) the broader interpretation of remedy within the Remedy Pillar compared to the Respect Pillar; (2) the novelty of enforcing human rights through dialogue and engagement as opposed to adjudication; and (3) the difficulty in reconciling objective human rights standards with the subjective preferences of the parties. It then aims to resolve these issues by applying a human rights-based approach: examining how empowerment of communities can act as the founding basis for understanding whether an outcome is effective. It concludes by examining the working of the Porgera Mine mechanism from this perspective.

Keywords: alternative dispute resolution, human rights-based approach, non-judicial grievance mechanisms, operational-level mechanisms, transformative remedy

I. Introduction

The Guiding Principles on Business and Human Rights (GPs) were unanimously endorsed by the United Nations Human Rights Council (HRC) in June 2011.[1] They were drafted by the then Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises (SRSG) with the aim of implementing the 'Respect, Protect, Remedy Framework' (Framework), which had been similarly drafted by the SRSG and welcomed by the HRC in 2008.[2] The Framework elucidates on the state's role to protect human rights, the business's role to respect human rights, and communities' access to remedy for human rights abuses.

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1 Human Rights Council, 'Human Rights and Transnational Corporations and Other Business Enterprises', A/HRC/RES/17/4 (6 July 2011).

2 Human rights council, 'Mandate of the Special Representative of the Secretary/General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', A/HRC/RES/8/7 (18 June 2008).

Business and Human Rights Journal, 2 (2017), pp. 55–85
doi:10.1017/bhj.2016.30 © Cambridge University Press

https://doi.org/10.1017/bhj.2016.30 Published online by Cambridge University Press

As part of their responsibility to respect, businesses have a responsibility to co-operate in remediation where they identify that they have caused or contributed to adverse human rights impacts.[3] The third pillar of the Framework/GPs anticipates remedy will be provided by both judicial and non-judicial mechanisms. Non-judicial mechanisms may be administered by a state or other actors including businesses, international organizations, multi-stakeholder initiatives, international financial institutions, or communities themselves. This article will focus on non-judicial mechanisms administered by businesses: operational-level *grievance* mechanisms.

An operational-level mechanism is a formalized procedure administered by the business itself (alone or in collaboration with others) which addresses the grievances of individuals and communities that have been affected by their activities.[4] It has two primary functions: (1) to help identify a business's adverse human rights impacts by acting as a vehicle for communities and individuals to raise concerns, and (2) to make it possible for grievances to be addressed early and directly by the business concerned to prevent harms from compounding and grievances from escalating.[5]

Principle 31 puts forward the effectiveness criteria for operational-level grievance mechanisms, as well as other non-judicial mechanisms. The effectiveness criteria require operational-level mechanisms to be legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning, and based on engagement and dialogue.[6] They do not provide express criteria with which to evaluate the outcome of a grievance mechanism,[7] as they are 'limited in terms of outcomes, stating simply that they should be compatible with human rights'.[8]

Following the SRSG's mandate, the UN Working Group on the issue of human rights and transnational corporations and other business enterprises (UNWG) decided there was a need 'to conduct further research on the elements and criteria for effective non-judicial remedies'.[9] However, at the end of their initial mandate, they concluded that, beyond the need for remedies to be adequate, effective, and prompt, it may not be possible to identify common elements of effective remedy *outcomes*.[10] Determining criteria for what constitutes an effective outcome is essential as it can facilitate businesses' improvement of their own grievance processes,[11]

[3] Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', A/HRC/17/31 (21 March 2011) (Guiding Principles), Principle 22.

[4] Ibid, Principle 29; Principle 31(h) Commentary; see also Office of the High Commissioner for Human Rights, 'The Corporate Responsibility to Respect Human Rights: An Interpretive Guide', HR/PUB/12/02 (Geneva, 2012), 68.

[5] Guiding Principles, note 3, Principle 29 Commentary.

[6] Ibid, Principle 31.

[7] General Assembly, 'Note by the Secretary-General Transmitting the Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', A/68/279 (7 August 2013), para 53.

[8] Martijn Scheltema, 'Assessing the Effectiveness of Remedy Outcomes of Non-judicial Grievance Mechanisms' (2013) 4 *Dovenschmidt Quarterly* 190.

[9] Human Rights Council, 'Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', A/HRC/23/32 (14 March 2013), para 48.

[10] Human Rights Council, 'Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', A/HRC/26/25 (5 May 2014), para 41.

[11] CSR Europe, 'Assessing the Effectiveness of Company Grievance Mechanisms' (12 December 2013), at 32, http://www.csreurope.org/sites/default/files/Assessing%20the%20effectiveness%20of%20Company%20Grievance%20Mechanisms%20-%20CSR%20Europe%20(2013)_0.pdf (accessed 29 June 2016).

https://doi.org/10.1017/bhj.2016.30 Published online by Cambridge University Press

be used by other actors in understanding how grievance mechanisms are working (thus helping hold businesses accountable),[12] and inform the broader policy debate.[13]

Section II of this article will identify the key ambiguities relating to the outcomes of operational-level mechanisms which require elucidation before the question of what constitutes effective remedy can be answered. It will explain how the GPs tend towards a much broader 'transformative' logic of remedy compared to simple compensation for wrongs and that this logic does not always sit well with the limited responsibility of a business to 'do no harm' (Section II.A). It will then analyze the discordant relationship between objective human rights standards and participatory, dialogue-based processes (Section II.B). Finally, it will highlight the difficulty in reconciling subjective preferences and human rights standards, especially given the lack of human rights standards immediately relevant to businesses (Section II.C).

In order to reconcile the apparently inharmonious logics identified in Section II, Section III advocates that operational-level mechanisms employ a human rights-based approach (HRBA). It will draw attention to the similarities between the HRBA and the GPs, in particular the incorporation of the HRBA in the effectiveness criteria of Principle 31, the focus on the rights-holder, and the use of empowerment through participation as a means for the realization of human rights. It will also highlight the qualifications as to what extent the HRBA can be applied to operational-level mechanisms.

Section IV will then aim to determine criteria to evaluate the outcomes of operational-level mechanisms through the application of the HRBA, including answering the key questions raised in Section II. It will conclude that the 'transformative' logic within the GPs should be understood as a requirement that operational-level mechanisms must not exacerbate existing structural injustices (Section IV.A). It will suggest that a 'process-outcome' approach be taken, whereby outcomes cannot be considered as autonomous from the processes that produce them (Section IV.B). It will then design a method by which human rights standards can be identified and reconciled with participatory, dialogue-based processes through advocating the use of a 'capability-based measurement framework' (Section IV.C). I will conclude by showing how the conclusions of the article could be applied to an operational-level mechanism, that is, the Porgera Mine operational-level mechanism in Papua New Guinea (Section IV.D). This case is chosen because it has become the focal point of many conflicting interpretations of the GPs and it is the only case where the Office of the High Commissioner for Human Rights (OHCHR) has offered interpretative guidance on the GPs.

II. Principle 31: Identifying Key Issues in Their Interpretation

Because human rights have traditionally relied on enforcement through mechanisms operated by states and international organizations, there is little precedent of remedies

[12] 'Note by Secretary-General', note 7, para 41.

[13] David Vermijs, 'Overview of Company–community Grievance Mechanisms' in Emma Wilson and Emma Blackmore (eds.), *Dispute or Dialogue? Community perspectives on company-led grievance mechanisms* (London: IIED, 2013), 36. See also Larry Catá Backer, 'From Guiding Principles to Interpretive Organizations: Developing a Framework for Applying the UNGPs to Disputes that Institutionalizes the Advocacy Role of Civil Society' in César Rodríguez-Garavito (ed.), *Business and Human Rights: Beyond the End of the Beginning* (forthcoming), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2501167 (accessed 29 June 2016).

https://doi.org/10.1017/bhj.2016.30 Published online by Cambridge University Press

being enforced through non-judicial mechanisms designed by businesses under international human rights law (IHRL).[14] The GPs, however, anticipate a role for non-judicial mechanisms in the provision of remedy. Principle 31 specifies seven criteria which all non-judicial mechanisms must fulfil in order to be considered effective, with an eighth criterion which further applies specifically to operational-level mechanisms:

(a) Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes

(b) Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access

(c) Predictable: providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation

(d) Equitable: seeking 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

(e) Transparent: keeping 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

(f) Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights

(g) A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms;Operational-level mechanisms should also be:

(h) Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.[15]

With the exception of 'rights-compatible', these criteria only relate to *process*.[16] To form any basis for an interpretation of what constitutes an effective *outcome*, it is necessary to highlight three issues. First, the Remedy Pillar of the GPs anticipates a broader scope of wrongs that ought to be remedied, even though the Respect Pillar expects businesses to remediate only those adverse human rights impacts which businesses have caused or contributed to. Second, human rights are generally expected to be enforced through adjudicative processes such as the courtroom, whereas operational-level mechanisms are

[14] In assessing the effectiveness of an operational-level mechanism from the perspective of the GPs, the OHCHR found that IHRL did not explicitly address the issue of the final settling of human rights related grievances against a company through a non-judicial mechanism and that there was no consistent practice amongst national or regional courts in relation to even state-based non-judicial mechanisms. OHCHR, 'Re: Allegations regarding the Porgera Joint Venture remedy framework' (*Porgera Mine* case) (July 2013), at 2, http://www.barrick.com/files/doc_downloads/Opinion-of-the-UN-Office-of-the-High-Commissioner-for-Human-Rights.pdf (accessed 29 June 2016).

[15] Guiding Principles, note 3, Principle 31.

[16] Scheltema, note 8, 190.

https://doi.org/10.1017/bhj.2016.30 Published online by Cambridge University Press

dialogue-based processes. Third, it is difficult to ascertain objective standards to determine whether an outcome is effective because the GPs anticipate subjective preferences to be included in any understanding of remedy and objective human rights standards are generally not immediately applicable to businesses.

A. Remedy: Compensation or Transformation

When describing remedy, the GPs refer to apologies, restitution, rehabilitation, financial or non-financial compensation, punitive sanctions, and the prevention of future harm.[17] These criteria mirror the criteria within the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation (Basic Principles).[18] The Basic Principles refer only to gross violations of IHRL and serious violations of international humanitarian law, whereas the GPs make clear that judicial remedy is required where crimes are alleged[19] and that operational-level mechanisms should not be employed in situations where adjudication is required:

> Since a business enterprise cannot, with legitimacy, both be the subject of complaints and unilaterally determine their outcome, [operational-level] mechanisms should focus on reaching agreed solutions through dialogue. Where adjudication is needed, this should be provided by a legitimate, independent third-party mechanism.[20]

Hence, the Basic Principles cannot be automatically 'plugged into' the logics of operational-level mechanisms for several reasons. First, the Basic Principles anticipate administrative mechanisms set up by states and refer to many forms of remedy that cannot be expected from a business (e.g., judicial sanctions).[21] Second, the Basic Principles are also based on the state's obligations under international humanitarian law and IHRL, which extend to taking action to prevent violations of these norms by third parties and remedy such violations.[22] This is significantly broader than the business's responsibility to 'do no harm'. Third, unlike state-based adjudicative mechanisms, operational-level mechanisms are intended to offer remedies based on the consent of the parties.[23] While the Basic Principles do not expressly advocate for the participatory rights of victims,[24] the GPs recognize the involvement of alleged victims both in the remedy provided and the design of the overall process.[25]

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[17] Guiding Principles, note 3, Principle 25 Commentary.

[18] General Assembly Resolution 60/147, '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', A/RES/60/147 (16 December 2005); UNWG 2014 Report, note 10, para 40; *Porgera Mine* case, note 14.

[19] Guiding Principles, note 3, Principle 22 Commentary.

[20] Ibid, Principle 31.

[21] Basic Principles, note 18.

[22] Ibid.

[23] Guiding Principles, note 3, Principle 31(h); Interpretive Guide, note 4, 64.

[24] Valérie Couillard, 'The Nairobi Declaration: Redefining Reparations for Women Victims of Sexual Violence' (2007) 1 *International Journal of Transitional Justice* 444, 450. However, the Basic Principles do imply the importance of some degree of participation through their emphasis on equal and effective access to justice, adequate, effective and prompt reparation and the right to truth. Brianne Mcgonigle Leyh, 'Victim-Orientated Measures at International Criminal Institutions: Participation and its Pitfalls' (2012) 12 *International Criminal Law Review* 375, 382.

[25] Guiding Principles, note 3, Principle 31(h) Commentary; Interpretive Guide, note 4, 64.

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When looking at the underlying logics for the provision of an effective remedy, the UNWG has concluded that a compensatory based logic of remedy is often not sufficient under the GPs and that there should be greater consideration of more *transformative outcomes*.[26] An expert meeting established during their mandate highlighted the role of operational-level mechanisms' role in allowing for a constructive transformation of the relationships between victims and businesses.[27] The expert meeting report states that transformative outcomes require not only redressing specific adverse human rights impacts but also an overall assessment of their root causes in order to establish meaningful change in the conduct of the business, which may include addressing the power imbalances between the business and the victims.[28]

This need to move beyond a compensatory-based logic of remedy towards an analysis of the underlying issues has also been raised in literature on operational-level mechanisms. In an analysis on various operational-level mechanisms, Lukas concludes that they all failed to address the root causes for the grievances they deal with.[29] She recommends that operational-level mechanisms must contribute to institutional learning across the business in order to tackle root causes.[30] Vermijs concurs that an effective mechanism must lead to structural changes to a business's practices.[31] Drawing comparison with health and safety systems, he argues that there are three levels of settling grievances that businesses should aspire to: settling individual grievances (level one), analyzing and addressing root causes in key processes (level two), and ensuring these changes are implemented throughout the business (level three).[32]

However, it is not always clear how these efforts to encourage more transformative remedy are reconcilable with the business responsibility to respect human rights or with the inherent limitations of non-judicial mechanisms. Transformative remedies require consideration of underlying systemic injustices, but there are many systemic issues that cannot and should not be dealt with by bilateral business-community processes alone, e.g., where the prevailing issues result from a lack of government regulation,[33] an absence of functional public institutions,[34] or existing legacies between the communities and the government.[35]

Furthermore, underlying systemic injustices may result in situations where a business putting an end to its own contributions to adverse human rights impacts results in further

[26] UNWG 2014 Report, note 10, para 38; UNHRC Twenty Sixth Regular Session 10–27 June 2014, 'International Expert Workshop (Toronto): "Business Impacts and Non-judicial Access to Remedy: Emerging Global Experience"' (5 May 2014), A/HRC/26/25/Add.3 (Toronto Meeting), para 28.

[27] UNWG 2014 Report, note 10, paras 8, 20(i).

[28] Ibid, para 31.

[29] Karin Lukas, 'Access to Justice through Company Complaint Mechanisms?' in Tara Van Ho and Jernej Letnar Cernic (eds.), *Human Rights and Business: Direct Corporate Accountability for Human Rights* (Oisterwijk: Wolf Legal Publishers, 2015), 329.

[30] Ibid, 345.

[31] Vermijs, note 13, 36.

[32] Ibid.

[33] Lukas, note 29, 346.

[34] Pablo Lumerman and Duncan Autrey, 'Chichigalpa Association for Life and Nicaragua Sugar Estates Ltd' (ACCESS Case Story Series No.1 2013).

[35] Emma Wilson, 'Company-Led Approaches to Conflict Resolutions in the Forest Sector', (The Forests Dialogue 2009), at 42, https//:pubs.iied.org/pdfs/G02510.pdf (accessed 4 October 2016).

https://doi.org/10.1017/bhj.2016.30 Published online by Cambridge University Press

harm. Rees hypothesizes a situation where an apparel company discovers its supplier has subcontracted work to young children in illegal facilities. The business might want to cut ties with the supplier and a court might order payment of a fine, but neither solution guarantees the rights of the children who will merely go on to similar work for other factories or worse forms of abuse. She argues that sophisticated solutions are needed which might 'involve measures to ensure the children's families can sustain themselves while providing access to education for the children and seeking industry-wide responses to the systemic problem of abuse'.[36] This approach would require the business to remedy a broader array of human rights harms than would be expected under its responsibility to respect, that is, remedying adverse human rights impacts that they have not caused or contributed to.[37] Any consideration of what constitutes an effective outcome of an operational-level mechanism must reconcile the transformative aspirations of the Remedy Pillar with the notably more restrictive nature of a business's responsibility to respect. I return to this question in Section IV.

B. The Relationship between Process and Outcome

Principle 31(h) requires all operational-level mechanisms to be dialogue-based processes.[38] This differs significantly from the adjudicative-based processes characteristic of traditional human rights mechanisms. International human rights advocates have, to a large extent, argued that human rights abuses committed by businesses require adjudicative remedial processes, preferably through the courts.[39] Rees identifies several reasons for the antipathy towards mediation: the appropriate role of the state in addressing abuses that raise questions of criminal liability, the character of human rights both as legal rights and as rights inherent to the individual that cannot be waived, the public, norm-setting role of the civil law suit (particularly in common law systems), and the actual or perceived power imbalances between the victim and perpetrator.[40]

Reconciling dialogue-based processes with international human rights standards represents a serious challenge. The fact that an outcome is consented to by the victim of a human rights abuse will not always ensure that it meets human rights standards. People who live in states of deprivation often adapt their expectations and preferences to their social situations and will not 'dream of life liberty, and the pursuit of happiness, for they do not question what is customary'.[41] Structural injustices may also affect individuals' bargaining power. For instance, sweat shops often employ those who would be worse

[36] Caroline Rees, 'Mediation in Business-Related Human Rights Disputes; Objections, Opportunities and Challenges,' Harvard Kennedy School Working paper No.56 (February 2010), at 5, https://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_56_rees.pdf (accessed 29 June 2016). Caroline Rees was not asserting that this is required under the GPs but elucidates on the potentials of non-judicial remedy.

[37] Guiding Principles, note 3, Principle 22.

[38] Ibid, Principle 31(h).

[39] Rees, note 36, 5.

[40] Ibid.

[41] Florian Wettstein, *Multinational Corporations and Global Justice* (Stanford: Stanford University Press 2009) 67, citing Margaret MacDonald, 'Natural Rights' in Jeremy Waldron (ed.), *Theories of Rights* (Oxford: Oxford University Press 1984).

https://doi.org/10.1017/bhj.2016.30 Published online by Cambridge University Press

off without the work.[42] Likewise, people with more privileged backgrounds may have demands that exceed minimum human rights requirements.[43]

Furthermore, power imbalances between businesses and communities are likely to adversely affect what communities will consider an appropriate remedy.[44] These may arise because of the superior bargaining position of the business with respect to the complainants,[45] because of the structure of the grievance process itself (e.g., where communities play no role in its design),[46] and because the complainants lack information regarding the project and/or their human rights.[47]

Two divergent approaches to respond to these issues are referred to here as 'independence' and 'participation'. *Independence* expects that disputes will be resolved through mediation by a third party, where the third party is largely responsible for ensuring that outcomes are effective. *Participation* expects the users of the mechanism to engage with businesses on an equal basis and expects both parties to ensure that the outcomes are effective. Both these will be discussed in turn before concluding which approach best fits with the logic of the GPs.

1. Independence

Lukas[48] implicitly endorses an independence approach. She analyzed the operational-level mechanism set up by HP Mexico, together with the NGO Centre for Labour Reflection and Action (CEREAL), for its employees and workers of its supplier factories. The Code of Conduct which the mechanism uses in resolving complaints was designed in communication with the Mexican Chamber of the Electronics Industry (CANIETI). The process has four levels. At level one, the worker negotiates directly with their own factories, but only a minority of disputes are resolved this way. At level two, CEREAL negotiates with the factory on behalf of the worker, without them being present; most disputes are resolved this way. If the dispute is still not resolved, the matter is referred to CANIETTI which reviews the complaint and asks the factory management to propose a solution. If the issue cannot be resolved, CEREAL can mediate between CANIETTI and the factory management. At the fourth stage, the matter is taken to HP in the US, who will then urge the factory management to propose a solution. Apart from complaining directly to the HR manager or through an anonymous hotline, at no point are the workers directly involved in negotiations.[49]

In evaluating the mechanism, Lukas asserts that the mechanism complies with the requirement that the mechanism be based on engagement and dialogue on the basis that the mechanism was established as a result of a multi-stakeholder process and that there

42 Ibid, 50.

43 Ibid, 67.

44 UNWG 2014 Report, note 10, para 41.

45 Ibid; Toronto Meeting, note 26, para 34(e).

46 UNWG 2014 Report, note 10, para 37; Toronto Meeting, note 26, para 34(d).

47 Rees, note 36, 4.

48 Lukas, note 29.

49 Ibid, 333–7.

https://doi.org/10.1017/bhj.2016.30 Published online by Cambridge University Press

are regular communications between HP, CANIETTI, and CEREAL, even though the actual users were not involved in the design of the process or the process itself. In assessing the mechanism's rights-compatibility, she states that the mechanism is aligned with national law and thus rights-compatibility is ensured at the national level. In relation to international standards, Lukas notes that the Code reflects international standards but that this is not the case in practice: genuine trade unions do not exist. Lukas concludes that the key strengths in the mechanism lie in the involvement of third parties and argues for even greater independence in the mechanism.[50]

One could infer that Lukas endorses an 'independence' approach; the use of a third party is seen as complementary to ensuring outcomes are compatible with rights standards, and much less priority is given to the involvement of users themselves in dialogue or their own subjective preferences. Since this mechanism has been limited to employees, the scope of human rights has been mainly limited to labour rights. As such, the content of the rights would have been relatively concise compared to other human rights (see Section II.C). In addition, the mechanism largely drew its understanding of rights from the national legal system.

If one follows the approach that mediation by a third party is the best method to ensuring human rights are respected, one characteristically views subjective preferences and rights as being in conflict. This is demonstrated by Rees who describes the difference between facilitative mediation, where a mediator merely facilitates dialogue between parties, and evaluative mediation, where the mediator 'draws on law, industry practice or other authoritative sources to provide direction to the participants on appropriate grounds for settlement'.[51] She states that the idea that evaluative mediation is required to ensure compatibility with rights assumes that there is a zero sum between rights and subjective preferences: 'the more rights are inserted into the process, the less room there is for interests'.[52] Hence, an 'independence' approach is not likely to resolve the conflicts between dialogue-based processes and rights-compatible outcomes but accepts this conflict as inevitable.

2. *Participation*

Whilst 'independence' is characterized by processes driven by assessment, evaluation, or adjudication by a third party, 'participation' takes a broader perspective of achieving, advancing, or restoring the enjoyment of rights by empowering rights-holders to participate actively and shape outcomes which reflect their interests.[53] This approach can be seen in Knuckey and Jenkin's analysis of the Porgera Mine mechanism,[54] a case examined in more detail at the end of this article. Barrick Gold Corporation (Barrick) and the Porgera Joint Venture (PJV) set up a reparations programme for women who had been victims of sexual violence by security personnel at the Porgera Mine in Papua

[50] Ibid 342–5.

[51] Rees, note 36, 9.

[52] Ibid.

[53] Ibid, 7.

[54] Sarah Knuckey and Eleanor Jenkin, 'Company-created remedy mechanisms for serious human rights abuses: a promising new frontier for the right to remedy?' (2015) 19:6 *The International Journal of Human Rights* 801.

https://doi.org/10.1017/bhj.2016.30 Published online by Cambridge University Press

New Guinea.[55] As part of the agreement for a reparations settlement, the claimant was expected to sign a controversial agreement not to pursue any further claim for compensation or any civil legal action that relates to the entities concerned.[56]

Knuckey and Jenkin[57] correctly recognize that operational-level mechanisms should consult end users on the design and performance of the mechanism and should focus on dialogue as a means to resolve grievances. In assessing the mechanism, they ascertained that there was insufficient dialogue with the users and that key decisions were effectively made unilaterally by the business. They also criticized the mechanism for its insufficient scope, that the reparations provided were not proportionate to the harm suffered, that legal waivers prevented subsequent access to judicial mechanisms, and that there was a lack of transparency and oversight, especially given the fact that the mechanism was effectively providing a final settlement to the disputes.[58] They concluded that any direct remediation efforts should have a mechanism which is created and administered as a partnership between businesses and stakeholders (including users, their representatives, local civil society and, where relevant, tribal leaders).[59] Under this approach, users are empowered through allowing them to share ownership and participate in decisions in relation to both the process and the outcomes.

However, this approach does not remove the need for objective criteria to assess the rights-compatibility of outcomes. As Knuckey and Jenkin highlight, whilst operational-level mechanisms present opportunities for remedy that would otherwise not be provided, there is also the risk that rights will not be properly recognized. They argue that strict safeguards should be put in place, the nature of which will depend on the severity of the alleged abuses, the vulnerability of the users, and the finality of the settlement, e.g., whether legal waivers are signed upon receipt of remedy. They provide examples of safeguards which could be incorporated into the process: ensuring 'meaningful consultation and engagement with stakeholders, a mechanism scope which reflects the full range of serious violations of human rights experienced by the local community, adequate and appropriate compensation and transparency'.[60] In the case of final settlement of claims, they argue there should be a strong presumption against final settlement and that, where operational-level mechanisms seek to provide final settlement, there should be effective oversight by a third party.[61]

3. The GPs' approach: from independence to participation

In the drafting of the GPs, there was a movement from the idea of ensuring effective outcomes through *independence*—as had been the dominant approach in the Protect, Respect, Remedy Framework—to having effective outcomes ensured by *participation*. For example, under the Framework, the criterion that mechanisms be 'legitimate' required mechanisms 'have clear, transparent and sufficiently independent governance

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[55] *Porgera Mine* case, note 14, 1.

[56] Ibid, 2.

[57] Knuckey and Jenkin, note 54.

[58] Ibid, 817.

[59] Ibid.

[60] Ibid.

[61] Ibid, 804–16.

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structures to ensure that no party to a particular grievance process can interfere with the fair conduct of that process'.[62] Hence, the initial view of non-judicial grievance mechanisms was that they ensure any adjudicatory feature was independent from the parties.

Following the publication of the Framework, a pilot project was devised to test these criteria with four different operational-level mechanisms in different regions in the world (Pilot Project).[63] All of these criteria, except rights-compatibility, were tested during this pilot project and redefined before publication in the GPs in light of the lessons learnt.[64] The project was not in a position to assess the effectiveness of individual outcomes or the rights-compatibility of outcomes, as most of the operational-level mechanisms tested were only reaching implementation towards the end of the Pilot Project, and the type of engagement between the researchers and businesses did not allow researchers to be privy to individual grievances, grievance processes, and outcomes.[65] The Project concluded that, 'Formal and independent oversight structures may well play a role in achieving [trust] in operational-level grievance mechanisms … But other factors – including other effectiveness criteria discussed in this report, not least, transparency, dialogue and engagement – may be equally, or more, important.'[66]

Consequently, the focus of the criteria in the GPs was shifted from 'independence' to 'participation'.[67] Under the Framework, business-administered mechanisms were already required to be based on dialogue.[68] However, the Pilot Project concluded that engagement was required with stakeholders not only at the stage of dispute resolution but also in the design or review of the grievance mechanism,[69] a requirement incorporated into the GPs.[70]

However, participatory approaches may lead to outcomes that conflict with human rights standards and principles.[71] Furthermore, whether or not processes genuinely allow for meaningful participation can be difficult to ascertain because information on people's situations is not always possible to gather in its entirety: such processes are expensive and time-consuming and those carrying them out may misinterpret what people mean.[72] Furthermore, the need for criteria to measure whether an outcome is effective is particularly necessary where the processes themselves are non-ideal through lack of

62 Human Rights Council, 'Protect, Respect and Remedy: a Framework for Business and Human Rights', A/HRC/8/5 (7 April 2008) (2008 Framework), para 92(a).

63 Human Rights Council, 'Piloting Principles for Effective Company-Stakeholder Grievance Mechanisms: A Report of Lessons Learned', A/HRC/17/31/Add.1 (21 March 2011), para 5. The full version of the project with case studies is: Caroline Rees, 'Piloting principles for effective company-stakeholder grievance mechanisms: A report of lessons learned' Harvard Kennedy School Corporate Social Responsibility Initiative (2011) (Pilot Project), 90.

64 Ibid, paras 22–75. A further criterion, that mechanisms be a source of continuous learning, was added.

65 Ibid, 11, 21.

66 Ibid, 15.

67 Ibid.

68 2008 Framework, note 62, para 95.

69 Pilot Project, note 63, 26.

70 Guiding Principles, note 3, Principle 31(h).

71 Tania Burchardt and Polly Vizard, '"Operationalizing" the Capability Approach as a Basis for Equality and Human Rights Monitoring in Twenty-first-century Britain' (2011) 12:1 *Journal of Human Development* 91, 92.

72 Enrica Chiappero-Martinetti et al, 'Operationalisation of the Capability Approach' in Hans-Uwe Otto et al (eds.), *Facing Trajectories from School to Work: Towards a Capability-Friendly Youth Policy in Europe* (Springer, 2015) 119.

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resources, insufficient time, or a failure of adequate representation.[73] I will return to how approaches based on participation relate to our understanding of outcomes in Section IV.

C. Defining 'Rights-compatible outcomes'

Two main difficulties exist in interpreting what constitutes a 'rights-compatible' outcome. The first is the reference of the Remedy Pillar not only to understand remedy on human rights terms but also to understand the subjective preferences of the users. The second is that 'rights-compatibility' requires remedies to accord with international human rights standards. Most human rights standards were written with states in mind, and they do not automatically translate objective standards applicable to businesses. Both these issues will be discussed in turn.

1. Subjective Grievances

A business's provision of remedy is discussed both in the second and third pillar of the GPs. The Responsibility to Respect under the GPs is principally about businesses identifying, preventing, mitigating, accounting for, and remedying adverse human rights impacts.[74] The responsibility to remedy is defined as requiring businesses to remedy adverse human rights impacts that they have caused or contributed to. In contrast to the Respect Pillar, the Remedy Pillar's approach is not limited to the rectification of adverse human rights impacts but revolves around the resolution of 'grievances'. Operational-level mechanisms are expressly required to address concerns that do not amount to human rights abuses on the justification that, otherwise, such grievances may over time escalate into major disputes and human rights abuses.

A grievance is defined as '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'.[75] The UNWG confirmed that what constitutes effective remedy will vary greatly depending on many subjective elements, including 'the personal preferences and circumstances of the victim, the specific harm suffered and the local context and culture'.[76] In its guidance to businesses on how to implement their responsibility to respect, the OHCHR stated that it is important for businesses to understand what those affected would view as effective remedy and that the remedy should be agreed upon by the parties.[77] A lack of perceived bargaining power on the side of the victim may also affect what they consider effective.[78] Hence any understanding of the effectiveness of outcomes must incorporate objective criteria.

[73] Burchardt and Vizard, note 71, 92.

[74] Guiding Principles, note 3, Principle 15.

[75] Ibid, Principle 25 Commentary.

[76] UNWG 2014 Report, note 10, para 41.

[77] Interpretive Guide, note 4, 26, 64.

[78] Ibid.

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2. *Identifying Objective Standards*

At the same time, the Remedy Pillar also relies on objective human rights standards. Under the effectiveness criteria in Principle 31, all non-judicial mechanisms (including operational-level mechanisms) should be rights-compatible: 'ensuring that outcomes and remedies accord with internationally recognized human rights'.[79] The commentary states: 'Grievances 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.'[80]

The GPs require business enterprises to respect internationally recognized human rights which are understood to be those included in the International Bill of Human Rights and the International Labour Organization's Declaration on Fundamental Principles and Rights at Work. These substantive standards define the 'adverse human rights impacts' that the business should provide remedy for. However, many authors have expressed concerns about the use of human rights instruments as relevant benchmarks for the performance of businesses including that there are very few human rights obligations directly applicable to them,[81] state-based human rights treaty provisions are very difficult to understand in relation to businesses,[82] there is very little indication as to what substantive performance outcomes a business should meet,[83] and the implementation of human rights varies so much from context to context that it is difficult to adapt general principles into specific obligations.[84]

John Knox elaborates on the difficulties of identifying applicable standards of behaviour for businesses under international law. He describes the various duties that international law provides for private actors under four classifications: 'enforcement', 'placement', 'specification', and 'contemplation'.[85] He argues they exist in a pyramid structure with the least international law obligations falling under 'enforcement', with more falling under 'placement', even more falling under 'specification', and the most falling under 'contemplation'.[86]

Duties under 'contemplation' are those that do not apply directly to private actors but require states to carry out due diligence in protecting human rights from interference by private actors. Duties under 'specification' are those that are also placed on states rather than private actors but where the duty has been elaborated by reference to measures that a state should take to this end, hence lowering its discretion as to how it should regulate private actors. Those human rights duties that fall under 'placement' are duties that are

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79 Guiding Principles, note 3, Principle 31(f).

80 Ibid, Principle 31 Commentary.

81 John H Knox, 'The Ruggie Rules: Applying Human Rights Law to Corporations' in Radu Mares (ed.), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Martinus Nijhoff, 2012).

82 Surya Deva, 'Guiding Principles on Business and Human Rights: Implications for Companies' (2012) 9:2 *European Company Law* 101.

83 Rory Sullivan and Nicholas Hachez, 'Human Rights Norms for Business: The Missing Piece of the Ruggie Jigsaw – The Case for Institutional Investors', in Mares, note 81.

84 Fiona Haines, Kate Macdonald and Samantha Balaton-Chrimes, 'Contextualising the Business Responsibility to Respect: How Much Is Lost in Translation?' in Mares, note 81.

85 Knox, note 81, 57.

86 Ibid, 55–7.

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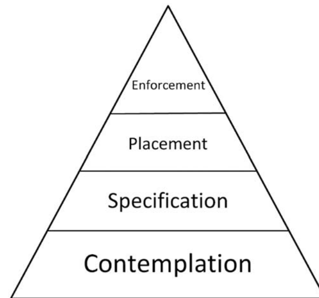

Figure 1. Knox's classifications of non-state actors' international law obligations

directly applicable to private actors but are only indirectly enforceable through state action, such as the Genocide Convention. Those human rights duties that fall under 'enforcement' are those few obligations that are *directly* enforceable upon private actors by international institutions such as international criminal law obligations through the International Criminal Court and the *ad hoc* tribunals.

Egregious human rights violations that fall within Knox's title of 'enforcement' would clearly fall outside of the scope of operational-level mechanisms as, currently, these all fall under international criminal law.[87] The ILO standards would fall under Knox's understanding of 'placement' as they provide duties on non-state actors but are only binding on states. However, as Knox concludes, most international human rights law does not provide clear standards for duties of businesses or other non-state actors.[88] Hence, a question that needs to be answered is how the rights reflected in the International Bill of Rights, and possibly other rights, relate to businesses.

This question is far from academic and is a source for conflict in practice, particularly in cases where the national legal framework offers inadequate protection for human rights. In such cases, 'contrasting views on the bases of rights and responsibilities may exacerbate misunderstandings and conflicts between civil society organizations and the private sector'.[89] There is currently little guidance on what constitutes a rights-compatible outcome. CSR Europe, a European business network for corporate social responsibility, drafted a guide that aimed to provide a practical interpretation of Principle 31's effectiveness criteria. It concluded that more research is required on the 'under-examined criterion of "rights-compatibility"'[90] and that a lack of clarity as to what constitutes an appropriate outcome under a non-judicial mechanism presents a challenge to the development of any metrics.[91]

87 Guiding Principles, note 3, Principle 22 Commentary; Principle 31 Commentary.

88 Knox, note 81, 66.

89 Wilson, note 35, 44. See also Haines, Macdonald and Balaton-Chrimes, note 84, in which the authors discuss the difficulties in translating general human rights standards into specific business responsibilities in different contexts. They draw on studies in which context specific standards such as progressive realization provisions in private codes can be used by businesses to escape their duties.

90 CSR Europe, note 10, 39.

91 Ibid, 38.

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III. Introducing a Human Rights-Based Approach

This article will seek to resolve the issues identified in Section II with reference to HRBA. The HRBA was developed in order to counteract perceived failures with the basic needs model which had dominated development discourse previously.[92] This movement from a needs-based approach to a rights-based approach within development was characterized by greater calls for accountability,[93] the understanding that all rights are indivisible and cannot be treated separately[94] and the movement towards self-reliance in the form of rights-bearers exercising their capabilities rather than being the beneficiaries of entitlements.[95] The HRBA focused not only on the fulfilment of needs but on social structures, loci of power, the rule of law, empowerment, structural change in favour of the poorest and most deprived, and access to remedy.[96] Central to this approach was the principle that affected stakeholders participate in the decision processes which affect them.[97]

In 2000, the UNDP, 'the flagship and main platform' of the HRBA,[98] published its first report explicitly recognizing the role of human rights in human development.[99] It stated that human rights and human development are both about securing basic freedom; human rights are claims for social arrangements that protect them from the worst abuses and deprivations and human development is the enhancement of capabilities (choices and opportunities) necessary to lead a life of value. It argued that rights language should be included in human development to 'lend moral legitimacy and the principle of social justice to the objectives of human development'.[100]

The HRBA is strongly influenced by the capabilities approach in philosophy.[101] Nussbaum went as far as to describe the capabilities approach as a species of the rights-based approach to justice.[102] The reason for adding 'rights language', for her, is a pragmatic one; that the language of human rights has such wide currency and resonance that it reminds people that claims for treatment to secure capabilities is justified.[103] Sen, who was an essential architect of the UNDP reports and the HRBA, has argued that the 'two concepts – human rights and capabilities – go well with each other, so long as we do not try to subsume either category within the territory of the other'.[104] Hence, in discussing the role of the HRBA, supplementary reference is made to the capabilities approach.

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92 Paul Gready and Jonathan Ensor, 'Introdution' in Paul Gready and Jonathan Ensor (eds.), *Reinventing Development? Translating Rights-Based Approaches From Theory To Practice* (London: Zed Books, 2005) 15–16.

93 Peter Uvin, *Human Rights and Development* (Kumarian Press, 2004) 131.

94 Gready and Ensor, note 92, 18–19; Uvin, note 93, 123.

95 Gready and Ensor, note 92.

96 Uvin, note 93, 131.

97 UN Development Programme, 'Human Development Report 1990: Concept and Measurement of Human Development', (Oxford: Oxford University Press, 1990) 11.

98 Wettstein, note 41, 101.

99 UN Development Programme, 'Human Development Report 2000: Human Rights and Human Development' (Oxford: Oxford University Press, 2000) 2.

100 Ibid.

101 For the HRBA's incarnation as a capabilities-only approach, see the 1990 Development Report, note 97.

102 Martha C Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge MA: Harvard University Press, 2007) 291.

103 Ibid, 295.

104 Amartya Sen, 'Human Rights and Capabilities' (2005) 6:2 *Journal of Human Development* 151, 163.

https://doi.org/10.1017/bhj.2016.30 Published online by Cambridge University Press

In 2003, the United Nations Development Group adopted the UN Statement of Common Understanding on Human Rights-Based Approaches to Development Cooperation and Programming (Common Understanding).[105] The Common Understanding stated that: (1) all development should further the realization of human rights as expressed in IHRL, (2) human rights in, *and principles derived from*, the UDHR and IHRL should guide development programming in all phases of the programming process, and (3) that development should contribute to the development of the capacities of 'duty-bearers' to meet their obligations and/or of 'rights-holders' to claim their rights.[106] The HRBA has been taken as a perspective by which to assess company-led human rights impact assessments and the requirements of due diligence under the GPs,[107] multi-stakeholder initiative certification schemes,[108] worker-driven social responsibility programmes, business-community impact-and-benefit agreements, and community-driven consultations.[109]

The HRBA is chosen as the basis for analyzing outcomes of operational-level mechanisms for three reasons. First, it provides a basis for the attribution of human rights responsibilities to non-state actors which follows a similar logic to that taken by John Ruggie in drafting the GPs. As discussed in Section II.C, there is no clarity as to how human rights standards apply to businesses' responsibilities. Rather than focusing on the duty-bearer and designing rights obligations for businesses,[110] the GPs focus on the rights-holders and define obligations in terms of not adversely impacting their enjoyment of their rights.[111] The approach is not limited to human rights in law but instead takes the approach that human rights themselves demand acknowledgement of imperatives.[112] Ruggie clarifies the GPs' reference to human rights instruments in this respect: 'the question is where companies should look for an authoritative enumeration, not of human rights *laws* that might apply to them, but of human *rights* they should respect'.[113]

Second, the HRBA inspired the effectiveness criteria in Principle 31. During consultations in the run up to designing the Framework, many participants had argued for a rights-based approach to grievance mechanisms which would emphasize the same principles of equality, equity, accountability, empowerment, and participation as in the

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[105] UN Development Group, 'The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies', (2003) (Common Understanding), http://hrbaportal.org/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies (accessed 5 May 2015).

[106] Ibid.

[107] Nora Götzmann, 'Human Rights Impact Assessments: Conceptual and Practical Considerations in the Private Sector Context', (2014) The Danish Institute of Human Rights Human Rights Research Papers No.2014/2 10, http://www.humanrights.dk/files/media/dokumenter/udgivelser/research/matters_of_concern_series/matters_of_concern_huri_and_impact_assessment_gotzmann_2014.pdf (accessed 29 June 2016).

[108] Wilson, note 35.

[109] Jonathan Kaufmann and Katherine McDonnell, 'Community-Driven Operational-level Mechanisms' (2015) 1:1 *Business and Human Rights Journal* 127, 130.

[110] As had been the previous approach taken prior to the Framework and the GPs: Human Rights Commission, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003).

[111] John Ruggie, *Just Business* (New York: WW Norton & Company, 2013).

[112] Amartya Sen, *The Idea of Justice* (Cambridge MA: Harvard University Press, 2011) 357–8; Amartya Sen, 'Elements of a Theory of Human Rights' (2004) 32:4 *Philosophy and Public Affairs* 315.

[113] Ruggie, note 111, 96.

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HRBA.[114] The Harvard Kennedy School Report, which formed the basis for Principle 31, based its criteria on the human rights principles in the HRBA.[115] Both the HRBA and Principle 31 require linkage to human rights;[116] non-discrimination and equality;[117] active, free and meaningful participation;[118] accountability;[119] and transparency.[120] Hence, the approach in the GPs in relation to operational-level mechanisms can be seen as broadly incorporating the principles of the HRBA.[121]

Third, the HRBA also follows the same 'participation' logic as Principle 31. This requirement that stakeholders participate in the design as well as the process is consistent with a HRBA which requires that participation and inclusion extend amongst every stage of the process.[122] Where a dispute requires adjudication, the GPs specify that it should not be dealt with by an operational-level mechanism.[123] A further point not explicit in the Common Understanding, but which is central to the capabilities approach underlying the HRBA, is that the understanding of justice employed is an outcome theory of justice rather than a procedural theory: it looks straight to the content of any outcomes rather than providing procedures with a determinative set of outcomes.[124]

This movement from *procedural* understandings towards *outcome* understandings of what constitutes an effective remedy is demonstrated by the fact that the criteria in Principle 31, which were originally based on conventional understandings of good process requirements under the Framework, were increasingly phrased away from

[114] Human Rights Commission, 'Summary of five multi-stakeholder consultations', A/HRC/8/5/Add.1 (7 April 2008), para 173.

[115] Corporate Social Responsibility Initiative, 'Rights Compatible Grievance Mechanisms: A Guidance Tool for Companies and their Stakeholders', Harvard Kennedy School of Government (January 2008), 1–2, 7.

[116] Human Rights Commission, 'What is a rights-based approach to development?', cited in Siobhán Alice McInerney-Lankford, *Human Rights Indicators in Development: An Introduction* (World Bank Publications, 2010) 42; Common Understanding, note 105; Guiding Principles, note 3, Principle 31(f).

[117] This requires that all people are treated equally and there is a focus on marginalized, disadvantaged, and excluded groups: Common Understanding, note 105. See also Guiding Principles, note 3, Principle 31(b) on equality and Principle 1 Commentary on particular attention being paid to vulnerable and marginalized groups.

[118] OHCHR, 'What is a rights-based approach to development?', note 116; Guiding Principles, note 3, Principle 31(h) Commentary. See also Lauchlan T Munro, '"The Human Rights Based Approach to Programming": A Contradiction in Terms?' in Sam Hickey and Diana Mitlin (eds.), *Rights-Based Approaches to Development* (Kumarian Press, 2009) 191.

[119] The Common Understanding stresses that when duty-bearers fail to observe human rights, they should be answerable to rights-holders before a competent court or adjudicator in accordance with the rules and procedures provided by law (Common Understanding, note 105). Likewise, the GPs require that businesses must co-operate with judicial mechanisms (Guiding Principles, note 3, Principle 22 Commentary).

[120] Transparency is not expressly mentioned in the Common Understanding but is mentioned in various implementations: International Human Rights Network, 'What are human rights based approaches?' http://ihrnetwork.org/what-are-hr-based-approaches_189.htm (accessed 29 June 2016); OHCHR, 'Good Governance', http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx, (accessed 29 June 2016); Australian Council for International Development, 'Practice Note: Human Rights-Based Approach to Development', (ACFID Practice Note Series, July 2010), https://acfid.asn.au/sites/site.acfid/files/resource_document/human-rights-based-approaches-to-development.pdf (accessed 29 June 2016). It is also mentioned in Guiding Principles, note 3, Principle 31(e). See also Arjun Sengupta, General Assembly, 'Right to Development - Report of the Independent Expert', A/55/150 (17 August 2000), 21–2.

[121] Tara J Melish and Errol Meidinger, 'Protect, Respect, Remedy and Participate: "New Governance" Lessons for the Ruggie Framework' in Mares, note 81, 314.

[122] Common Understanding, note 105. It is clear, within development literature, that access to remedy may extend to administrative mechanisms, in addition to judicial mechanisms. Human Development Report 2000, note 99, 100.

[123] Ibid.

[124] Nussbaum, note 102, 87.

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understanding of what an effective process would look like towards whether the process actually achieved the outcome that an effective process ought to. For example, the 'legitimate' criterion, which originally required 'sufficiently independent governance structures', was adapted to ensure the fair conduct of the process was modified to 'enabling trust from the stakeholder groups … and being accountable for the fair conduct of grievance processes'.[125] Similarly, where process safeguards existed, these were dropped. For example, the criterion for mechanisms to be 'predictable' in the Framework initially required mechanisms to provide absolute time frames, but the criterion was revised to merely requiring indications as to timelines.[126]

One key difference worth noting between the HRBA and the GPs relates to the understanding of non-state actors' human rights responsibilities. The HRBA understands that 'actors [are] collectively responsible for the realization of human rights. [They] are accountable if the right goes unrealized. When a right has been violated or insufficiently protected, there is always someone or some institution that has failed to perform a duty'.[127] Claims of rights-holders are directed at anyone who will help.[128] The GPs, on the other hand, require that businesses respect the human rights of others;[129] they recognize the primacy of the state, and the domestic legal system, over a business's responsibility to recognize international law norms.[130] Hence, the responsibility to provide remedy under Principle 31 arises only where the business itself has caused or contributed to an adverse human rights impact.[131] When viewing the GPs through the lens of the HRBA, it is necessary that we restrict any understanding of its application in light of the narrow responsibility of a business to 'do no harm'.

IV. Applying the Human Rights-Based Approach

This Section will examine how the HRBA may resolve the key problems identified in what constitutes an effective remedy in Section II. Section IV.A will review the types of

[125] Pilot Project, note 63, 13–15.

[126] Ibid, 19.

[127] Human Development Report 2000, note 99, 16.

[128] Uvin, note 93, 132, citing Amartya Sen, *Development as Freedom* (Knopf Doubleday Publishing Group, 2011) 230. For a critique of the HRBA's approach to duty-bearers, see Wettstein, note 41, 113. For a description of how the HRBA has been used to identify the duties of different actors in practice, see Urban Jonsson, 'A human rights-based approach to programming' in Gready and Ensor, note 92, 52 and Munro, note 118, 196.

[129] Guiding Principles, note 3, Principle 11. The SRSG was quick to reject the approach that businesses should have similar roles in the realization of human rights as states. He argued that a business performs a specialized function rather than the function of a state and that, by placing states and corporations as co-equal duty bearers, this could undermine a state's duty to protect human rights. Human Rights Commission, 'Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', E/CN.4/2006/97 (22 February 2006), paras 66–8.

[130] Larry Catá Backer, 'From Institutional Misalignments to Socially Sustainable Governance: The Guiding Principles for the Implementation of the United Nations "Protect, Respect and Remedy" and the Construction of Inter-Systemic Global Governance' (2012) 25 *Global Business and Development Law Journal* 69, 137.

[131] Guiding Principles, note 3, Principle 22 Commentary. Where the business itself has a business relationship with an entity that has caused an alleged impact, but has not contributed to it itself, it should to take measures to prevent the adverse impact (Principle 13(b); Principle 19 Commentary); the GPs do not require it to provide remedy for such impacts (Principle 22 Commentary). Radu Mares, '"Respect" Human Rights: Concept and Convergence' in Robert C Bird, Daniel R Cahoy and Darin Prenkert (eds.), *Law, Business and Human Rights: Bridging the Gap* (Cheltenham and Northampton MA: Edward Elgar Publishing, 2014) 14–15.

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remedy that ought to be provided. Section IV.B will look at how a participatory approach relates to any understanding of outcomes. Section IV.C will then determine how participatory strategies can be employed to determine the content of what constitutes a 'rights compatible outcome'. It will conclude with a discussion of the OHCHR's reasoning in relation to the Porgera Mine operational-level mechanism in light of lessons learned (Section IV.D).

A. Reconciling Transformative Remedy with the Responsibility to Respect

As discussed in Section II.A, the GPs advocate an approach based on more transformative outcomes. The HRBA also aims to transform underlying structural injustices and thus anticipates transformative outcomes.[132] Transformative remedies correct 'inequitable outcomes precisely by restructuring the underlying generative framework',[133] and they can be distinguished from so-called affirmative remedies which just correct 'inequitable outcomes of social arrangements without disturbing the underlying framework that generates them'.[134] The transformative remedy approach rejects formal equality as insufficient[135] and instead aims for 'equality of parity'.[136] This principle recognizes the right of all to participate and interact with each other as peers in social life.[137] Equality of parity is evaluated by the same criteria as the capabilities approach as it assesses social arrangements in terms of the degree to which people have the capability to participate on an equal basis.[138] Within the context of operational-level mechanisms, it is essential that power is equally distributed between the business and the users, and it is therefore essential that the operational-level mechanism is designed and implemented through a partnership between the community and the business.

Transformative remedy has also been discussed in IHRL. Two poignant examples are the Convention for the Elimination of Discrimination Against Women (CEDAW) and a leading judgment on transformative remedy from the Inter-American Court for Human Rights (IACtHR): the *Cotton Field* case.[139]

The CEDAW does not contain any definition of equality, but Cusack and Pusey characterize it as having three different types of equality within its text: formal, substantive, and transformative.[140] Key provisions that advocate for transformative remedy within the

[132] For an in-depth discussion of the similarities and differences between theories of transformative remedy and the capabilities approach, see Nancy Fraser, 'Identity, Exclusion and Critique: A Response to Four Critics' (2007) 6:3 *European Journal of Political Theory* 305; Ingrid Robeyns, 'Is Nancy Fraser's Critique of Theories of Distributive Justice Justified?' (2003) 10:2 *Constellations* 538.

[133] Nancy Fraser, 'From redistribution to recognition? Dilemmas of justice in a "post-socialist age"' [1995] *New Left Review* 68, 82.

[134] Ibid.

[135] Sandra Liebenberg, 'Needs, rights and transformation: adjudicating social rights in South Africa: feature' (2005) 6:4 *ESR Review: Economic and Social Rights in South Africa* 3, 4.

[136] Nancy Fraser and Axel Honneth, *Redistribution or Recognition?: A Political-philosophical Exchange* (Verso, 2003) 229.

[137] Liebenberg, note 135, 4.

[138] Fraser, note 132, 319.

[139] Inter-American Court of Human Rights, *Case of González et al ('Cotton Field') v Mexico* (2009) Series C No 205.

[140] Simone Cusack and Lisa Pusey, 'CEDAW and the Rights to Non-Discrimination and Equality' (2013) 14 *Melbourne Journal of International Law* 1, 10.

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CEDAW are Articles 2(f) and 5 which require states to address prevailing gender relations and gender-based stereotypes through the transformation of institutions, systems, and structures and the transformation of harmful norms, prejudices, and stereotypes.[141]

The CEDAW Committee has provided the two clearest indications as to the role of transformative remedy in its General Recommendations 25 and 28.[142] General Recommendation 25 on CEDAW Article 4(1) states that 'measures adopted towards a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns'.[143] It advocates for formal equality (ensuring women are not directly or indirectly discriminated against), substantive equality (through improving the de facto position of women), and transformative remedy (to address prevailing gender relations and the persistence of gender-based stereotypes).[144] General Recommendation 28 requires that remedies provide for, 'different forms of reparation, such as monetary compensation, restitution, rehabilitation and reinstatement; measures of satisfaction, such as public apologies, public memorials and guarantees of non-repetition; changes in relevant laws and practices; and bringing to justice the perpetrators of violations of human rights of women'.[145]

The IACtHR has paved the way in terms of providing remedy with a 'transformative aspiration'[146] in *Cotton Field v Mexico*.[147] Having found that Mexico had infringed its human rights obligations by failing to carry out due diligence to prevent, investigate, and impose penalties for violence against women, the Court held that Mexico provide a variety of reparations including monetary compensation, symbolic redress, and guarantees of non-repetition.[148] The IACtHR decided that 'the reparations must be designed to change this situation, so that their effect is not only of restitution, but also of rectification. In this regard, re-establishment of the same structural context of violence and discrimination is not acceptable'.[149] Two key transformative principles were adopted by the IACtHR: the principle not to *exacerbate* structural discrimination and the principle that remedies *subvert* structural discrimination.[150]

Whilst the Basic Principles on Remedy and their partial incorporation into the GPs do not, on their own, advocate transformative remedy,[151] the GPs, in respect of

[141] Ibid.

[142] Cusack and Pusey, note 140.

[143] General Recommendation 25, note 141, para 10.

[144] Ibid, para 7.

[145] General Recommendation 28, note 141, para 32.

[146] Human Rights Commission, 'Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Rashida Manjoo', A/HRC/14/22 (23 April 2010), para 77.

[147] *Cotton Field,* note 139.

[148] Ibid, 464–589. See also, Manjoo, note 146, para 77.

[149] Ibid, 450.

[150] Ibid, 451; Ruth Rubio-Marín and Clara Sandoval, 'Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the Cotton Field Judgment' (2011) 33 *Human Rights Quarterly* 1062, 1084. For other discussions of the role of transformative remedy in the context of human rights, see Manjoo, note 146, paras 31, 58–66; Human Rights Council, 'Common Violations of the Rights to Water and Sanitation', A/HRC/27/55 (30 June 2014) 30; and Secretary-General's Guidance Note on Reparations for Conflict-Related Sexual Violence (June 2014), http://www.unwomen.org/~/media/Headquarters/Attachments/Sections/News/Stories/FINAL%20Guidance%20Note%20Reparations%20for%20CRSV%203-June-2014%20pdf.pdf (accessed 29 June 2016).

[151] Couillard, note 24, 450.

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operational-level mechanisms, have made several important steps in this regard. They have incorporated participatory rights of the victims in both the process and the design of remedial processes. They also require that the remedy be informed by an understanding of what those affected would view as effective remedy.[152] Furthermore, they are sensitive to the underlying systematic causes for human rights abuses. This is demonstrable in the envisaged role of an operational-level mechanism not only as a vehicle for remedy but also as 'analysing trends and patterns in complaints [so businesses] *identify systemic problems and adapt their practices accordingly*'.[153]

Likewise, the criterion that grievance mechanisms be a continuous source of learning requires that the business take lessons from the patterns of grievances in order to influence its policies, procedures, or practices to prevent future harm.[154] Operational-level mechanisms are required to pay particular attention to vulnerable peoples and the different risks that may be faced by women and men when providing remedy.[155] Hence, implicit in the GPs is the understanding that structural discrimination is not exacerbated. Recalling the two key transformative principles highlighted into the *Cotton Field* judgment—the principle not to exacerbate structural discrimination and the principle that remedies subvert structural discrimination[156]—one could interpret the GPs as containing the first principle: not to *exacerbate* structural discrimination.

However, the GPs do not prescribe that remedies must *subvert* structural discrimination. Unlike the HRBA or transformative remedy, they are limited to harms that the business has caused or contributed to. Furthermore, as discussed in Section II.A, operational-level mechanisms would not be the appropriate forum for the resolution of many structural injustices existing in broader society, such as issues arising from a lack of government regulation. As Backer illustrated, issues of *social structures relating to the status of women* are matters for the state and its duty to protect, whereas issues of *a business's involvement in affecting the status of women in their operations* is at the heart of the responsibility to respect.[157]

B. How a Participatory Approach Affects our Understanding of Outcomes

The theoretical foundations of remedies have not traditionally been discussed in IHRL.[158] Remedy is generally divided into two concepts: procedural and substantive.[159] Procedural remedy refers to the *processes* by which disputes are heard and decided; substantive remedy refers to the *outcome* of proceedings and the relief afforded to a successful claimant.[160] Sen has paid special attention to the definition of outcomes in connection to

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[152] Interpretive Guide, note 4, 64.

[153] Guiding Principles, note 3, Principle 29 Commentary (emphasis added).

[154] Ibid, Principle 31(g) Commentary.

[155] Guiding Principles, note 3, Principle 1.

[156] *Cotton Field,* note 147, 451; Rubio-Marín and Sandoval, note 150, 1084.

[157] Backer, note 130, 161. However, it is worth noting that the distinction between the social formation of discrimination and a business creating or exacerbating existing discrimination may, in practice, be artificial and inseparable (at 162).

[158] Dinah Shelton, *Remedies in International Human Rights Law* (Oxford: Oxford University Press, 2000) 7.

[159] Ibid.

[160] Ibid.

https://doi.org/10.1017/bhj.2016.30 Published online by Cambridge University Press

the capabilities approach: 'The outcome is meant to be the state of affairs that results from whatever decision variable we are concerned with, such as action or rule of disposition.'[161] These states of affairs cannot possibly be described in its 'entirety', as it is always possible to add more detail to our understanding of them, but one must take note of all of the features that are deemed important. It also cannot be evaluated using solely objective criteria, given the capabilities approach's emphasis on criteria such as processes and relations between different actors.[162] Sen differentiates between *culmination* outcomes and *comprehensive* outcomes: *culmination* outcomes look at *what* situation people end up in and *comprehensive* outcomes look at the *way* someone ends up in that situation.[163] Hence, in the latter, favoured approach, the processes involved are considered part of the outcome. For the sake of clarity, this will be referred to as the 'process-outcome' approach.

The GPs require that the outcomes to operational-level mechanisms are determined with full participation of the affected stakeholders. The UNWG confirmed that remedial outcomes cannot be separated from processes: they should be considered in tandem.[164] Hence, under Sen's approach, this would be a comprehensive outcome to the extent that adherence to the processes by which a particular state of affairs comes about should be considered as part of the overall outcome: even an outcome that would ordinarily be considered good will not be a good outcome if the processes and relations that have led to that outcome are also not good.

This connection between process and outcome is not always made clear in the literature on the HRBA itself.[165] However, many approaches align with Sen's understanding. For Jonsson, the HRBA requires the satisfaction of two conditions: a desirable outcome and an adequate process to achieve and sustain that outcome based on human rights principles.[166]

Figure 2, below, shows that most development starts at A, and the ideal, final stage is D. Unfortunately many development programmes become trapped in one of the two areas represented by B or C. The former represents a good outcome at the expense of, for example, sustainability (resulting from a good process), and is as ineffective as C—a good process without a significant outcome. Some immunization programmes have become trapped in B, while some local, community-oriented programmes remain trapped in C.[167]

Gallant and Parlevliet[168] look at the relationship between processes and outcomes within the context of the relationship between the different perspectives of human rights practitioners and conflict management practitioners. The human rights perspective's focus 'generally translates into a prescriptive approach towards the outcome or product of negotiations', whereas conflict management practitioners' focus is on a process of

[161] Sen, *Idea of Justice,* note 112, 215.
[162] Ibid, 220.
[163] Ibid, 230.
[164] UNWG 2014 Report, note 10, para 41.
[165] Gready and Ensor, note 92, 10.
[166] Jonsson, note 128, 48.
[167] See Urban Jonsson, 'A Human Rights-based Approach to Programming' in Paul Gready and Jonathan Ensor (eds.), *Reinventing Development? Translating Rights-Based Approaches From Theory To Practice* (London: Zed Books, 2005) 49.
[168] Ghalib Galant and Michelle Parlevliet, 'Using rights to address conflict – a valuable synergy' in Gready and Ensor, note 92, 111.

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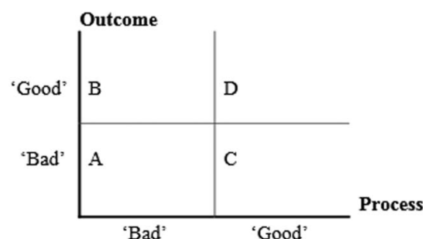

Figure 2. A process-outcome approach

establishing dialogue to ensure the quality, legitimacy, and sustainability of an outcome. For Gallant and Parlevliet, these approaches are not only reconcilable but complementary. They highlight that there is a great degree of scope in how rights are realized and that the implementation of rights will differ from context to context. Rules, relationships, and process must be taken together as a coherent whole. Hence, any evaluation of outcomes under Principle 31 cannot be limited to the content of the final remedy but must be based on the whether the process criteria in this principle have been met. It is from this 'process-outcome' perspective that the type of remedy should be viewed.[169]

C. Defining 'Rights-Compatible Outcomes'

In order to develop a definition of rights-compatibility, it is necessary to provide a basis for translating general human rights standards into standards which are specific to a given context.[170] Otherwise, where their applicability is subject to wide ambiguities, these can be utilized by businesses to water down standards and effectively escape their responsibilities.[171] The HRBA approach would require the interpretation of the content of such rights to result not from independent adjudication or an enumerative list of norms but from the participation of rights-holders who will shape outcomes in such a way that will reflect their interests;[172] it is essential that users and businesses design and implement the mechanism as partners.[173]

As discussed in Section II.B, most human rights, particularly non-labour rights, do not provide concise norms for businesses; they are open to contesting interpretations of what they demand in practice. If we adopt a HRBA, it is essential that community members be involved in determining the final interpretation of how human rights should apply in their given context. Various participatory approaches have been developed which provide the opportunity of communities to shape their own understandings of the content of such rights. Under the 'Getting-it Right Tool', a toolkit for community-driven human rights impact assessments, human rights capacity-building is an essential part of the

[169] Ibid, 111–17.

[170] Haines, Macdonald and Balaton-Chrimes, note 84, 108.

[171] Ibid, 115.

[172] Rees, note 36, 7.

[173] An example of the attempt to develop an operational-level mechanism that is truly owned by the community is a community-driven mechanism in Thilawa, one of Myanmar's first Special Economic Zones. Kaufmann and McDonnell, note 109, operational-level.

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process.[174] In order for participants to own the process, it is essential that every participant is asked what each human right means to them, in their own language and in ways specific to their own culture.[175] Participatory-based capacity-building methods require that participants are actively involved and freely express their opinion; that the programme for learning is based on their own needs, desires, and perceptions; and that any trainer or facilitator interacts with them on an equal basis.[176] A trainer or facilitator is often necessary to generate discussions on human rights and to inform participants on human rights materials.[177] It is also essential that any capacity-building adopts a gender perspective and pays specific attention to the role of vulnerable peoples whose rights would otherwise be overlooked.[178]

In the SRSG's Pilot Project on operational-level mechanisms, human rights capacity-building was seen as essential to ensure that users were well informed of their rights before participating.[179] Community participatory approaches can be carried out by an independent civil society organization, a business, or another actor.[180] Due to the tendency of businesses to not fully engage in participatory processes,[181] some may recommend that a third party is necessary. However, it is essential that there is some form of 'buy-in' from the business itself for any community-participatory process to lead to effective remedy.[182] Ultimately, the arrangement of capacity-building processes must also be decided with participation of potential users.

Operational-level mechanisms must comply with national laws:[183] the state, in turn, is required to ensure that these national laws have the effect of requiring businesses to respect human rights.[184] In addition, businesses must ensure that outcomes and remedies accord with internationally recognized human rights.[185] This reliance on international standards is especially important where national standards are relatively weak.[186] The application of such standards will depend on mutual understandings of the content and application of human rights between the actors involved, resulting from processes based on equality of parity.[187]

[174] 'Getting It Right: Human Rights Impact Assessment Guide', Phase A: Preparation – Step 5: Meet with the Community (2011), http://www.gaportal.org/resources/detail/getting-it-right-human-rights-impact-assessment-guide (accessed 30 June 2016).

[175] Ibid.

[176] Circle of Rights, 'Economic Social and Cultural Rights Activism: A Training Resource – Part 2: Using the Manual in a Training Program', http://www1.umn.edu/humanrts/edumat/IHRIP/circle/part2/usingthemanual.htm (accessed 30 June 2016) [referenced as a potential resource for capacity-building in the *Getting It Right* Tool].

[177] Ibid.

[178] Ibid.

[179] Pilot Project, note 63, 90.

[180] Oxfam America, 'Community voice in human rights impact assessments', (July 2015) at 20, http://www.oxfamamerica.org/static/media/files/COHBRA_formatted_07-15_Final.pdf (accessed 29 June 2016).

[181] Ibid.

[182] Kaufmann and McDonnell, note 109, 132.

[183] Guiding Principles, note 3, Principle 23(a).

[184] Ibid, Principle 3(a).

[185] Ibid, Principle 31(f).

[186] Lukas, note 29, 346.

[187] For an example of community perspectives on the implementation of the effectiveness of the GPs, see Taylor Fulton et al, 'What is Remedy for Corporate Human Rights Abuses? Listening to Community Voices, A Field Report' [2015] *Columbia School of International and Public Affairs*, 29–44.

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An outstanding question is whether dialogue-based settlements may deviate from existing standards where such outcomes are in the interests of both parties.[188] Gallant and Parlevliet make clear that, for settlements of disputes to survive challenge in the long term, they must confirm to human rights rules, as found in constitutions, legislation, contracts, and agreements, amongst others.[189] They make clear this is the case even where the parties themselves would be comfortable with a solution that does not uphold these rules.[190] Breaches of such standards are likely to render outcomes illegitimate, thereby increasing the risk of future conflict.[191] Also, for the GPs to be commensurate with IHRL, it would be necessary for them to not advocate breaching IHRL standards in any situation. Therefore, where human rights standards do exist, they should be abided with even where subjective preferences would otherwise decide to the contrary. As a preparatory report, which informed the drafting of Principle 31, states:

> it is important to underline that dialogue-based grievance mechanisms are not about renegotiating minimum human rights standards. Minimum standards should set the parameters for acceptable outcomes. It is the legitimate leeway in their interpretation and implementation, along with wider interests at stake, that form the basis for dialogue, negotiation and problem solving.[192]

However, participative processes may themselves lead to outcomes that conflict with human rights standards and principles.[193] It is therefore necessary to develop a minimum threshold that outcomes should not contravene. Several reasons can be put forward for this. First, operational-level mechanisms can, particularly where they do not follow genuinely participatory strategies, result in inadequate remedy and can even undermine individuals' rights to remedy.[194] Second, there are significant obstacles to the ascertainment of whether genuine participatory approaches have been followed,[195] and therefore a minimum threshold of outcome can be relied upon where there are disputes over the participatory nature of the process. Furthermore, where individuals are already subject to serious injustice, their understanding of what constitutes a just outcome may be considerably lower than human rights standards.[196] Finally, the need for measurement of effective outcomes is particularly poignant where the processes themselves are non-ideal through lack of resources, insufficient time, or a failure for adequate representation.[197]

Burchardt and Vizard provide an approach to settling this problem of reconciling 'bottom-up' deliberative/participative strategies and internationally recognized human

[188] ACCESS Facility Expert Meeting Report, 'Sharing experiences and finding practical solutions regarding the implementation of the UNGP's effectiveness criteria in grievance mechanisms', (17 July 2014) (Hague Meeting) at 10, http://accessfacility.org/expertmeeting-April2014 (accessed 30 June 2016).

[189] Gallant and Parlevliet, note 168, 114.

[190] Ibid.

[191] Ibid.

[192] CSR Initiative, note 115, 9.

[193] Burchardt and Vizard, note 73, 92.

[194] Knuckey and Jenkin, note 54, 816.

[195] Enrica Chiappero-Martinetti et al, 'Operationalisation of the Capability Approach' in Hans-Uwe Otto et al (eds.), *Facing Trajectories from School to Work: Towards a Capability-Friendly Youth Policy in Europe* (Springer, 2015), 119.

[196] Wettstein, note 41.

[197] Burchardt and Vizard, note 73, 92.

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rights standards,[198] informed by their work in developing a 'capability-based measurement framework'.[199] This approach has been used to monitor the equality and human rights position of individuals and groups for the UK's Equality and Human Rights Commission.[200] Instead of identifying potential standards to adhere to, they identify 'human rights capabilities' through a two-stage process: '(1) deriving a "minimum core" capability list from the international framework; and (2) refining, expanding and orientating the "minimum core" capability list through a deliberative research exercise.'[201]

They take the ICCPR and ICESCR as the basis for identifying 'human rights capabilities'.[202] For instance, one such 'human rights capability' is 'participation, influence and voice' which was inferred from the rights to peaceful assembly (ICCPR Art 21), freedom of association (ICCPR Art 22), participation in public affairs (ICCPR Art 25), and the right to form a trade union (ICESCR Art 8).[203]

In order to ensure appropriate participation in the selection of human rights capabilities, stage two was a deliberative research exercise.[204] Workshops were held with participants selected from a wide spread of socio-economic and demographic characteristics.[205] Participants were asked what is needed for a person to flourish in society, initially inviting unprompted responses and then inviting responses based on a simplified 'plain English' version of the list devised in stage one.

These capabilities were added to the capabilities from stage one. This produced an amalgamated list with added capabilities which, in this case, included: 'creativity and intellectual fulfilment; access to information technology; activities with family and friends; personal development'.[206] A 'trump' rule was applied: where the capability lists contradicted, list one 'trumped' list two. In the case of the British public, the trump rule was only applied to the right to join a trade union, which was regarded as non-essential in a number of workshops but was added to the amalgamated list regardless.[207]

This approach could provide a potential solution dilemma between subjective preferences and objective standards. By following an approach akin to the HRBA and translating international human rights into capabilities, one can provide greater rights awareness and prompt participants into making a better informed determination of what

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[198] Ibid, 92.

[199] Ibid, 96.

[200] Tania Burchardt, 'Monitoring inequality: putting the capability approach to work' in Gary Craig, Tania Burchardt and David Gordon (eds.), *Social Justice and Public Policy: Seeking Fairness in Diverse Societies* (Bristol: Policy Press, 2008), 205.

[201] Burchardt and Vizard, note 73, 100.

[202] Tania Burchardt and Polly Vizard, 'Developing a Capability List: Final Recommendations of the Equalities Review Steering Group on Measurement', Centre for Analysis of Social Exclusion Case/121 (April 2007), at 39, http://eprints.lse.ac.uk/6217/1/Developing_a_capability_list_Final_Recommendations_of_the_Equalities_Review_Steering_Group_on_Measurement.pdf (accessed 29 June 2016).

[203] Burchardt and Vizard, note 73, 101.

[204] Deliberative research is a participatory approach where participants reach conclusions based on the provision of information and public reasoning. Tania Burchardt, 'Deliberative research as a tool to make value judgements' (2014) 14:3 *Qualitative Research* 1, 5.

[205] Burchardt and Vizard, note 73, 103.

[206] Ibid, 106.

[207] Ibid.

https://doi.org/10.1017/bhj.2016.30 Published online by Cambridge University Press

capabilities they want for themselves, moving beyond basic needs. This participatory approach would honour the key principles behind the GPs and ensure better equality of parity in operational-level mechanisms by helping to address a key contributor to power imbalances: lack of knowledge of rights. More importantly, by providing a 'trump rule', capabilities based on human rights standards would trump capabilities based on the perspectives of the participants, thereby ensuring both that the remedies do not deviate from the principles contained in IHRL and that remedies are sustainable, as they are less open to challenge in the future.

D. Evaluating Outcomes: Examining the *Porgera Mine* Case

Barrick and PJV had set up a reparations programme for women who had been victims of sexual violence by security personnel at the Porgera Mine in Papua New Guinea.[208] This mechanism was set up to counteract perceived failures on the national legal system to provide remedy for these human rights abuses.[209] In 2013, the OHCHR issued interpretive guidance in response to letters written by Barrick and MiningWatch Canada (MWC).[210] MWC had asserted, amongst other allegations, that a legal waiver is contrary to the GPs and that Barrick should remove this requirement from their reparations programme. Barrick argued that the agreement was not in contravention of the GPs, stating that, at any point during the programme, a complainant can choose to pursue legal claims in the courts. If the claimant is satisfied with the offer of reparations, then it is appropriate that claims against Barrick be released to provide finality to the process. The OHCHR proceeded not to evaluate the mechanism itself but to offer interpretive guidance on issues raised by Barrick and MWC.

It stated that where outcomes have implications for human rights, care should be taken to ensure they are in line with internationally recognized rights, as required by Principle 31(f). It concluded that there should be a strong presumption against the use of legal waivers in non-judicial grievance mechanisms but that situations may arise where, for reasons of predictability and finality, a legal waiver could be required from claimants. However, the interpretive guidance did not specify what these reasons could be.

If this case is examined from the perspectives detailed above, the first conclusion would be that an operational-level mechanism should probably not deal with matters relating to allegations of rape and serious sexual assaults.[211] The GPs stipulate that 'some situations, in particular where crimes are alleged, typically will require cooperation with judicial mechanisms'.[212] While the language does not necessarily

[208] *Porgera Mine* case, note 14, 1.

[209] Barrick Gold Corporation, 'Violence against women: Framework of remediation initiatives for the Porgera Joint Venture in Papua New Guinea' (22 March 2013), 3 (note 6), http://www.barrick.com/files/porgera/Letter-to-UN-High-Commissioner.pdf (accessed 29 June 2016).

[210] *Porgera Mine* case, note 14.

[211] For an in-depth description of the human rights issues related to the Porgera Mine (including the issues covered in the mechanism) see Human Rights Watch, 'Gold's Costly Dividend Human Rights Impacts of Papua New Guinea'sPorgera Gold Mine' (February 2011), https://www.hrw.org/sites/default/files/reports/png0211webwcover.pdf (accessed 29 June 2016); Amnesty International, 'Undermining Rights: Forced Evictions and Police Brutality Around the Porgera Gold Mine' (January 2010), https://www.amnestyusa.org/sites/default/files/asa340012010eng.pdf (accessed 29 June 2016).

[212] Guiding Principles, note 3, Principle 22 Commentary.

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preclude non-judicial remedy in every situation relating to allegations of crime, it is important to note that the scope of disputes that operational-level mechanisms should handle is even narrower: 'where adjudication is needed, this should be provided by a legitimate, independent third-party mechanism'.[213]

When examining the application of the process standards, type of remedy, and overall stakeholder engagement, the OHCHR found there was too much dispute over the facts to come to any conclusions without an independent investigation.[214] However, it finished with the conclusion that there should be proper engagement with affected stakeholder groups about the design and performance of an operational-level grievance mechanism to ensure that it 'meets their needs, that they will use it in practice, and that there is a shared interest in ensuring its success'.[215] An investigation by Enodo Rights, commissioned by Barrick in 2016, concluded that the operational-level mechanism was without any dialogue-based process between the business and the affected parties.[216] It is clear that the mechanism followed an *independence* approach to the provision of remedy. While consultations did take place with potential claimants on the design of the operational-level mechanism, the investigation found there was a common perception amongst those interviewed that they were not consulted on the mechanism's process.[217]

When looking at the issue of outcome, the OHCHR noted that their analysis could not be limited to 'the substance of the reparations agreement alone, but must include consideration of *any* human rights outcomes and implications of the agreement'.[218] Hence, their analysis appropriately looked at the overall consequences of the agreement rather than just the agreement itself. Whilst the indivisibility of the criteria in Principle 31 was affirmed,[219] the OHCHR examined the issues relating to legal waivers, processes, outcomes, and the nature of remedy separately. When examining whether legal waivers were acceptable, the OHCHR solely examined the question in relation to Principle 31(f), that remedies and outcomes should be rights-compatible.[220]

By merely applying the criterion of rights-compatibility to the issues of legal waivers without considering Principle 31 as a whole, the OHCHR did not take a process-outcome approach. In examining whether the requirement for legal waivers was acceptable, the process by which communities were involved in the design of the process should have been central to any evaluation.[221] As the grievance mechanism was designed by experts

[213] Ibid, Principle 31 Commentary. For a full discussion of how the mechanism deviates from the understanding of operational-level mechanisms as under the GPs, see Knuckey and Jenkin, note 54, 804.

[214] *Porgera Mine* case, note 14, 10, 12–13.

[215] Ibid, 12–13. For an in-depth discussion of the failings of the actual engagement with stakeholders, see Knuckey and Jenkin, note 54, 805–7.

[216] Yousuf Aftab, 'Pillar III on the Ground: An Independent Assessment of the Porgera Remedy Framework', Enodo Rights (January 2016), at 46, http://enodorights.com/wp-content/uploads/2015/05/YAftab-Pillar-III-on-the-Ground-FINAL.pdf (accessed 28 August 2016).

[217] Ibid, 55

[218] *Porgera Mine* case, note 14, 8.

[219] Ibid, 5.

[220] Ibid, 8.

[221] MWC raised this in its reply to the Office of the High Commissioner of Human Rights. MWC, 'Re: Allegations regarding the Porgera Joint Venture remedy framework' (4 September 2013) at 2, http://miningwatch.ca/sites/default/files/letter_to_unhchr_re_porgera_opinion_2013-09-04_0.pdf (accessed 29 June 2016).

https://doi.org/10.1017/bhj.2016.30 Published online by Cambridge University Press

with no consultation of the victims of human rights abuses,[222] any outcome from the mechanism would not be effective under Principle 31. Even the dispute procedure did not appear to be determined by real participatory dialogue as the remedy is determined by a claims assessment team who apply predetermined criteria,[223] and there was evidence that women were not receiving remedy of the type they had requested.[224]

In terms of the type of remedy, the OHCHR appropriately stated that remedy could fall within a broad field of reparations: restitution, compensation, rehabilitation, satisfaction (including apologies), and guarantees of non-repetition.[225] The OHCHR detailed the wide variety of potential remedies that included non-financial remedies, but it did not analyze whether remedies such as apologies or structural changes were being employed by the business.[226] The investigation by Enodo Rights concluded that the operational-level mechanism provided a broad range of reparations including, 'restitution (repatriation assistance); rehabilitation (counselling, health care); compensation (including livelihood assistance, micro-credit or economic development grants, and school fees); and satisfaction (assistance in filing a police complaint). In addition … broader policy and procedure changes beyond the Framework were geared towards guarantees of non-repetition'.[227]

Furthermore, the OHCHR did not look to whether the remedies offered would further exacerbate structural injustices. One of the key problems women suffered having been raped was that they had lost their housing; there was evidence that some of the women raped were ostracized by their husbands and communities.[228] While, the Barrick mechanism did, to some degree, look at the vulnerable position of women in relation to worries that any cash payments might ultimately be dispersed to husbands and the clan,[229] it provided financial awards contrary to this advice.[230]

When it came to rights-compatibility, the OHCHR could find no standards applicable to non-state non-judicial mechanisms and looked at the OHCHR Rule of Law Tools for Post-Conflict States—Reparations Programmes, which state: 'it is difficult to decide, in the abstract, whether it is desirable, in general, for reparations programmes to be final'.[231] It concluded that whether the settlement should be final ought to be determined by the context, such as the functioning of legal systems and preventing double compensation, but the presumption should be to leave accessibility to the courts

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[222] Ibid, 4; *Porgera Mine* Case, note 14, 2.

[223] *Porgera Mine* Case, note 14, 11.

[224] Ibid, 10. For an account of the difficulties in ensuring that women's individual preferences were taken into account while avoiding unfair differentiation between different cases, see Aftab, note 216, 55–6.

[225] *Porgera Mine* Case, note 14, 11.

[226] Ibid. For an overview of the types of remedies offered, 'A Framework of Remediation Initiatives in Response to Violence against Women in the Porgera Valley: Claims Process Procedures Manual', at 6, http://www.barrick.com/files/porgera/Claims-Process-Procedures-Manual.pdf. There are substantial differences of opinion as to whether the remedies offered in the manual were offered in practice, *Porgera Mine* case, note 14, 12.

[227] Aftab, note 216, 102. However, there is evidence to suggest that sexual abuse committed by security personnel continued. Valentina Stackl, 'Survivors of Rape by Barrick Gold Security Guards Offered "Business Grants" and "Training" in Exchange for Waiving Legal Rights' (21 November 2014), http://www.earthrights.org/media/survivors-rape-barrick-gold-security-guards-offered-business-grants-and-training-exchange (accessed 29 June 2016).

[228] Ibid.

[229] Claims Manual, note 226, 6.

[230] Aftab, note 216, 107–8

[231] OHCHR, 'Rule-of-law tools for post-conflict states – Reparations programmes' (Geneva, 2008), at 35, http://www.unrol.org/files/ReparationsProgrammes[1].pdf (accessed 29 June 2016).

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uncurtailed.[232] Ultimately though, the OHCHR found that there was no international standard prohibiting legal waivers for civil suits.[233]

If one interprets 'rights-compatible' in the manner prescribed in Section IV.C, rather than attempting to apply human rights standards in a situation where concise human rights standards do not exist, one can attempt to honour the capabilities behind these human rights standards. If we apply this model, the relevant human rights capability is 'legal security',[234] as the potential right being infringed is the right to a fair trial. The avoidance of double compensation would not impact a person's human rights capability as they would not be in a worse place relative to where they started with regard to their entitlement to receive compensation. MWC took this position and stated that any waiver should be limited to double compensation and not to all court access,[235] because preventing all court access would undermine 'rights-compatibility'. The Enodo Rights investigation concluded that the settlement led to a widespread sense of injury amongst those participants who had received remedies from the mechanism and signed legal waivers.[236]

V. Conclusion

This article has advocated that the HRBA be adopted when evaluating the effectiveness of operational-level non-judicial grievance mechanisms. Under this approach, an operational-level mechanism must be designed with the participation of stakeholders, and remedies provided through it must also be determined with the participation of stakeholders. In each case, the processes followed should meet the requirements in Principle 31(a)-(e): legitimacy, accessibility, predictability, equality, and transparency. A 'process-outcome' approach should be taken: an analysis of the processes involved in providing an outcome should also be included in any assessment of the outcome. Where the process followed is not compliant with the effectiveness criteria in Principle 31, then the outcome is not effective either.

Outcomes of operational-level mechanisms should be transformative[237] rather than just compensatory. This means ensuring that parties have 'equality of parity' in the process, systematic causes of adverse human rights impacts are addressed (including through guarantees of non-repetition), account is taken of the position of marginalized people (including the position of women in comparison to men), and more symbolic forms of remedy are included (such as participation in the process and apologies). Remedies should account for what the victim considers to be effective remedy; the victims must be well informed as to their rights.

The requirement for outcomes to be rights-compatible requires that where there are human rights standards that specify standards of behaviour for businesses, they must be complied with, even where both parties specify a preference that they need not be. In other cases, where the application of rights to a given situation leaves space for

232 *Porgera Mine* case, note 14, 8.
233 Ibid.
234 Burchardt and Vizard, note 73, 101.
235 MiningWatch, note 221.
236 Aftab, note 216, 26–7.
237 Albeit limited to not exacerbating structural injustices, see Section IV.A.

https://doi.org/10.1017/bhj.2016.30 Published online by Cambridge University Press

interpretation, the interpretation of how these rights should apply should be determined with communities through participatory capacity-building processes which in turn honour the principles of the HRBA.

To ensure outcomes accord with international standards, it is necessary that minimum thresholds are achieved. One method to resolve clashes between top-down human rights standards and bottom-up participatory approaches is that a list of human rights capabilities could be provided to communities, upon which they could base their own understandings of what capabilities they would like an outcome to provide. A community's own understandings would be the basis of any dialogue. However, where conflicts exist between the community's understanding and these human rights capabilities, the authoritative list of human rights capabilities would prevail.

The approach recommended in this article is just an example of how the remedial outcomes of operational-level mechanisms may be evaluated, and further research is required on the effectiveness of this approach and other relevant approaches. Without some form of minimum threshold, there is a risk that remedies will be inadequate and that operational-level mechanisms could even further entrench the power differentials between businesses and local communities.[238] The development of more practicable criteria may facilitate businesses' improvement of their own grievance processes, be used by other actors in understanding how grievance mechanisms are working, hold businesses accountable, and inform the broader policy debate.[239] More importantly, given the risks with the provision of remedies by a business—which can potentially lead to unjust outcomes, force communities into dependency relationships with the business and undermine effective judicial processes[240]—it is essential that there is an understanding of outcomes which incorporates international human rights norms.

[238] Knuckey and Jenkin, note 54, 815–16.

[239] Vermijs, note 13. See also Backer, note 13.

[240] Knuckey and Jenkin, note 54, 815–16.

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