

**BUSINESS AND HUMAN RIGHTS: EXPLORING EFFECTIVE REMEDIES UNDER
UNITED NATIONS GUIDING PRINCIPLES AND EUROPEAN UNION PROPOSAL
FOR CORPORATE SUSTAINABILITY DUE DILIGENCE DIRECTIVE**

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ABSTRACT

This Capstone Thesis explores international and regional standards for effective alternative mechanisms in cases of human rights violations by businesses. The United Nations 'Guiding Principles on Business and Human Rights' (UNGP) established a foundation for understanding remedies beyond the judicial system, introducing grievance mechanisms at both state and non-state levels. The legislation of the European Union, particularly the proposed Directive on corporate sustainability due diligence, aligns with the UNGP principles but lacks clarity on effective remedies and criteria. This research investigates the effectiveness of the proposed mechanisms and their role in improving access to justice for victims of human rights violations. The analysis utilizes the criteria established by the Third Pillar of the UNGP to evaluate the proposed mechanisms. The study concludes that the UNGP has laid the groundwork for non-judicial mechanisms but highlights the need for clear provisions and descriptions of their roles to ensure effectiveness. The Directive's provisions exhibit gaps in assessing mechanism efficiency, potential barriers to justice for victims, and the lack of integration with existing redress mechanisms.

INTRODUCTION

The United Nations 'Guiding Principles on Business and Human Rights' (UNGP) was one of the first international sets of standards for business human rights obligations. It established the main Three "Pillars" revealing not only the business's negative and positive human rights obligations but also creating a basis for a common understanding of effective remedies beyond the judicial system introducing other grievance mechanisms both state and non-state based.¹

The provisions of the UNGP and the general trend in the development of accountability of businesses in violation of international human rights law topic served as the beginning of the formation of local and regional legislation in the field of Business and Human Rights. One of the actively developing regional regulatory frameworks in this area is the legislation of the European Union.²

In 2022, the European Commission made proposals for the adoption of the Directive on corporate sustainability due diligence. Despite the generally positive feedback in the academic and political community, the lack of clear criteria and understanding of effective remedies in the Directive has raised the question of how efficient the proposed standards and mechanisms could be, given the international principles and impact of the UNGP.³

This Capstone Thesis explores international and regional standards for providing effective alternative mechanisms for violations of human rights by the business. The main

¹ United Nations Human Rights Council (UNHRC), 'Guiding Principles on Business and Human Rights Implementing the United Nations "Protect, Respect and Remedy"' (New York and Geneva, 17 April 2011).

² Aleydis Nissen, *The European Union, Emerging Global Business and Human Rights*, Cambridge Studies in European Law, and Policy (Cambridge: Cambridge University Press, 2022), <https://doi.org/10.1017/9781009284295>: 89.

³ Claire O'Brien and Olga Martin-Ortega, *Sustainable Corporate Governance: Submission to Consultation on European Commission's Proposal for a Directive on Corporate Sustainability Due Diligence COM(2022)71 Final*, 2022, <https://doi.org/10.13140/RG.2.2.18885.93923>, 2.

purpose of this Thesis is to investigate the effectiveness of the new mechanisms proposed by the Directive for the protection of human rights and remediation in cases of violations or non-compliance with the provisions of the Directive. An analysis of the mechanisms carried out based on the criteria established by the Third Pillar of the UNGP allows us to evaluate not only the effectiveness of the proposed grievance mechanisms, but also to understand how the Directive will improve access to justice for the victims of the human rights violations within the scope of proposed mechanisms.

To understand existing international standards of effective redress and grievance mechanics, I first explore the general understanding of the concept within the framework of international standards of the Third Pillar of the UNGP. In the third chapter of the Project, I explore how the concept of remedies and alternative mechanisms is revealed in the European Commission Draft on corporate sustainability due diligence Directive and whether it meets the requirements of the UNGP's effectiveness criteria.

Considering the lack of use of mechanisms in practice, since the Draft Directive is in the status of a proposal, and not an adopted legal document, this study has limitations. One limitation of the project is the absence of empirical work or concrete practical examples of redress mechanisms. By exploring a range of practical examples, the project could have identified common patterns, success factors, and limitations across different contexts, providing a more comprehensive understanding of effective grievance mechanisms. The absence of empirical work and concrete examples limits the project's ability to provide real-world insights and practical recommendations.

However, in the absence of a final version of the Draft Directive, as well as a clear understanding of the proposed mechanisms and their role as a remediation tool due to possible

and occurred amendments,⁴ a more specific analysis of the proposed mechanisms, as well as identifications of the main challenges and possible solutions for the effective redress and grievance mechanisms are the main goal within the framework of the Practical Part of this Capstone Project, in particular the second and third episodes of the podcast.⁵ This analysis and development of basic recommendations will allow not only to understand the role of the proposed mechanisms in seeking justice for victims of human rights violations but also to propose solutions for how to effectively integrate these mechanisms for the benefit of victims.

⁴ European Parliament ‘MEPs push companies to mitigate their negative social and environmental impact’ (2023) <https://www.europarl.europa.eu/news/en/press-room/20230524IPR91907/meps-push-companies-to-mitigate-their-negative-social-and-environmental-impact>

⁵ Toporova Ekaterina, “Amateur podcast for mature human rights concerns”. Available: <https://open.spotify.com/show/7LXNPc2xvgzULTuE801X4z?si=038daac1250c49e5>

1 WHY EFFECTIVE REMEDIES?

The issue of business and human rights has become increasingly relevant in recent years, as the adverse impacts of business activities on human rights have come to light.⁶ This has led to a growing demand for businesses to be held accountable for their actions and to respect human rights in their operations, both within their countries of incorporation and in third countries. While there has been progress in terms of reporting on sustainability and human rights, as well as ESG compliance, there are still practical challenges related to holding businesses accountable and providing effective remedies to victims of human rights violations.⁷ However, considering the legal status of the main actors of business - transnational corporations (TNC), which are not subjects of international law,⁸ the creation of certain conditions and criteria for providing mechanisms for protecting human rights and bringing the violator to justice falls on the shoulders of regional and local legislators.

Legal gaps, or lack of regional and state-level norms for the provision of effective remedies and mechanisms, can lead to a culture of impunity, where businesses are not held accountable for their actions and human rights violations continue unchecked.⁹ This can ultimately undermine the rule of law and social cohesion, creating significant risks for both affected communities and businesses themselves. Indubitably, the development of international principles determines the basis of standards for what can be considered effective ways and mechanisms for protecting human rights to context, but due to their non-binding nature, these

⁶ Olivier De Schutter, 'Towards a New Treaty on Business and Human Rights', *Business and Human Rights Journal* 1, no. 1 (2016), 45.

⁷ David Hess, 'The Transparency Trap: Non-financial Disclosure and the Responsibility of Business to Respect Human Rights', *American Business Law Journal* 56, no. 1 (2019), 28. Alexander M Solntsev and Salikhat G Magomedova, 'Transnational Corporations, Climate Change and Human Rights ("Milieudefensie Versus Royal Dutch Shell", 2021)', in *Current Problems of the Global Environmental Economy Under the Conditions of Climate Change and the Perspectives of Sustainable Development* (Springer, 2023), 226.

⁸ Alice De Jonge, 'Transnational Corporations and International Law: Bringing TNCs out of the Accountability Vacuum', *Critical Perspectives on International Business*, 2011, 92.

⁹ De Schutter, 'Towards a New Treaty on Business and Human Rights', 48.

principles serve as recommendations necessary for adaptation and application in local legislation to provide opportunities for the accountability and access to justice.

Adapting international recommendations to regional and domestic legal acts creates inconsistencies in understanding effective remedies, leading to challenges in identifying means of protection that states and businesses must provide for fulfilling their human rights obligations. This results in difficulties for victims, especially third-country nationals, to find effective remedies to protect their rights.¹⁰ Thus, the study of international standards of effective remedies and alternative mechanisms, as well as regional standards and their adaptation into local legislation, is an important element of mapping the available ways to protect human rights in the context of business activities.

Therefore, this study is not aimed at determining the ineffectiveness of the remedies in the business and human rights frameworks. On the contrary, the Written Part of this Draft aims to determine the extent to which possible new mechanisms of the proposed Directive are copied from the existing framework of the effective remedies from the theoretical part. At the same time, the Practical Part of the project touches upon more practical issues of applying the proposed mechanisms and identifying possible obstacles to the integration of this mechanism into the existing legal systems of the EU Member States. In addition, the last part of the practical component touches upon the problems of existing grievance mechanisms using the example of the Belgian system, identifying the main challenges in access to remediation for victims of human rights violations. Based on these challenges, it was possible to identify some of the most important elements that should be at the base of the creation and implementation

¹⁰ Liliana Lizarazo-Rodríguez, 'The UN "Guiding Principles on Business and Human Rights": Methodological Challenges to Assessing the Third Pillar: Access to Effective Remedy', *Nordic Journal of Human Rights* 36, no. 4 (2 October 2018), 364, <https://doi.org/10.1080/18918131.2018.1547525>.

of new mechanisms at the state level, as well as determine the importance of mechanisms at the level of business-operational mechanisms.

2 THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

2.1 Respect and Protect

Attention to the issues of responsibility of business corporations increased together with the influence of business on society and human rights.¹¹ It was the growing interest in this issue that in June 2011 the UN Human Rights Council approved the first guiding principles on Business and Human Rights (UNGPs), developed by John Ruggie – UN Secretary-General's Special Representative on the issue of business and human rights.¹²

The UNGP introduced three fundamental principles – “Three Pillars” that are responsible for the duties of the state and business to protect, respect, and provide access to remedies. The first two Pillars focus on the responsibilities of the state and businesses to protect and respect human rights, while the Third Pillar concentrates on providing access to remedies.¹³ The UNGP also divides the sphere of responsibility and action between businesses and states. The First Pillar outlines the duties and responsibilities of the state to protect people from human rights violations within its jurisdiction, and it also extends to protect people from violations created by commercial entities.¹⁴ The Second Pillar focuses on the responsibilities and necessary actions of businesses to respect human rights and prevent any negative impacts on human rights within the framework of their activities.¹⁵ The main factor for reassuring responsibility for respecting human rights is the development and implementation of processes and policies to monitor and prevent possible violations in their activities.¹⁶

¹¹ John Gerard Ruggie, ‘Business and Human Rights: The Evolving International Agenda’, *American Journal of International Law* 101, no. 4 (2007), 830.

¹² OHCHR, ‘Frequently Asked Questions about the Guiding Principles on Business and Human Rights’ (HR/PUB/14/3, 2014).

¹³ United Nations Human Rights Council (UNHRC), ‘UNGPs’.

¹⁴ United Nations Human Rights Council (UNHRC), P. 7.

¹⁵ United Nations Human Rights Council (UNHRC), P. 20.

¹⁶ United Nations Human Rights Council (UNHRC), P. 23–24.

2.2 Remedies

While describing the principles required for states and businesses to respect human rights, the first two Pillars lead to one of the most important questions – how to ensure that these rights are respected, even if effective policies and processes are applied at all levels? One of the characteristics of this Pillar is the recognition that the most effective political and business practices cannot fully ensure respect for human rights.¹⁷ And the lack of mechanisms for the protection of human rights and access to justice can devalue all state legislation, as well as the lack of tools to influence and keep accountable businesses available to victims, is not able to ensure corporate responsibility and respect for human rights.¹⁸ Thus, this component considers both states and companies. Both approaches seem more logical when judicial and non-state complaint mechanisms differ. This Pillar contains only one fundamental principle, which clearly states the duty of the State to ensure through "judicial, administrative, legislative or other appropriate means"¹⁹ access to remedies, which are "effective".²⁰

By making it clear that any means of protecting rights should not only be generally accessible to victims of violations but also effective, the operational principles, in turn, delve into terminology, revealing each of the methods of protecting rights, attaching to some of them an effectiveness test.

2.2.1 State-based mechanisms

State-based judicial mechanisms, being one of the main effective ways of protecting rights in international and domestic practice, expressed in Principle 26 make it clear that the

¹⁷ John Ruggie, 'Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', 7 April 2008, (A/HRC/8/5), 4.

¹⁸ Ruggie, 6.

¹⁹ United Nations Human Rights Council (UNHRC), 'UNGP', P. 25.

²⁰ United Nations Human Rights Council (UNHRC), P. 25.

effectiveness of protection methods is directly related to the availability of a given remedy for all individuals and groups who have experienced human rights violations.²¹ Public obligations under this principle extend to ensuring the independence of the judiciary from any external interference, as well as the removal of legal, practical, and procedural barriers that may impede effective access to remedies. It is believed that the effectiveness of access to judicial mechanisms is also expressed in the quality and effectiveness of due process.²² Undoubtedly, external issues of interference and corruption are also included in the evaluation of the effectiveness of a legal procedure, however, the term goes further, including other indicators related to the effectiveness of the trials themselves and the "quality of the due process".²³ If the quality of the due process is more external factors, corresponding to the level of education, budgets, and resources within the judiciary, then the effectiveness of judicial proceedings has a direct impact on the efficiency of access and remedy itself, as it is determined by the length of consideration, as well as the rate of consideration of cases.²⁴ The length of court proceedings depends on the complexity of the case, as well as on the activity however, protracted litigation may be expressed in financial difficulties for victims of infringements, especially if the claim is filed by third-country nationals or representatives of vulnerable communities.

UNGP comments on this principle that part of the barriers and lack of access to justice is caused by the judicial system within the state itself, which often benefits one side of the claim, which has more financial opportunities, access to information resources, and is also less likely to be discriminated against.²⁵ Thus, state obligations extend not only to providing the necessary means of protecting human rights, but also to making sure that they are effective and

²¹ United Nations Human Rights Council (UNHRC), P. 26.

²² Liliana Lizarazo Rodriguez, 'UNGP on Business and Human Rights in Belgium: State-Based Judicial Mechanisms and State-Based Nonjudicial Grievance Mechanisms, with Special Emphasis on the Barriers to Access to Remedy Measures', 2017, 19.

²³ Lizarazo Rodriguez, 72.

²⁴ Lizarazo Rodriguez, 72.

²⁵ United Nations Human Rights Council (UNHRC), 'UNGP', P. 26.

accessible to all, regardless of financial status or country of residence, through appropriate government support programs, and not neglecting their duties to investigate crimes related to human rights in business activities. It corresponds that the effectiveness of state-based judicial remedies under Principle 26 is determined not only by the presence of mechanisms and institutions for filing claims but is an extensive concept that includes criteria for accessibility, provision, and guarantee which are the duties of states.

For its part, Principle 27 states that within the framework of the mechanisms and system for the protection of human rights, including violations caused by business activities, on an equal footing with judicial mechanisms, States need to provide other means of protecting rights, in this case, we are talking about state-based non-judicial grievance mechanisms." However, the practice has shown that universally recognized effective remedies, namely judicial mechanisms, are not always able to ensure effective access to justice.²⁶ This can be caused precisely by financial and practical barriers, so it is important that the victim, within his capabilities and resources, can independently choose the mechanisms available to him, including alternative ones.²⁷ The State, as can be seen from the commentary on Principle 27, can offer alternatives through several non-judicial mechanisms, including administrative and mediation.²⁸ It is important to note that the obligation of the state to provide alternative means of protecting rights is also reflected in international human rights law, for example, the legally binding Convention on the Elimination of All Forms of Discrimination Against Women,²⁹ Convention on the Rights of the Child,³⁰ which are legally binding for the State signatories of

²⁶ John Gerard Ruggie, 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Business and Human Rights: Further Steps toward the Operationalization of the "Protect, Respect, Remedy" Framework' (A/HRC/14/27, 9 April 2010), 20.

²⁷ Ruggie, 22.

²⁸ United Nations Human Rights Council (UNHRC), 'UNGP', P. 27.

²⁹ 'Convention on the Elimination of All Forms of Discrimination Against Women' (UN General Assembly, 18 December 1979).

³⁰ 'Convention on the Rights of the Child' (UN General Assembly, 20 November 1989).

these treaties, guarantee not only access to the judicial system in the event of human rights violations but also the creation of competent authorities that can perform indistinguishable roles, in particular remediation. However, not all mechanisms are automatically classified as effective to ensure access to effective remedies, these mechanisms must meet the criteria that allow the mechanism to pass the performance test.³¹ These criteria are listed in Principle 31 and will be discussed below in this Chapter.

2.2.2 Non-state-based mechanisms

The following section of the Third Pillar departs from the state's responsibilities to provide judicial and alternative mechanisms, at the level of the state itself, allowing for the expansion of mechanisms to international and national human rights bodies and opening business opportunities in guarantying human rights respect through access to non-judicial remedies created by the business itself. The author of the Guiding Principles noted that the need to mention and disclose grievance mechanisms at the company's operational level is due to its underdevelopment and lack of desire for development on the part of the business.³²

First, Principle 28 brings us back to the state's capabilities and obligations to encourage and promote the creation of other rights protection mechanisms at the level of the business itself, as well as accessible human rights bodies.³³ In this case, the role of the state is not limited to the creation of these mechanisms, but rather to inform and provide information and the existence of these mechanisms for victims and potential victims of human rights violations.

Secondly, this section focuses on the need and urgency of businesses to provide complaint mechanisms within the functioning of the company. However, this mechanism

³¹ United Nations Human Rights Council (UNHRC), P. 27.

³² John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights (Norton Global Ethics Series)* (WW Norton & Company, 2013), 121.

³³ United Nations Human Rights Council (UNHRC), 'UNGP', P. 28.

should not only deal with the consequences, but its functioning should also extend to the prevention of any violation and possible negative consequences on human rights.³⁴ Operational-based mechanisms have two roles: to prevent possible violations and to provide remedies for crimes already committed.³⁵ Thus, according to Principle 30, any industry, business, or association that shows their commitment to human rights is obliged to ensure the availability of this mechanism, which will ensure the legitimacy of their commitments.³⁶ Researchers note that these Principles provide a broad understanding of what mechanisms and initiatives should be applied by businesses, rather they note that businesses should create these tools to prevent and protect, but do not answer the question of how.³⁷

2.2.3 Effectiveness criteria

The Principles do not answer questions about the form in which non-judicial grievance mechanisms should be granted, however, as mentioned above, UNGP provides a list of criteria contained in Principle 31, whereby any of the non-judicial or operational mechanisms both on state and non-state level can go through the effectiveness test.³⁸ As noted in the commentaries to this Principle, these criteria do not constitute a threshold for an efficacy test, but merely set out the minimum requirements for what non-judicial grievance mechanisms should be.³⁹

These criteria begin with classical factors, which also determine the effectiveness in cases of classical – judicial remedies. **Legitimacy** and **accessibility** provide trust and the ability to use grievance mechanisms.⁴⁰ For example, a state-based non-judicial mechanism must ensure the principle of "equality of arms". This binds the two principles together since

³⁴ United Nations Human Rights Council (UNHRC), P. 29.

³⁵ United Nations Human Rights Council (UNHRC), P. 29.

³⁶ United Nations Human Rights Council (UNHRC), P. 30.

³⁷ Martijn Scheltema, 'Assessing the Effectiveness of Remedy Outcomes of Non-Judicial Grievance Mechanisms', *Dovens Schmidt Quarterly* 2013, no. 4 (2013): 193.

³⁸ United Nations Human Rights Council (UNHRC), 'UNGP', P. 21.

³⁹ United Nations Human Rights Council (UNHRC), P. 31.

⁴⁰ United Nations Human Rights Council (UNHRC), P. 31.

legitimacy requires acceptance from the stakeholder, however, this mechanism cannot be in the zone of trust if it is not available to those who are in the most vulnerable position.⁴¹ Thus, the state is obliged to make sure that stakeholders not only have theoretical access to this mechanism but are also informed about its existence, which brings us to the next criterion - **predictability**.⁴² This criterion is expressed not only in awareness of the existence of this mechanism but also in how this procedure takes place and its possible consequences. The following of the criteria is **equitability**, this characteristic of the mechanism is because the provider must make sure that the injured party has sufficient resources for information, as well as legal assistance.⁴³ Also, in the case of state mechanisms, the state is obliged to make sure that the victim is safe and is not a victim of harassment. Thus, this criterion provides effective access to the mechanism from the point of view of the adequacy of resources for the participating, reducing the risks of practical restrictions for alleged victims of violations.⁴⁴

However, for a mechanism to achieve a sufficient level of trust and be accessible to a common understanding, both in use and in efficiency in terms of possible outcomes, it must meet the criterion of **transparency**, which guarantees its legitimacy and equitability.⁴⁵ An important aspect of transparency is the disclosure of information relevant to the evaluation of the criteria listed above, so the number and length of consideration of proceedings can serve as a basis for understanding how predictable and equitable this mechanism is.⁴⁶ Disclosure of information about the process and important components of decision-making makes it possible

⁴¹ Lizarazo Rodriguez, 'UNGP on Business and Human Rights in Belgium: State-Based Judicial Mechanisms and State-Based Nonjudicial Grievance Mechanisms, with Special Emphasis on the Barriers to Access to Remedy Measures', 69.

⁴² United Nations Human Rights Council (UNHRC), 'UNGP', P. 31.

⁴³ United Nations Human Rights Council (UNHRC), P. 31.

⁴⁴ Ruggie, 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Business and Human Rights: Further Steps toward the Operationalization of the "Protect, Respect, Remedy" Framework', 22.

⁴⁵ United Nations Human Rights Council (UNHRC), 'UNGP', P. 31.

⁴⁶ Stefan Zagelmeyer, Laura Bianchi, and Andrea Shemberg, 'Non-State Based Non Judicial Grievance Mechanism (NSBGM): An Exploratory Analysis', *Manchester: The University of Manchester Alliance Manchester Business School*. DOI 10 (2018), 15.

to assess the sequence of the trial, as well as to verify the compliance of these decisions with international human rights law, which can play a key role in choosing a mechanism by the affected stakeholders, as well as ensure compliance with the **rights-compatibleness criterion**.⁴⁷ Thus, when creating non-judicial mechanisms, the state, within the framework of its human rights obligations, must comply with the provisions of the treaties, and the consequences of the actions of these mechanisms must ensure the protection and respect of these rights, as well as work to prevent violations by the business.⁴⁸

This does not mean that this mechanism should participate in policy changes and the formation of new regulations, on the contrary, according to **the source of continuous learning** criterion, an extrajudicial mechanism should provide the maximum amount of information and clear decisions that will comply with international human rights law, which can serve a base for new initiatives.⁴⁹

So, this efficiency test can be applied for both state and non-state mechanisms, however, Principle 31 singles out the criterion for the operational-level mechanism separately. According to the provisions of this principle, the mechanism should be based on **engagement and dialogue**, which will allow the provider to create a basis for dialogue with interested and affected groups, to understand the concerns and possible risks of the activity to prevent the violations and negative consequences for human rights.⁵⁰

2.3 Effective in implementation

It is becoming clear that the UNGP recognizes that effective redress mechanisms are not limited to classical judicial remedies; these remedies are indeed "at the core", but the role of

⁴⁷ United Nations Human Rights Council (UNHRC), 'UNGP', P. 31.

⁴⁸ Scheltema, 'Assessing the Effectiveness of Remedy Outcomes of Non-Judicial Grievance Mechanisms, 194'.

⁴⁹ United Nations Human Rights Council (UNHRC), 'UNGP', P. 31.

⁵⁰ United Nations Human Rights Council (UNHRC), P. 31.

other non-judicial mechanisms provided by the state or business is one of the most important for alternatives or opportunities to supplement judicial remedies for victims of human rights violations. As noted earlier in this chapter, the inclusion of these by the mechanism under the provisions of the UNGP does not mean that they automatically become effective and reliable for use to protect human rights. That is why the author has created a list of criteria that can contribute to the assessments of the effectiveness of both state and non-state grievance mechanisms.

This effectiveness test provides an opportunity for UNGP to step forward from pre-existing grievance mechanisms. For example, one of the most significant mechanisms in providing alternative means of protection for victims of business activities was the National Contact Point (NCP) provided by OECD Guidelines for Multinational Enterprises in 1984.⁵¹ NCPs originated as a mechanism for the promotion of the OECD Guidelines for responsible business conduct, as well as an additional mechanism for those who were affected by non-compliance with the provisions of the Guidelines by TNC.⁵² However, despite 40 years of experience in implementing this mechanism and its legally-binding nature of it,⁵³ the NCP has not created the necessary basis to provide an alternative to seeking justice in cases of business violations of the OECD Guidelines. The legal obligation of the state to implement this mechanism has created the conditions for the opening of 51 NCPs around the world, however, due to the lack of a legally binding nature of the OECD Guidelines itself,⁵⁴ as well as the lack of a common system for the application of NCPs, local legislation failed to ensure the effectiveness of the mechanism. Therefore, studies of the effectiveness of NCP in the countries

⁵¹ Sander van 't Foort, 'The History of National Contact Points and the OECD Guidelines for Multinational Enterprises', *Rechtsgeschiede - Legal History*, no. 25 (2017): 197, <https://doi.org/10.12946/rg25/195-214>.

⁵² Gefion Schuler, 'Effective Governance through Decentralized Soft Implementation: The OECD Guidelines for Multinational Enterprises', *German Law Journal* 9, no. 11 (2008): 1768.

⁵³ Foort, 'The History of National Contact Points and the OECD Guidelines for Multinational Enterprises', 199.

⁵⁴ Foort, 201.

where this mechanism exists indicated a lack of accessibility to this mechanism due to limited financial and human resources within the system, a lack of enforcement powers, transparency in activities, and decision-making, as well as a lack of predictability for stakeholders who used this mechanism.⁵⁵ Additionally, Sanchez, notes that the lack of homogeneity in the application of this mechanism and understanding of its status in the domestic legal system has created conditions under which this mechanism is used more, as an actor for the promotion of the OECD Guidelines, rather than the remedy itself.⁵⁶

Thus, being formulated almost 30 years after the NCP, the authors of the UNGP stepped forward and introduced conditions that could ensure the effectiveness of the non-judicial mechanism and stressing that the competence of the mechanism should not be within the borders of consultations and promotion and serve as a real opportunity for victims to obtain compensation through the introduction of a non-judicial state mechanism into the legal system of the state. Thus, the UNGP does not give the states and business the mechanism itself, which subsequently will not be able to ensure the effectiveness of their activities, unlike the OECD, but offer them, taking into account the various legal and procedural differences of states, to independently create these mechanisms, while providing basic characteristics for these mechanisms, thereby helping providers in the formation of these new remedies, and victims a certain check-box to assess the rationality of using this mechanism.

Although, despite the obvious evolution in the formulation of characteristics for effective mechanisms, the practical application of UNGP effectiveness criteria often does not give real effective results for victims of human rights violations by business activity. The vagueness of

⁵⁵ Sander van't Foort, Tineke Lambooy, and Aikaterini Argyrou, 'The Effectiveness of the Dutch National Contact Point's Specific Instance Procedure in the Context of the OECD Guidelines for Multinational Enterprises', *McGill J. Sust. Dev. L.* 16 (2020): 194.

⁵⁶ Juan Carlos Ochoa Sanchez, 'The Roles and Powers of the OECD National Contact Points Regarding Complaints on an Alleged Breach of the OECD Guidelines for Multinational Enterprises by a Transnational Corporation', *Nordic Journal of International Law* 84, no. 1 (2015): 96.

the wording and description of each of the criteria creates a gap in understanding what mechanisms other than judicial mechanisms can be considered effective.⁵⁷ Wielga and Harrison in their work, note that despite passing an effectiveness test under the provisions of Principle 31,⁵⁸ complaint mechanisms have an unsatisfactory result in assessing the results for complainants and victims of human rights violations.⁵⁹

However, it must be understood that Ruggie in the formation of the provisions of the UNGP never stated that the criteria described in Principle 31 should fully determine the effectiveness of the grievance mechanism from beginning to end.⁶⁰ Rather, this efficacy test was supposed to be the basic minimum of the alternative remedies on the state and company level to help stakeholders assess existing mechanisms and create an understanding of whether there is a local need for the formation of more effective ones. Thus, the Third Pillar of UNGP expands the general understanding of remedies in the context of the interaction of business and human rights and describes the minimum criteria for the further development of the regional and local regulation for providing alternative remedies and the opportunity to assess its effectiveness by stakeholders and legislators.

⁵⁷ Mark Wielga and James Harrison, 'Assessing the Effectiveness of Non-State-Based Grievance Mechanisms in Providing Access to Remedy for Rightsholders: A Case Study of the Roundtable on Sustainable Palm Oil', *Business and Human Rights Journal* 6, no. 1 (2021): 76.

⁵⁸ United Nations Human Rights Council (UNHRC), 'UNGP', P. 31.

⁵⁹ Wielga and Harrison, 'Assessing the Effectiveness of Non-State-Based Grievance Mechanisms in Providing Access to Remedy for Rightsholders: A Case Study of the Roundtable on Sustainable Palm Oil', 93.

⁶⁰ Ruggie, *Just Business: Multinational Corporations and Human Rights (Norton Global Ethics Series)*, 121.

3 THE EU FRAMEWORK ON BUSINESS AND HUMAN RIGHTS

3.1 Towards Mandatory Due Diligence

Being an intergovernmental organization EU is bound by negative and positive human rights obligations through internal Treaties and Charters, as well as international obligations.⁶¹ The development of the international agenda of Business and Human Rights, as well as the introduction of the UNGP, undoubtedly affected the development of soft and hard laws of the European Union.⁶²

Taking as a basis the provisions of the UNGP, the EU institutions have consistently begun to promote initiatives related to the introduction of a new soft law in the field of mandatory human rights due diligence and corporate social responsibility. In 2011, the European Commission established the Strategy on Corporate Social Responsibility as one of the main policies to address the implementation of the UNGP.⁶³ However, this strategy has not been able to fully realize the potential to adapt the provisions of the Principles to domestic legislation on Member States, in particular, due to the voluntary nature of this concept, which focuses on business activities, without paying due attention to issues of responsibility and access to the protection of rights.⁶⁴

For the first time, questions about corporate accountability and possible challenges related to access to justice for victims of human rights violations were raised by the European

⁶¹ Sionaidh Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon', *Human Rights Law Review* 11, no. 4 (2011): 662.

⁶² Daniel Augenstein, Mark Dawson, and Pierre Thielbörger, 'The UNGPs in the European Union: The Open Coordination of Business and Human Rights?', *Business and Human Rights Journal* 3, no. 1 (2018): 12.

⁶³ European Commission, 'Commission Staff Working Document on Corporate Social Responsibility, Responsible Business Conduct, and Business & Human Rights: Overview of Progress' (SWD, 19 March 2019).

⁶⁴ Patrick C Leyens, 'Corporate Social Responsibility in European Union Law: Foundations, Developments, Enforcement', *Globalisation of Corporate Social Responsibility and Its Impact on Corporate Governance*, 2018, 163.

Parliament in 2016.⁶⁵ As part of its report, EP cited several concerns and issues of business responsibility, in the areas of activities in third countries, which was one of the first proofs of the need for mandatory human rights due diligence (MHRDD) of EU legislation and the subsequent introduction of this regulation into the justice system of the Member States.⁶⁶ Despite the urgency for the action from the European institution, the regulation for the MHRDD remained at the level of recommendations and Shadow EU Action Plan, which over the years, has failed to get a push towards legally binding regulation.⁶⁷

Indubitably, Member States (MS), as part of the implementation of National Action Plans introduced by the Human Rights Council⁶⁸, gradually began to introduce local regulations that in one way or another relate to human rights issues in business activities, but these initiatives were caused by the international obligations of the Member States themselves. and the individual wishes of the governments themselves, rather than the binding regulations of the Union.⁶⁹

The evolving local legislation that business responsibility in the field of human rights and pressure from different political and business entities⁷⁰ pushed the EU institutions to create and subsequently make the proposal of the Directive on Corporate Sustainability Due Diligence on 23rd February 2022.⁷¹

⁶⁵ Ignazio Corrao, 'REPORT on Corporate Liability for Serious Human Rights Abuses in Third Countries' (European Parliament, 19 July 2016).

⁶⁶ European Coalition for Corporate Justice, 'Evidence for Mandatory HRDD Legislation', May 2019, 2.

⁶⁷ Business & Human Rights Resource Center, 'Shadow EU Action Plan on Business & Human Rights', 19 March 2019, <https://www.business-humanrights.org/en/latest-news/shadow-eu-action-plan-on-business-human-rights/>.

⁶⁸ Human Rights Council, 'Human Rights and Transnational Corporations and Other Business Entities' (HRC Resolution /17/4, 6 July 2011), 3.

⁶⁹ OHCHR, 'National Plans of Action for the Promotion and Protection of Human Rights', n.d.

⁷⁰ Business & Human Rights Resource Center, 'MEPs & Companies Call for EU-Level Human Rights Due Diligence Legislation', 19 March 2019, <https://www.business-humanrights.org/en/meps-companies-call-for-eu-level-human-rights-due-diligence-legislation>.

⁷¹ Business & Human Rights Resource Center, 'EU Commission Publishes Proposal for a Directive on Corporate Sustainability Due Diligence', 23 February 2022, 23 Feb 2022.

3.2 Operational Level Mechanisms and Civil Liability

The Directive is based on a "Study on due diligence in supply chains"⁷², ordered by the European Commission. The study highlighted not only the interest of companies in mandatory regulation and the ability to conduct supply chain audits but also showed several limitations related to the voluntary nature of Corporate Social Responsibility and the importance of creating a single standard at the EU level for legal certainty.⁷³

The Directive aims to increase business liability through monitoring, mandatory reporting, and access to remedies. While the "explanatory memorandum" and the Directive draw inspiration from the UNGP,⁷⁴ there are clear differences in the classification of human rights protection mechanisms. Non-state-based grievance mechanisms are not referred to as alternative remedies for victims of human rights violations, instead, operational-level mechanisms are used as a warning to companies to prevent future violations.⁷⁵ The Directive allows various groups, including civil society organizations and unions, to access this mechanism, limiting businesses' ability to act independently in response to violations.⁷⁶ However, operational-level mechanisms are not a substitute for judicial remedies, as Article 42 clarifies that recourse to the complaints and remediation mechanism should not prevent complainants from seeking judicial remedies.⁷⁷ Overall, the Directive emphasizes access to remedies as an integral part of holding corporations accountable, but its approach to protection mechanisms differs from that of the UNGP.

⁷² Lise Smit et al., *Study on Due Diligence Requirements through the Supply Chain* (Publications Office of the European Union Luxembourg, 2020).

⁷³ Claire Bright and Lise Smit, 'The New European Directive on Corporate Sustainability Due Diligence', *British Institute of International and Comparative Law and NOVA School of Law* 23 (2022), 2.

⁷⁴ O'Brien and Martin-Ortega, *Sustainable Corporate Governance: Submission to Consultation on European Commission's Proposal for a Directive on Corporate Sustainability Due Diligence COM(2022)71 Final*, 16.

⁷⁵ European Commission, 'Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937', (42).

⁷⁶ European Commission, (42).

⁷⁷ European Commission, (42).

The Directive introduces a new system of civil liability for companies, which allows for full or partial responsibility. Companies may be exempted from liability if the damage caused by their or subsidiary activities complies with the requirements for preventing human rights violations and environmental harm.⁷⁸ However, it is unclear how the liability mechanisms for corporations will be applied, as the provisions do not provide a clear understanding of their extent. Although Article 8 (3) stipulates that companies are liable to pay damages and financial compensation in case of breaches,⁷⁹ the relationship between this provision and civil liability for non-compliance with due diligence under Article 22 is ambiguous, as are the practical implications.⁸⁰ It could bring practical uncertainty by relying on qualifying terms like 'appropriate,' 'reasonable,' and 'relevant.' The use of these terms throughout the Directive raises questions about their precise legal implications. It is important to note that non-compliance with Articles 7, and 8, could potentially lead to liability under Article 22, which could create challenges, particularly concerning the effectiveness of remedial actions in such cases.⁸¹ The text focuses on business liability from a civil perspective, highlighting the possibility of holding corporations accountable for paying victims of violations.⁸² However, it gives more attention to defining the scope of responsibility and the possibility of removing it from the business if the Directive's provisions are met, rather than addressing victims' access to effective remedies, identifying the main obstacles to justice, and providing solutions to these barriers.

⁷⁸ European Commission, art. 7-8.

⁷⁹ European Commission, 'Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937', art. 8(3).

⁸⁰ European Commission, art. 22.

⁸¹ O'Brien and Martin-Ortega, *Sustainable Corporate Governance: Submission to Consultation on European Commission's Proposal for a Directive on Corporate Sustainability Due Diligence COM(2022)71 Final*, 13.

⁸² O'Brien and Martin-Ortega, *Sustainable Corporate Governance: Submission to Consultation on European Commission's Proposal for a Directive on Corporate Sustainability Due Diligence COM(2022)71 Final*, 17.

3.3 Supervisory Authority and Remedies

The Directive acknowledges the importance of access to justice for victims of human rights violations but does not clearly state the EU's goal of providing redress and compensation, as recognized in regional and international human rights standards. While the preamble and exploratory memorandum mention the need to improve access to remedies, the Directive does not provide specifics on how this will be achieved, or which remedies are considered sufficient to fulfill human rights obligations.⁸³ Additionally, the Directive distinguishes between judicial remedies and operational-level mechanisms but does not clarify the extent to which each can provide effective remedies for victims.

As mentioned, the Draft of the Directive provides a limited understanding of what “effective” remedies will be open to victims of human rights violations by business activity. It follows from the text of the Directive that internal mechanisms for filing complaints and warning businesses about possible and past violations are not seen as an independent effective mechanism for seeking justice, on the contrary, the use of this mechanism should be simplified so that plaintiffs do not have practical barriers to use the judicial institutions in the search for remedies. However, the lack of criteria or enumeration of how access to remedies and what remedies will be improved for the victims calls into question the real impact of this Directive in improving the protection of human rights.⁸⁴

One of the purposes of the Directive is the harmonization of EU Member States law, which should simplify not only the work of business in complying with one standard throughout the Union but also essentially should establish uniform standards for access to

⁸³ European Commission, ‘Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937’.

⁸⁴ “Better protection of human rights” was advertised as one of the benefits of the Directive according to the official website of European Commission. https://commission.europa.eu/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en

justice for victims.⁸⁵ Thus, Article 18 states the creation of a unified system of Supervisory Authority (SA), which will work as a supervisory body for compliance with the Directive in the territory of all Member States with the possibility of collaboration and exchange of relevant information on its role as one of the state-based non-judicial remedies is not fully disclosed.⁸⁶

Under the provisions of Article 19, the Member-State is obliged to ensure the right to submit "substantiated concerns" to the SA, in the event of non-compliance with the provisions of the Directive by the company, both physical and legal entities.⁸⁷ Based on the complaint, within its powers, SA can initiate an inspection and subsequently notify the applicant of the results of the inspection. Nevertheless, the role of SA is limited only to the investigation of actions, subsequent information about the validity of violations, as well as the imposition of sanctions on the company. The provisions of the Directive do not fully disclose the possibilities and forces of SA to perform remedial actions concerning applicants, which does not give a complete understanding of whether this mechanism can be classified and used as an effective remedy in the first place. Based on the contents of Articles 18 and 19, it can be assumed that SA is like the operational level, rather, mechanisms serve as additional resources for victims when using judicial remedies.⁸⁸ For example, the results of an SA audit because of "substantiated concerns" can be an additional argument and evidence when using judicial remedies as a violation of the provisions of the Directive.

However, under Article 19, the question of the use of judicial mechanisms by potential victims of human rights violations is mentioned only to question the legitimacy of the decisions or "failure to act" by the SA.⁸⁹ This leaves unanswered the possibility and the process of

⁸⁵ European Commission, 'Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937'.

⁸⁶ European Commission.

⁸⁷ European Commission, art. 19.

⁸⁸ European Commission.

⁸⁹ European Commission.

victims of violations appealing to the judiciary, as well as possible improvements in access to remedies. Undoubtedly, the Directive does not deny access to the judicial remedies to the victims of human rights violations, however, the lack of clarification of the mentioned mechanisms in the chain of processes for accessing effective remedies creates a gray area and leaves it to the Member States to decide the consistency of the use of the mechanisms. Thus, the Draft does not clarify through which tools the Directive will be able to improve access to justice, while it proposes operational mechanisms as types of grievance mechanisms with the complaint procedure and possibilities of remediation, leaving these solutions for compensation and any action for business, administrative supervision despite the possibility of filing complaints as it is direct, and indirect victims, plays a large role as a supervisor of the implementation of the due diligence itself, leaving questions about the powers in the field of remediation unmentioned, together with issues of improving access to justice through the courts, even within their competence of EU law, outside the scope of the Directive.

3.4 Effectiveness of the mechanisms

The absence of rules for the coordination and implementation of available mechanisms in the provisions of the Directive can cause different conditions for these mechanisms in different Member States. The consequences of this can be expressed in the repetition of the "fate" of the OECD's NCP and the inability to assess the effectiveness of the mechanisms according to the 31 Principles of UNGP, especially for the state-level mechanisms.

Indeed, despite the **legitimacy** of these mechanisms based on the legally binding nature of the Directive, due to the lack of clarification on the mandatory use of complain mechanisms on the operational level or following the SA procedure before pending the initiation of legal proceedings on the alleged infringement, leaves to the discretion of the Member State ways of adapting these mechanisms into the national legal system and making them mandatory. This feature may lead to a lack of **predictability** of the mechanisms, due to the fact that, despite the

initial role of the Directive to harmonize the legislation of Member States and create one system for alternative remedies,⁹⁰ it fails to ensure the harmonization, in particular in the procedure and sequence of access to mechanisms.

In the adopted amendments,⁹¹ the European Parliament (EP) specifically notes the need to certify the effectiveness of the operational level mechanism in accordance with the provisions of UNGP Principle 31.⁹² Thus, based on the criteria of effectiveness, the amendments to the Directive oblige businesses to follow established standards to ensure the effectiveness of the implemented mechanisms, in particular for use by potential victims and involved stakeholders. However, the amendments clarifying the effectiveness criteria and the role of SA were not reflected in the adopted EP text.

Moreover, the Draft of the Directive does not mention whether **accessibility** to SA will be provided as an alternative method of protection. Indeed, it follows from the provision of Paragraph 42 that operational level the mechanism should not be a resource obstacle to the use of the judicial system, from which it can be concluded that it is mandatory to ensure financial accessibility for potential victims and those wishing to use complain mechanisms, such an article is not mentioned within the framework of the SA. Thus, the Directive does not mention the obligation of Member States to ensure the principle of “equality of arms”. As well as the responsibilities of the Member States to ensure the safety of the victims and their access to legal assistance within the SA mechanism to ensure **equitability**, considering, that the creation of an equal playing field, within the framework of the creation of uniform standards of access to legal aid in the territory of Member States, is mentioned as one of the most important steps

⁹⁰ European Commission.

⁹¹ European Parliament, ‘Corporate Sustainability Due Diligence Amendments* Adopted by the European Parliament on 1 June 2023 on the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937 (COM(2022)0071 – C9-0050/2022 – 2022/0051(COD))1’ (P9_TA(2023)0209, 1 June 2023).

⁹² United Nations Human Rights Council (UNHRC), ‘UNGP’, P.31.

in improving access to remedy in the area of business and human rights at the EU level according to the European Union Agency for Fundamental Rights since 2017.⁹³

Although Article 19 of the Directive obliges SA and operational-level mechanisms to provide results assessment of the concern applied with the reasoning,⁹⁴ it is not mentioned whether the information on the results and procedure of the assessment and investigation by SA will be available for broad use, to assess the **transparency and rights-compatibleness** of the mechanism by the stakeholders, as well as the ability to serve as a **source of continuous learning**, according to UNGP.

Therefore, despite the “inspirational” use of the UNGP as one of the resources of the proposed Directive, the Draft fails to comply with the basic standard provided by the UNGP to ensure the effectiveness of the alternative non-judicial mechanisms. The lack of guarantees of the effectiveness of new mechanisms, in particular state-based SA, as well as the experience of the existing mechanism of NCP, including in Member-States, calls into question the possibility of this Directive to facilitate access to remedies for the victims of the human rights violations and the potential effectiveness of the proposed mechanisms.

⁹³ European Union Agency for Fundamental Rights, ‘Improving Access to Remedy in the Area of Business and Human Rights at the EU Level Opinion of the European Union Agency for Fundamental Rights’ (FRA Opinion – 1/2017, 10 April 2017).

⁹⁴ European Commission, art. 19.

CONCLUSION

The UNGP introduced new protection mechanisms beyond judicial remedies and presented criteria to assess their effectiveness, allowing stakeholders to evaluate mechanisms before and after implementation. While performance criteria may not always ensure effective outcomes for victims, the UNGP provides a framework for creating practical non-judicial mechanisms tailored to evolving business responsibility.

This Capstone Thesis shows that in the proposed Directive on Corporate Sustainability Due Diligence by the European Commission, UNGP was used as one of the basic sources and references, which can be traced not only in the provisions on the mandatory due diligence processes themselves but also by the introduction of two new mechanisms available to potential victims of human rights violations.

However, the provisions regarding state-level mechanisms lack an assessment of their effectiveness. The absence of clear legislative provisions raises questions about how these mechanisms will function and their role in providing access to justice. While the adopted amendments by the EP offer some certainty regarding the operational level complaint procedure, the role and effectiveness of SA remain uncertain. The Draft fails to provide a comprehensive description of how SA will effectively serve victims in seeking justice and further remediation. The Practical Part of the thesis highlights that the introduction of new mechanisms within EU Member States may create additional barriers to justice for victims. The lack of understanding regarding the division of competencies and roles among existing national institutions and mechanisms further complicates the situation.

Moreover, the Directive does not describe how these mechanisms will complement existing redress mechanisms and improve access to justice. Due to the limited regulatory powers of the EU over Member States' judicial systems, the Directive does not guarantee harmonization of legislation across all Member States. This situation not only hinders the

harmonization of laws but also threatens to complicate access to justice and compensation for victims of human rights violations, jeopardizing the effectiveness of the new mechanism and questioning the feasibility of the initial purpose of this regulation – "better access to justice for victims".

As part of the Practical Components of this Capstone Project⁹⁵, it was also noted that while the role of the SA is more obvious as an overseer of due diligence provisions, the role of this institution in interacting with victims and seeking redress is still unclear. In addition, it was mentioned that the introduction of this mechanism into the system of existing grievance mechanisms implies a greater role for Member States' authorities, who will have ensured not only that there is no overlapping of the competencies, but also that there are no new obstacles for victims to find suitable mechanisms and a high level of information provided about available and suitable mechanisms for potential victims.

In addition, considering the possible challenges associated with the implementation of the proposed mechanism in the Member State legal system, within the framework of the final part of the Practical Component, the main problems associated with the system of grievance mechanisms and the availability of these mechanisms for victims of human rights violations created by business activity were studied. Based on the identified challenges, were developed recommendations, and bases for the creation of accessible state-based grievance mechanisms, as well as noted the importance of the use and availability of operating mechanisms in the prevention of potential violations and rapid responses to existing violations.⁹⁶

⁹⁵ Toporova Ekaterina, "Amateur podcast for mature human rights concerns", ep.2 "New mechanisms under CSDDD: challenges and opportunities"

Available: <https://open.spotify.com/show/7LXNP2xvgzULTuE801X4z?si=038daac1250c49e5>

⁹⁶ Toporova Ekaterina, "Amateur podcast for mature human rights concerns", ep.3 "Where to start and how to overcome the challenges?"

Available: <https://open.spotify.com/show/7LXNP2xvgzULTuE801X4z?si=038daac1250c49e5>

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