

JUST GROUND

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To: UN Working Group on Business and Human Rights

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Re: Multi-stakeholder Consultation on “Corporate Influence in the Political and Regulatory Sphere”

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Just Ground advances the visions of communities working to address corporate activity that threatens or violates their human rights. Toward that end, we interrogate and challenge exercises of corporate power that impede access to justice for rights holders negatively impacted by corporate human rights abuses. This work informs our input to this Working Group consultation on “Corporate Influence in the Political and Regulatory Sphere,” in support of your upcoming thematic report on “the examination of links between corporate political engagement practices and responsible business conduct.”

Specifically, we write to address the following questions posed by the Working Group:

- “What is your understanding of undue corporate influence in policy and regulatory matters? What challenges have you observed? Could you

think of any concrete examples in activities or operations of your organisation?

- How does corporate influence in the political and regulatory sphere impact the ability of victims of business-related human rights abuses to seek access to effective remedies? What specific challenges do rights holders face in accessing effective remedy?”

We welcome this opportunity to address the issue of corporate political influence, and focus on the subtle but powerful ways that corporations shape discourse, how this influences institutions, policies and norms—and how they have done this in the business and human rights (BHR) space in particular. As the expert consultation identified, while lobbying or campaign spending directed at government actors may be the most apparent means of corporate capture, another key theme considers new or lesser-known areas of influence.¹ Building on that, our contribution addresses the issue of corporate capture with a broader lens, examining how undue influence has shaped the current approach to business and human rights.

We view corporate capture as an exercise of corporate power over human rights. As such, our contribution focuses on two sites of corporate power over human rights – power over knowledge and power over institutions – as delineated in BHR scholar David Birchalls’ analytical framework.² Birchall’s definition of corporations’ power over knowledge refers specifically to their ability to reshape what constitutes relevant human rights knowledge. “This includes the power to define their own human rights responsibilities, priorities, exclusions, and to influence the field of BHR.”³ This encompasses a “discursive” facet of power, given its purpose of shaping discourse. Ruggie defines corporations’ discursive power as the power “to shape ideas that then come to be taken for granted as the way things should be done, even for non-business entities like governments.”⁴ Fuchs notes that “a focus on discursive power shows that an exercise of power may not just prevent conflicts of interest from showing up on the agenda. Rather, discursive power may induce that potential conflicts of interest will not even be perceived as such.”⁵

¹ UN Working Group on Bus. & Hum. Rts., [Summary of Expert Consultations: Ensuring Business Respect for Human Rights in the Political and Regulatory Sphere and Preventing “Corporate Capture”](#) (2021).

² David Birchall, *Corporate Power over Human Rights: An Analytical Framework*, 6 BUS. & HUM. RTS. J. 42–66 (2021).

³ *Id.* at 52.

⁴ John Gerard Ruggie, *Multinationals as Global Institution: Power, Authority and Relative Autonomy*, 12 REGUL. & GOVERNANCE 317–333, 325 (2018).

⁵ Doris Fuchs & Markus Lederer, *The Power of Business*. 9 BUS. & POL. 1–17, 9 (2008).

Thus an interrogation of this type of power is particularly useful for articulating the under-addressed issue of corporate influence on the BHR narrative itself. This discursive power creates an enabling environment for corporate capture, as corporate engagement on regulatory and political matters becomes less contested—even welcomed—allowing corporate actors to influence BHR institutions in ways beneficial to them, and often harmful to rights holders and the environment.

An examination of power over institutions is also important for BHR, as corporate actors continue to play an active role in such institutions as the UN Global Compact, the Sustainable Development Goals, and the UNGPs. In order to avoid further corporate capture, understanding how power is exercised in those spaces must be part of the analysis.

In order to centre “human rights” rather than “business” in BHR, the BHR project must recognize and challenge the different facets of corporate power. Toward that end, we write to encourage a critical reflection on the political, moral, and technical authority that corporate actors exercise in business and human rights institutions and discourse and how this has had a corrosive influence on rights holders’ access to remedy.

I. Corporate Capture of the BHR-relevant Discourses

Corporate actors have shaped the “broader epistemic framework”⁶ within which BHR resides, including discourses on governance, development and human rights. Discursive power has an effect of normalising potentially harmful ideas and framing them as uncontested realities, and in the BHR space, corporate actors have played a key role in shaping a discourse that: envisions business entities as governance actors instead of objects of regulation; that is more apt to embrace market-driven models of economic development as *the* definition of development; that advances making a “business case” for respecting human rights; and that increasingly calls for victims of corporate human rights abuses to collaborate with the perpetrators in seeking “win-win solutions” rather than claiming rights and demanding accountability.

The corporate capture of BHR-related discourse and institutions shrinks the available space for supporting alternative approaches to regulation, development, and remedy. This makes contestation and dissensus on critical issues more and more difficult.

⁶ Birchall, *supra* note 2 at 52.

A. Shaping the Global Governance Discourse: Business Entities Move from Objects of Regulation to Governance Partners

“[S]truggles against corporate crimes” have existed as long as the corporate form itself has.⁷ The emergence of the current BHR field is often traced to international pressure for reform, growing significantly from the 1990s, though related movements likely started earlier.⁸ This occurred alongside the rise of neoliberal globalisation. Ruggie himself acknowledged that “corporate globalisation has benefited from a massive shift in discursive power that favoured business”.⁹

The solution that emerged, however, was that of cooperation with corporations instead of addressing and limiting their power. Corporate interests exerted enormous pressure to curb attempted regulatory developments at the UN, and this significantly contributed to the shift in approach ‘[f]rom regulation to “partnership”’.¹⁰

This partnership approach is embodied in “polycentric governance,” or new governance. According to Ruggie, “[n]ew governance theory rests on the premise that the state by itself cannot do all the heavy lifting required to meet most pressing societal challenges, that it needs to engage other actors to leverage its capacities.”¹¹ These other actors include corporations, civil society and communities. For example, Ruggie described the UNGPs as an exercise in polycentric governance, in that they represent “a new regulatory dynamic” under which public, corporate and civil governance systems “become better aligned in relation to business and human rights; add distinct value; compensate for one another’s weaknesses; and play mutually reinforcing roles—out of which cumulative change can evolve.”¹²

Scholars have highlighted the limits of polycentric governance in BHR in terms of its capacity to deliver transformative change¹³ and to facilitate access

⁷ Chris Jochnick, *Shifting Power on Business and Human Rights: States, Corporations and Civil Society in Global Governance*, in BUSINESS AND HUMAN RIGHTS: BEYOND THE END OF THE BEGINNING, 129 (Cesar Rodriguez-Garavito, ed., 2017).

⁸ Florian Wettstein, *The History of “Business and Human Rights” and Its Relationship with Corporate Social Responsibility*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND BUSINESS, 23–45, 24–25 (Surya Deva & David Birchall, eds. 2020).

⁹ Ruggie, *supra* note 4 at 325.

¹⁰ Jens Martens, *Corporate Influence on the Business and Human Rights Agenda of the United Nations*, 8 (2014).

¹¹ John Ruggie, *Global Governance and “New Governance Theory”: Lessons from Business and Human Rights*, 20 GLOBAL GOVERNANCE 5–17, 4 (2014).

¹² *Id.*

¹³ Surya Deva, *Business and Human Rights: Alternative Approaches to Transnational Regulation*, 17 ANN. REV. OF L. AND SOC. SCI. 139–158 (2021).

to remedy.¹⁴ Other critiques highlight the marginalisation of civil society and rights holders as actual governance actors in BHR spaces.¹⁵ Critiques of political CSR – a related theory which similarly advocates for giving a governance role to corporations¹⁶ – highlight the need for power analysis,¹⁷ warn of the serious negative implications for human rights and democracy,¹⁸ and propose alternatives, such as “translocal governance”.¹⁹

Our argument here is not to take a position in favour of or against the idea of polycentric governance. Rather, we urge the Working Group to take a critical view – to consider not only what *undue* political influence is, but to question why and how corporate political engagement is accepted or welcomed in the first place.

B. Corporate Influence over BHR Institutions

According to Birchall, “corporations are increasingly seeking to influence human rights institutions.”²⁰ Participants in the expert consultation raised legitimate concerns about corporate participation in treaty negotiations and international multilateral institutions. In particular, some were highly critical of corporations participating in multilateral discussions that involved setting regulations that affect them.

Similar concerns apply to the powerful role of corporate actors in institutions such as the UN Global Compact, the SDGs, and the UNGPs.²¹ The corporate involvement in the development of the UNGPs is a source of pride for its supporters, however. For example, at the 2021 UN Forum on BHR, a speaker from the International Chamber of Commerce remarked on how the ICC was closely “involved in the development of the UNGP”, and a representative of

¹⁴ Samantha Balaton-Chrimes & Kate Macdonald, *WILMAR AND PALM OIL GRIEVANCES: THE PROMISE AND PITFALLS OF PROBLEM SOLVING* (2016); Samantha Balaton-Chrimes & Fiona Haines, *The Depoliticisation of Accountability Processes for Land-Based Grievances, and the IFC CAO*, 6 *GLOBAL POLICY* 446–454 (2015).

¹⁵ Tara J. Melish & Errol Meidinger, *Protect, Respect, Remedy and Participate: ‘New Governance’ Lessons for the Ruggie Framework* in *THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: FOUNDATIONS AND IMPLEMENTATION* 303–336 (Radu Mares, ed., 2001); Cesar Rodríguez-Garavito, *Business and Human Rights: Beyond the End of the Beginning* in *BUSINESS AND HUMAN RIGHTS: BEYOND THE END OF THE BEGINNING* 11–45 (Cesar Rodríguez-Garavito, ed. 2017); Deva, *supra* note 13 at 142.

¹⁶ Andreas Georg Scherer & Guido Palazzo, *The New Political Role of Business in a Globalised World: A Review of a New Perspective on CSR and Its Implications for the Firm, Governance, and Democracy*, 48 *J. MGMT. STUD.* 899–931 (2011).

¹⁷ Subhabrata Bobby Banerjee, *Transnational Power and Translocal Governance: The Politics of Corporate Responsibility*, 71 *HUM. REL.* 796–821 (2018).

¹⁸ Carl Rhodes & Peter Fleming, *Forget Political Corporate Social Responsibility*, 27 *ORG.* 943–951 (2020).

¹⁹ Banerjee, *supra* note 17.

²⁰ Birchall, *supra* note 2 at 61-62.

²¹ Martens, *supra* note 10; Birchall, *supra* note 2 at 63; Surya Deva, *From ‘Business or Human Rights’ to ‘Business and Human Rights’: What Next?*, in *RESEARCH HANDBOOK ON HUMAN RIGHTS AND BUSINESS*, 1–22, 6-7, 9 (Surya Deva & David Birchall, eds., 2020)

the UN Global Compact noted that “the UN and the private sector work well together.”²²

In contrast, scholars have emphasised that rights holders were not given the same space to engage.²³ They have critiqued how corporate influence in the process of developing the UNGP limited the scope of BHR by watering down human rights language²⁴ and “manufacturing” consensus,²⁵ and – as noted above – shifting the discourse away from a regulatory focus towards cooperation or partnership with corporations.²⁶

C. Movement Towards the Business *of* Human Rights

While participants in the expert consultation raised concerns over astroturfing as a means of corporate capture, we write to draw attention to related phenomena. Specifically, we direct attention to the rise of a BHR consulting industry that legitimises a “business case” for human rights, and blurs the lines between private agencies and civil society organisations. We further note how the social auditing and certification industry, while appearing to assure human rights compliance, instead invisibilises labour abuses and thereby legitimises exploitative business models in global value chains.²⁷

Citing Deva’s concern about the “the shift from Business *and* Human Rights to the Business *of* Human Rights,”²⁸ Birchall notes the “the mushrooming BHR consultancy business where a symbiosis between corporations and consultants develops around issues of practice such as human rights due diligence.”²⁹ The growth of this industry is perhaps an unintended, but nonetheless an insidious, form of corporate influence. Deva explains how corporate demand for external expert advice has led to a consulting industry

²² Notes on file with author Katherine McDonnell.

²³ Surya Deva, *Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles*, in HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT? (Surya Deva & David Bilchitz, eds., 2013); Tara Melish, *Putting “Human Rights” Back into the UN Guiding Principles on Business and Human Rights: Shifting Frames and Embedding Participation Rights in BUSINESS AND HUMAN RIGHTS: BEYOND THE END OF THE BEGINNING* (Cesar Rodríguez-Garavito ed., 2017); Carlos Lopez, *The ‘Ruggie Process’: From Legal Obligations to Corporate Social Responsibility?*, in HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT? (Surya Deva & David Bilchitz, eds., 2013).

²⁴ Deva, *supra* note 23.

²⁵ *Id.* at 81.

²⁶ Martens, *supra* note 10.

²⁷ See, e.g., Carolijn Terwindt & Amy Armstrong, *Oversight and Accountability in the Social Auditing Industry: The Role of Social Compliance Initiatives*, 158 INT’ L. LAB. REV. 245–272 (2019); Claudia Müller-Hoff, *HUMAN RIGHTS FITNESS OF THE AUDITING AND CERTIFICATION INDUSTRY?* (2021).

²⁸ Deva, *supra* note 21.

²⁹ Birchall, *supra* note 2 at 63.

that sees the SDGs and UNGPs as business opportunities; makes a “business case” for human rights; and accordingly identifies salient human rights risks based on convergence of risk to people and risk to the business.³⁰

Deva also notes that some consulting firms have incorporated as non-profit organisations and pass themselves off as CSOs to gain legitimacy.³¹ Rodríguez-Garavito describes how this conflation of corporate-aligned and human rights-focused “civil society” may “widen power disparities among stakeholders, as the voice of more powerful actors (e.g., corporations and states) gets further amplified by civil society actors working for them (e.g., consulting firms).”³² This also moves the bar, situating ostensibly impartial actors closer and closer to corporate interests.

The influence of the social auditing and certification industry is perhaps more corrosive in that it fails to detect abuses, yet creates *the appearance* that companies are taking appropriate action to address human rights risks – frustrating more effective or fundamental solutions.³³ Numerous studies have shown that social auditing fails to detect serious human rights abuses, a fact which well-publicised auditing failures, such as the Rana Plaza disaster, tragically underscore.³⁴ Critics of social auditing note the inherent conflict of interest involved when auditing firms are selected and paid by the companies they audit and note social auditing’s lack of transparency and its exclusion of and lack of accountability to rights holders.³⁵ Despite the mounting criticism, private auditing firms have opposed “the imposition of concrete performance targets, binding public regulation and an independent watchdog role for civil society”

The rise of BHR consulting and prominence of social auditing demonstrate corporate influence in processes intended to address corporate abuses. Rather than promoting human-rights based approaches, BHR consulting and social auditing “are becoming part of the problem”.³⁶

³⁰ Deva, *supra* note 21 at 5–6.

³¹ Deva, *supra* note 23 at 6.

³² Rodríguez-Garavito, *supra* note 15 at 31.

³³ Carolijn Terwindt & Amy Armstrong, *Oversight and Accountability in the Social Auditing Industry: The Role of Social Compliance Initiatives*, 158 Int’l Lab. Rev. 245–272 (2019).

³⁴ *Id.* at 251; Inst. For Multi-Stakeholder Initiative Integrity, NOT FIT-FOR-PURPOSE, 132–137 (2020).

³⁵ See, e.g.; Clean Clothes Campaign, FIG LEAF FOR FASHION: HOW SOCIAL AUDITING PROTECTS BRANDS AND FAILS WORKERS, (2019); Claudia Müller-Hoff, *supra* note 27; Inst. For Multi-Stakeholder Initiative Integrity, *supra* note 34; AFL-CIO, RESPONSIBILITY OUTSOURCED: SOCIAL AUDITS, WORKPLACE CERTIFICATION AND TWENTY YEARS OF FAILURE TO PROTECT WORKER RIGHTS (2014); Terwindt & Armstrong, *supra* note 33.

³⁶ Deva, *supra* note 21 at 20.

II. Corporate Capture of Remedy

Corporate capture of the approach to remedy and remedial mechanisms has a significant impact on the ability of rights holders to obtain adequate, appropriate and prompt remedy for human rights abuses linked to business activities. We discuss below how this impacts access to remedy through nonjudicial grievance mechanisms.

We applaud the Working Group's 2017 report on access to remedy, particularly its focus on the "centrality of rights holders".³⁷ One aim of our contribution below is to articulate how corporate capture has made it difficult to implement the recommendations in that report.

A. Shaping the Approach to Remedy: Favouring Interest-Based Problem-Solving over Rights-Based Accountability

Within the BHR context, remedy is fraught with tension between a rights-based approach and an interest-based approach to remedy. This debate began long before the endorsement of the UNGPs.³⁸ It still remains a point of contention over a decade later.³⁹

Supporters of the shift away from accountability to dialogue often argue that this allows space for improved remedy through creative solutions.⁴⁰ However, the continued, and arguably increased, barriers to remedy in the last decade do not bear this out.⁴¹

Despite the ample evidence of its flaws, the interest-based framing favoured by business-friendly narratives continues to influence approaches to remedy within BHR. The 2022 Remedy in Development report offers a recent

³⁷ UN General Assembly, Rep. of the Working Group on the Issue of Hum. Rts. and Transn'l Corp. and Other Bus. Enter. ¶ 19, 21, UN Doc. A/72/162, July 18, 2017.

³⁸ For example, see discussions at a multi-stakeholder workshop series on accountability mechanisms. Caroline C. Rees, *Corporations And Human Rights: Accountability Mechanisms For Resolving Complaints And Disputes, Report Of Multi-Stakeholder Workshop 11-12 April 2007* in CORPORATE SOCIAL RESPONSIBILITY INITIATIVE (2007) (John F. Kennedy Sch. Gov't, Harvard Univ. Report No. 15); Caroline C. Rees, *Corporations And Human Rights: Accountability Mechanisms For Resolving Complaints And Disputes, Report of 2nd Multi-Stakeholder Workshop 19-20 November, 2007* in CORPORATE SOCIAL RESPONSIBILITY INITIATIVE (2007) (John F. Kennedy Sch. Gov't, Harvard Univ. Report No. 27)

³⁹ Rajiv Maher, et al., *Torn Between Legal Claiming and Privatised Remedy: Rights Mobilisation against Gold Mining in Chile*. 31 Bus. Ethics Q. 37-74 (2021).

⁴⁰ Caroline Rees, *MEDIATION IN BUSINESS-RELATED HUMAN RIGHTS DISPUTES: OBJECTIONS, OPPORTUNITIES AND CHALLENGES* (2010); Rees, *supra* note 38.

⁴¹ See, e.g., Int'l Comm'n of Jurists, *EFFECTIVE OPERATIONAL-LEVEL GRIEVANCE MECHANISMS* (2019); Rep. of the UN High Comm'r Hum. Rts., *Improving Accountability And Access To Remedy For Victims Of Business-Related Human Rights Abuse Through Non-State-Based Grievance Mechanisms*, UN Doc. A/44/32, (2020); OECD Watch, *REMEDY REMAINS RARE: AN ANALYSIS OF 15 YEARS OF NCP CASES AND THEIR CONTRIBUTION TO IMPROVE ACCESS TO REMEDY FOR VICTIMS OF CORPORATE MISCONDUCT* (June 2015).

example. Although it emphasises that “[a]ccording to ordinary principles of justice, and under international human rights standards, any contribution to harm should entail a proportionate contribution to remedy”, it also states that “[r]emedy should not be seen as a “blame game” but rather an ordinary project contingency and a central part of a collective effort to make a positive difference in people’s lives.”⁴²

Accountability requires acceptance of responsibility. Even in restorative justice methods, which are often cited as alternatives to punitive approaches, “[t]he offender must acknowledge the wrongdoing and must be prepared to take account for what happened.”⁴³ Although distancing the discourse from the concept of “blaming” may make remedy more palatable to businesses, it makes actual accountability difficult to obtain.

Additionally, the dominance of an interest-based approach to remedy can lead to shifting the burden onto rights holders—an underexplored but harmful outcome. A recent case study highlights how corporate actors who caused human rights violations used engagement in a multistakeholder remedial mechanism to “shield themselves from blame by deflecting responsibility back onto the victims themselves and stressing that accountability is shared among all stakeholders.”⁴⁴ In the experience of one of the author’s while working with community members seeking remedy for harms related to the Thilawa Special Economic Zone, corporate representatives and their consultants criticised rights holders for claiming rights rather than seeking mutual interests while participating in a multi-stakeholder dialogue process – and the ensuing report on the process focused more on the behaviour of rights holders than on the companies causing the harms.⁴⁵ Thus, as some researchers have warned, describing a commitment to a remedial process as “good faith” may have “the unintended perverse effect of locking not only companies, but also community groups into processes that may not be working in their best interests.”⁴⁶

⁴² UN Off. High Comm’r Hum. Rts., *Remedy In Development Finance: Guidance And Practice*, 5, 6 (2022).

⁴³ Maximilian J. L. Schormair & Lara M. Gerlach, *Corporate Remediation of Human Rights Violations: A Restorative Justice Framework*, *J. Bus. Ethics* 167, 475–493, 483 (2020).

⁴⁴ Rajiv Maher, *Deliberating or Stalling for Justice? Dynamics of Corporate Remediation and Victim Resistance Through the Lens of Parentalism: The Fundão dam Collapse and the Renova Foundation in Brazil*, *J. Bus. Ethics*, 15–36, 17 (2021).

⁴⁵ Anna Zongolowicz, *THILAWA MULTI-STAKEHOLDER ADVISORY GROUP (MSAG) EVALUATION* (2016).

⁴⁶ Balaton-Chrimes & Macdonald, *supra* note 14, at 8.

B. Limiting the Definition of Remedy

The Working Group has previously stated that the appropriateness of remedy is to be considered from the perspective of the rights holders.⁴⁷ Yet in practice, this is largely not the case.

The UNGPs themselves employ language that distances corporations from accountability and the need to provide remedy. Deva discusses how ‘the GPs never use the term “violation” in relation to companies.’⁴⁸ Rather, ‘[t]he terms employed by the GPs are either “impact” or “risk” and [t]his seemingly deliberate attempt to replace the *violation typology* with the *impact typology* has the potential to undermine human rights. Unlike “violation”, “impact” is a neutral term and even qualifying it with the word “adverse” cannot adequately reflect perspectives of victims whose rights are violated by companies.’⁴⁹ Similarly, in one of the author’s experiences developing a model for community-driven operational-level grievance mechanisms (OGMs), some participants in consultations on the topic strongly advised against using words like “grievance” because they imply “conflict and coercion”.⁵⁰

Scholars have noted how “a community’s capacity to define the nature of the grievance and associated terms of redress” is an element of social empowerment that helps create an enabling environment for remedy.⁵¹ However, as others have noted, commitment to the market-driven model of economic development of institutions such as the IFC and the OECD limits the extent to which these mechanisms can actually provide remedy in many cases.⁵² For example, Balaton-Chrimes and Haines discuss how the CAO’s “normative orientation necessarily shapes which grievances are heard and what outcomes are possible.”⁵³ As corporations conceive of NJGMs’ purpose as facilitating, not questioning, business activity, they only accommodate remedial outcomes that conform to that vision. As a result, harms are not addressed adequately, if they are addressed at all.

Interventions from community leaders at the 2021 UN Forum similarly highlighted these tensions. For example, Miriam Miranda called for a

⁴⁷ UN General Assembly, *supra* note 37.

⁴⁸ Deva, *supra* note 23, at 96.

⁴⁹ *Id.* at 96-97.

⁵⁰ EarthRights International, [COMMUNITY-DRIVEN OPERATIONAL LEVEL GRIEVANCE MECHANISMS](#) (2015); *see also* EarthRights International, [Discussions and Feedback on Community-Driven Operational Grievance Mechanisms Workshop](#) (2014).

⁵¹ Fiona Haines & Kate Macdonald, *Nonjudicial Business Regulation and Community Access to Remedy*, 14 REGUL. & GOVERNANCE 840–860, 844 (2020).

⁵² Balaton-Chrimes & Macdonald, *supra* note 14; Balaton-Chrimes & Haines, *supra* note 14.

⁵³ Balaton-Chrimes and Haines, *supra* note 14.

“complete shift in the discourse on economic reparations.”⁵⁴ In another panel, Ikal Ang’elei criticised the “commodification” of stakeholder engagement and compensation practices, and called for “different forms of thinking on how we live” including conversations beyond simple economic terms, and greater understanding of “how indigenous peoples negotiate on these issues.”⁵⁵

These critiques highlight how difficult it can be to obtain adequate and appropriate remedy when corporate actors have influenced how harms are described and the discourse on if and how they are addressed. This departure from a human rights-based perspective trivialises and silences the perspectives of the rights holders.

Further, as the recent OHCHR report on Remedy in Development notes, some harms are irremediable.⁵⁶ The examples provided in the report related to gender-based violence, but we argue that the concept of irremediability can apply to contexts where livelihoods and relationships to land are destroyed. Thus claims of successful resolution of complaints may be masking their actual failure by “casting as successes those concessions made by communities that agree to problem solving processes”,⁵⁷ where the harms are in fact irremediable.

C. Influence over institutions: Control over Non-Judicial Remedial Mechanisms (NJGMs)

The corporate capture of remedy gives corporate actors the ability to influence the scope of the mandates of NJGMs, who can participate, and how they must participate. We see this as an example of corporate power over institutions.⁵⁸

We offer as a case in point that, while alternative dispute resolution is a central element of access to remedy under the UNGP, NJGMs have not consistently embraced providing remedy as a mandate.⁵⁹ For example, in an external review of the International Finance Corporation (IFC) Office of the Compliance Ombudsman (CAO), some IFC staff/managers indicated that the CAO process “should not lead to remedial actions but, instead, should remain restricted to institutional learning to prevent a recurrence of such non-

⁵⁴ Notes on file with author Katherine McDonnell.

⁵⁵ Notes on file with author Katherine McDonnell.

⁵⁶ U.N. Off. of High Comm’r for Hum. Rts., *supra* note 42.

⁵⁷ Balaton-Chrimes and Haines, *supra* note 14 at 447.

⁵⁸ Birchall, *supra* note 2.

⁵⁹ Mariëtte van Huijstee & Joseph Wilde-Ramsing, *Remedy Is the Reason: Non-judicial Grievance Mechanisms and Access to Remedy*, in *Research Handbook on Human Rights and Business*, 478 (Surya Deva & David Birchall eds., 2020).

compliance.”⁶⁰ The recent Remedy in Development report similarly noted “limitations as regards mandates”, including insufficient recognition that the objective of remedial processes “should be to remedy harms linked to the non-compliance” of a development finance institution.⁶¹

In the case of operational-level grievance mechanisms (OGMs), watering down of language in the UNGP has weakened the participatory role of rights holders. In his 2008 report, John Ruggie, acting as the UN Special Representative on Business and Human Rights, stated that an OGM “should be designed and overseen jointly with representatives of the groups who may need to access it.”⁶² This was echoed in guidance on OGMs published by the Compliance Advisor Ombudsman (CAO).⁶³ The final language in the UNGPs, however, merely stated that these mechanisms should be based on “engagement and dialogue”.⁶⁴ A similar backsliding occurred in the language around grievance mechanisms in the proposed European mandatory human rights due diligence legislation.⁶⁵

As a result, OGMs continue to be designed and implemented by the actors who have committed the harms, or by third parties of their choosing. Despite the emerging policy guidance recommending co-design and community-led design,⁶⁶ attempts at operationalising these have been met with significant pushback. One of the authors worked alongside community leaders for years as they designed a community-driven grievance mechanism and engaged with the project stakeholders to negotiate its implementation.⁶⁷ These efforts

⁶⁰ External Review of IFC/MIGA E&S Accountability, Including CAO’s Role and Effectiveness Report and Recommendations 70 (June 2020).

⁶¹ U.N. Off. of High Comm’r for Hum. Rts., *supra* note 42 at 4.

⁶² John Ruggie (Special Rep. of the Sec’y-Gen. on the Issue of Hum. Rts and Transnat’l Corp. and Other Bus. Enter.), *Protect, Respect and Remedy: A Framework for Business and Human Rights*, ¶ 95 U.N. Doc. A/HRC/8/5 (2008).

⁶³ Compliance Advisor Ombudsman, A GUIDE TO DESIGNING AND IMPLEMENTING GRIEVANCE MECHANISMS FOR DEVELOPMENT PROJECTS (2008).

⁶⁴ John Ruggie (Special Rep. of the Sec’y-Gen. on the Issue of Hum. Rts and Transnat’l Corp. and Other Bus. Enter.), *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, 34 U.N. Doc. A/HRC/17/ (2011).

⁶⁵ The Draft Report from September 2020, states “Grievance mechanisms shall be developed in partnership with stakeholders”. European Parliament Legal Committee, Draft Report with recommendations to the Commission on corporate due diligence and corporate accountability, (2020/2129(INL)), Art. 9. The adopted text, however, states “[u]ndertakings shall take decisions informed by the position of stakeholders, when developing grievance mechanisms.” European Parliament Resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)).

⁶⁶ See, e.g., UN Working Group on Bus. and Hum. Rts, UNGPS 10+ A ROADMAP FOR THE NEXT DECADE OF BUSINESS AND HUMAN RIGHTS (2021); Int’l Comm’n of Jurists, *supra* note 41; Rep. of the UN High Comm’r Hum. Rts., *supra* note 41.

⁶⁷ See, eg., Bus. & Hum. Rts Res. Ctr. and Global Bus. Init. on Hum. Rts, [Report from a session at the United Nations Fourth Annual Forum on Business and Human Rights: 16-18 November 2015: Multi-Stakeholder Engagement Across “Protect, Respect, Remedy”](#) (2016); Bus. & Hum. Rts Res. Ctr. and Global Bus. Init. on Hum. Rts, [Report from a session at the United Nations Sixth Annual Forum on Business and Human Rights, 28 November 2017: Access to Remedy Through Multi-Stakeholder Engagement Insights from cases in Myanmar and South Africa](#) (2018); Thilawa Design Committee [Draft CD-OGM](#).

were rejected, however, and the project developer instead put in place a wholly separate mechanism.⁶⁸ This new mechanism has been criticised for failing to meet good practice standards, as well as for ignoring community efforts to collaborate.⁶⁹ The Coalition of Immokalee Workers campaigned for years to get corporations to join the Fair Food Program,⁷⁰ and corporations still resist joining the FFP and similar programs, such as Milk With Dignity,⁷¹ despite that their worker-driven social responsibility model has been widely praised for successfully delivering access to remedy.⁷²

III. Conclusion

Corporate engagement in political and regulatory spheres is an exercise of power over human rights that must be interrogated. Yet power is under-examined both in BHR⁷³ and global governance.⁷⁴ Corporations' discursive power is particularly underexplored, despite its pervasiveness.⁷⁵

We argue for better theorising of power in BHR, not simply as an academic exercise, but because "the *political effects* of certain discourses are enacted *upon people's bodies*."⁷⁶ The current BHR, development, and governance discourses directly impact rights holders and the natural environment.

We call for a more robust interrogation of how corporate power influences the narratives of governance, development, and human rights, and how that undue influence affects related BHR institutions. We hope that the urgency of this need will be reflected in the Working Group's upcoming report and future work on this topic. In particular more attention and resources should be directed at addressing the exercises of power which create imbalances that disfavour rights holders, uphold corporate influence, and undermine human rights.

⁶⁸ See, Bus. & Hum. Rts. Res. Ctr., [Myanmar: Thilawa economic zone launches complaint mechanism. NGO says it falls short of intl. standards; inc. responses from company & other agencies](#) (Mar. 6, 2018).

⁶⁹ See, EarthRights Intl, [Myanmar Economic Zone Developers Launch Complaint Process That Violates Human Rights Norms](#) (Feb. 7, 2018); — [Analysis of the Thilawa SEZ Complaints Management Procedure](#) (Feb. 6, 2018).

⁷⁰ Greg Asbed & Steve Hitov, *Preventing Forced Labor in Corporate Supply Chains: The Fair Food Program and Worker-Driven Social Responsibility*, 52 Wake Forest L. Rev. 497–531 (2017).

⁷¹ See, e.g., Auditi Guha, *At May Day Rally in South Burlington, Hundreds Urge Hannaford to Support Dairy Workers*, VTDIGGER (May 1, 2022); Michael Sainato, *Why Wendy's Is the Source of Unrest Among US Farm Workers*, THE GUARDIAN (28 April 2022).

⁷² See, e.g., UN Working Group on Bus. and Hum. Rts, UNGPS 10+ A ROADMAP FOR THE NEXT DECADE OF BUSINESS AND HUMAN RIGHTS (2021); Opi Outhwaite and Olga Martin Ortega, *Worker-driven Monitoring: Redefining Supply Chain Monitoring to Improve Labour Rights in Global Supply Chains* 23:4 Competition & Change 378 (2019).

⁷³ Birchall, *supra* note 2.

⁷⁴ Fuchs & Lederer, *supra* note 5 at 1.

⁷⁵ *Id.* at 11.

⁷⁶ April R. Biccum, *Interrupting the Discourse of Development: On a Collision Course with Postcolonial Theory*, 3:1 Culture, Theory And Critique, 4, 33-50, 36 (2002).