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Buhmann, Karin

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SCHOLARLY ARTICLE

# Confronting Challenges to Substantive Remedy for Victims: Opportunities for OECD National Contact Points under a Due Diligence Regime Involving Civil Liability

Karin Buhmann 

Professor, Director of the Centre for Law, Sustainability & Justice, Department of Law, University of Southern Denmark; and Professor in Business & Human Rights, Department of Management, Society and Communication (MSC), Copenhagen Business School, Denmark  
Email: [karbu@sam.sdu.dk](mailto:karbu@sam.sdu.dk)

## Abstract

This article examines the under-researched, inter-connected issues of substantive remedy and a role for Organization for Economic Cooperation and Development (OECD) National Contact Points (NCPs) to complement judicial remedy regimes involving civil liability for companies in home-state jurisdictions. Even where access to judicial procedural remedy exists, it need not ensure substantive remedy. Legal and economic resource-based power-disparities between parties can reduce victims' opportunities to present and argue their case; and courts offer limited substantive remedy options compared with the types listed by the United Nations Guiding Principles on Business and Human Rights. The article argues that combining access to NCPs and judicial remedy offers important opportunities to address well-recognized challenges for victims' access to substantive remedy, especially with strong NCPs. NCPs can operate in ways that courts normally cannot, to help give victims voice and a choice of substantive outcome. The European Union's Corporate Sustainability Due Diligence Directive (CSDDD) proposal serves as a cue for the analysis. However, the issue is relevant for any OECD member or the OECD Guidelines adherent state.

**Keywords:** EU Corporate Sustainability Due Diligence Directive proposal; judicial remedy; non-judicial remedy; OECD National Contact Points; power disparities

## 1. Introduction

Preventing and remedying harm is a key element in the idea of business responsibility for human rights. This involves not just responsibilities for business enterprises,<sup>1</sup> including through the exercise of human rights due diligence,<sup>2</sup> but also duties for states. According to the United Nations Guiding Principles on Business and Human Rights (UNGPs), the state duty to protect requires, i.e., taking appropriate steps to prevent, investigate, punish and redress abuse by business enterprises.<sup>3</sup> States are to provide remedy through judicial institutions

<sup>1</sup> Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', A/HRC/17/31 (21 March 2011) (UNGPs), Principles 11 and 13.

<sup>2</sup> Ibid, Principles 15(b) and 17–21.

<sup>3</sup> Ibid, Principle 1.

(courts, tribunals, etc.) and non-judicial mechanisms such as the National Contact Points (NCPs)<sup>4</sup> for the OECD Guidelines for Multinational Enterprises.<sup>5</sup> In their capacity as remedy mechanisms, NCPs are unique state-based institutions charged with powers to also deal with transnational cases, i.e., involving a company domiciled in one country (typically that of the NCP) and victims in another. NCPs do not make judgments and cannot mandate corporate action, e.g., to halt projects causing harm, but they may offer mediation or other non-adversarial conflict resolution to assist the parties in resolving issues giving rise to a grievance, and as part of this engage directly with victims (and companies).<sup>6</sup> NCPs may also issue statements setting out findings, criticism and recommendations.<sup>7</sup> Independent and well-resourced NCPs are recognized to be the most effective, compared with less independent and resourced NCPs.<sup>8</sup> Still, the value of NCPs as alternatives to judicial remedy is widely acknowledged in the business and human rights (BHR) literature<sup>9</sup> and in analyses by the Office of the High Commissioner for Human Rights (OHCHR).<sup>10</sup> Studies also emphasize that NCPs should be assessed as unique institutions, including for their dialogue capacities,<sup>11</sup> and that the weaknesses of some NCPs should not lead to the rejection of the NCP system as such.<sup>12</sup> Effective NCPs may serve as models to increase the overall performance of NCPs more generally. As this article argues, that potential is worth exploring for the benefit of victims.

The UNGPs and the BHR literature distinguish between procedural remedy (access to lodge a case and have it dealt with) and substantive remedy (the outcome ensuring reparation), noting that effective remedy requires both.<sup>13</sup> Substantive remedy presumes

<sup>4</sup> Ibid, Principle 25 with commentary.

<sup>5</sup> OECD, *Guidelines for Multinational Enterprises* (Paris: OECD, 2011).

<sup>6</sup> Ibid, Procedural Guidance, Commentary 28–30; Maartje van Putten, ‘The NCP Work: Dancing on a Cord’, in Herman Mulder and Sander van’t Foort (eds), *OECD Guidelines for Multinational Enterprises: A Glass Half Full* (Paris and Nyenrode: OECD and Nyenrode Business University, 2018) 51.

<sup>7</sup> OECD, *note 5*, Procedural Guidance, Commentary 32–36.

<sup>8</sup> OECD, *Stocktaking Report on the OECD Guidelines for Multinational Enterprises* (Paris: OECD, 2022); OECD, *National Contact Points for Responsible Business Conduct, Providing Access to Remedy: 20 Years and the Road Ahead* (Paris: OECD, 2020); OECD, *Structures and Procedures of National Contact Points for the OECD Guidelines for Multinational Enterprises* (Paris: OECD, 2018); Kate Macdonald, Shelley Marshall and May Miller-Dawkins, *Redress for Transnational Business-Related Human Rights Abuses in the UK* (London: Corporate Accountability Research, 2016).

<sup>9</sup> Alison E Holm, *Corrective Corporate Responses to Accusations of Misconduct on Societal Issues*, PhD dissertation, Copenhagen Business School (PhD series 42, 2022); van Putten, *note 6*; John Ruggie and Tamaryn Nelson, ‘Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges’ (2015) 22:1 *Brown Journal World Affairs* 99; Karin Buhmann, ‘Analyzing OECD National Contact Point Statements for Guidance on Human Rights Due Diligence: Method, Findings and Outlook’ (2018) 36:4 *Nordic Journal of Human Rights* 390; Basak Baglayan Ceyhan, *Corporations and Human Rights: Searching for International Norms for Corporate Conduct in Domestic Case Law* (Luxembourg University, 2017); Larry Cata Backer, ‘Rights and Accountability in Development (Raid) v Das Air and Global Witness v Afrimex: Small Steps Toward an Autonomous Transnational Legal System for the Regulation of Multinational Corporations’ (2009) 10 *Melbourne Journal of International Law* 1; Macdonald et al, *note 8*.

<sup>10</sup> Human Rights Council, ‘Improving Accountability and Access to Remedy or Victims of Business-Related Human Rights Abuse Through State-Based Non-Judicial Mechanisms’, A/HRC/38/20 (2018), para 24.

<sup>11</sup> Kinnari Bhatt and Gamze Erdem Türkelli, ‘OECD National Contact Points as Sites of Effective Remedy: New Expressions of the Role and Rule of Law within Market Globalization?’ (2021) 6:3 *Business and Human Rights Journal* 423.

<sup>12</sup> Karin Lukas et al, *Corporate Accountability: The Role and Impact of Non-Judicial Grievance Mechanisms* (Cheltenham: Edward Elgar, 2016); Ruggie and Nelson, *note 9*; Buhmann, *note 9*.

<sup>13</sup> UNGPs, *note 1*, Principle 25 commentary; Gabrielle Holly and Claire Methven O’Brien, ‘Human Rights Due Diligence Laws: Key Considerations’ (Copenhagen: Danish Institute for Human Rights, 2021); Karin Buhmann, ‘National Contact Points under OECD’s Guidelines for Multinational Enterprises: Institutional Diversity Affecting Assessments of the Delivery of Access to Remedy’ in Liesbeth FH Enneking et al (eds.), *Accountability, International Business*

that harm is undone in a qualitative sense, for example via a reparation that restores the victim to the situation before the harm occurred.<sup>14</sup> Recognizing that substantive remedy may take multiple forms, including apologies, rehabilitation and guarantees of non-repetition,<sup>15</sup> the UNGPs recognize a wider range of substantive remedy than what can typically be granted by courts. The UN 'Protect, Respect and Remedy' (PRR) Framework, which set out theoretical underpinnings for the UNGPs,<sup>16</sup> noted that state regulation proscribing corporate conduct will have little impact without accompanying mechanisms to investigate, punish and redress abuses.<sup>17</sup> The importance of judicial remedy for human rights abuse is well recognized in UN documents<sup>18</sup> and the BHR literature.<sup>19</sup> However, significant challenges have also been noted for judicial remedy to fully deliver on the remedial needs of victims in BHR contexts.<sup>20</sup> This is not just due to jurisdictional barriers for courts' handling of cases involving transnational activities. Costs, formalities associated with litigation, and power-disparities between parties have been identified as major obstacles, especially in civil liability cases.<sup>21</sup> Accordingly, even if jurisdictional barriers are reduced, e.g., by enabling courts in companies' home states to handle cases involving harm to host-state victims, challenges remain for victims to obtain substantive remedy. Already existing power-disparities between parties in civil cases are increased if one party has less knowledge of applicable law, litigation expertise and abilities to access such knowledge and expertise through (typically costly) legal counsel. While highly relevant for BHR victims,<sup>22</sup> the problem exceeds BHR situations<sup>23</sup> and has long been recognized in the literature.<sup>24</sup> In essence, even if victims have access to procedural remedy, their opportunities to obtain substantive remedy through judicial remedy may suffer due to the other party being better equipped to argue its case and obtain its desired result, even if the victim has a good case. Because this occurs during the case, it may distort victims' opportunities to turn procedural access into substantive remedy. In the human rights context and beyond, this has led to proposals for non-adversarial conflict resolution

*Operations and the Law: Providing Justice for Corporate Human Rights Violations in Global Value Chains* (Abingdon: Routledge, 2019) 38.

<sup>14</sup> UNGPs, [note 1](#), Principle 25 commentary; Buhmann, [note 13](#).

<sup>15</sup> UNGPs, [note 1](#), Principle 25 commentary.

<sup>16</sup> On the UN Framework providing an interdisciplinary theoretical foundation on business and human rights, see Karin Buhmann, *Human Rights: A Key Idea for Business and Society* (Abingdon: Routledge, 2021).

<sup>17</sup> Human Rights Council, 'Protect, Respect and Remedy: A Framework for Business and Human Rights', A/HRC/8/5 (7 April 2008), para 82 (PRR Framework).

<sup>18</sup> For example, General Assembly, 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', A/RES/60/147 (16 December 2005).

<sup>19</sup> Humberto Cantú Rivera and Miguel Barboza López, 'Corporate Liability for Human Rights Abuses in Latin American Courts: Some Recent Developments' (2022) 7 *Business and Human Rights Journal* 481.

<sup>20</sup> See, e.g., Human Rights Council, 'Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse', A/HRC/32/19 (2016).

<sup>21</sup> Robert McCorquodale, *Survey of the Provision in the United Kingdom of Access to Remedies for Victims of Human Rights Harms Involving Business Enterprises* (London: British Institute of International and Comparative Law, 2015); Oxford Pro Bono Publico, 'Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse' (2008), <https://media.business-humanrights.org/media/documents/files/reports-and-materials/Oxford-Pro-Bono-Publico-submission-to-Ruggie-3-Nov-08.pdf> (accessed 1 December 2022); Holly and O'Brien, [note 13](#); Macdonald et al, [note 8](#).

<sup>22</sup> Oxford Pro Bono Publico, [note 21](#).

<sup>23</sup> Mariana M Prado and Michael J Trebilcock, *Advanced Introduction to Law and Development* (Cheltenham: Edward Elgar 2021) 59–60.

<sup>24</sup> Mark N Lazerson, 'In the Halls of Justice, the Only Justice is in the Halls' in Richard L Abel (ed), *The Politics of Informal Justice* (New York: Academic Press, 1982) 119; Richard L Abel, 'Introduction' in Abel (ed), *ibid*, 1; Nils Christie, 'Konflikt som eiendom' (1977) *Tidsskrift for Retsvæsen* 113.

mechanisms, noted to be better suited to ensuring that the interests of the disadvantaged party (typically the victim) are articulated and taken into account in the substantive outcome resulting from the process.<sup>25</sup>

In recent years, some home-states for multinational corporations (MNCs) have introduced mandatory human rights due diligence combined with administrative and/or judicial enforcement.<sup>26</sup> In February 2022, the European Commission proposed a Corporate Sustainability Due Diligence Directive (CSDDD).<sup>27</sup> The Council of the European Union issued an amended proposal on 30 November 2022.<sup>28</sup> These legislative steps make it timely to consider the challenges of victims' access to substantive remedy through judicial remedy institutions and the potential of NCPs to complement judicial remedy for the benefit of victims. The CSDDD proposal does not explicitly provide third-country victims with access to European Union (EU)-based courts, but implicitly does so through civil liability for companies, which presumes that victims argue their case at court. The proposals and debate<sup>29</sup> so far largely overlook the challenges faced by victims regarding obtaining substantive remedy for harm suffered, including power-disparities noted above and access to a wider range of substantive remedy than available with courts. The proposal is also silent on the role of NCPs *vis-à-vis* the proposed EU regime, although NCPs will remain operational in EU member states that are also OECD states (which most of them are),<sup>30</sup> given commitments under the OECD Guidelines.

Against this backdrop, this article takes the CSDDD proposal as a cue to address the under-researched and inter-connected issues of substantive remedy and a role for NCPs to complement judicial remedy regimes involving civil liability for companies in home-state jurisdictions. Although advanced, the draft CSDDD remains work-in-progress. If adopted, it will have wide reach across the 27 EU member states and for third-country victims, and may lend inspiration to other jurisdictions.<sup>31</sup> The main focus here is not the CSDDD, but the proposal helps frame the treatment of challenges confronting victims' access to substantive remedy in courts, and the potential of NCPs to help victims obtain such remedy in a set-up in

<sup>25</sup> Prado and Trebilcock, [note 23](#); Commission on Human Rights, 'Study on the Achievements Made and Obstacles Encountered During the First Decade to Combat Racism and Racial Discrimination', E/CN.4/Sub.2/1987/6 (23 November 1987); Lazerson, [note 24](#); Christie, [note 24](#).

<sup>26</sup> On French, German, the Netherlands and Norway's regimes, see Holly and O'Brien, [note 13](#); Shift/OHCHR, *Enforcement of Mandatory Due Diligence: Key Considerations for Administrative Supervision* (London/Geneva, 2021) 4.

<sup>27</sup> European Commission Proposal for a directive of the European Parliament and the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Com (2022) 71 final (23 February 2022) (EC proposal).

<sup>28</sup> Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937—General Approach, Council of the European Union, 15024/1/22 (CSDDD proposal).

<sup>29</sup> See, e.g., Claire Methven O'Brien and Olga Martin-Ortega, *Commission Proposal on Corporate Sustainability Due Diligence: Analysis from a Human Rights Perspective. In-Depth Analysis Requested by the DROI Subcommittee, European Parliament* (Brussels: European Parliament, May 2022); SHIFT, 'The EU's Proposal for a Corporate Sustainability Due Diligence Directive' (March 2022), <https://shiftproject.org/resource/eu-csdd-proposal-analysis/> (accessed 1 December 2022); Stephane Brabant, Claire Bright, Noah Neitzel and Daniel Schönfelder, 'The Draft Directive on Corporate Sustainability Due Diligence, Part One', *Verfassungsblog* (15 March 2022), <https://verfassungsblog.de/due-diligence-around-the-world/> (accessed 1 December 2022); Claire Bright and Lise Smit, 'The New European Directive on Corporate Sustainability Due Diligence' (Nova School of Law and British Institute of International and Comparative Law, 23 February 2022).

<sup>30</sup> The OECD is an international organization currently consisting of 38 members, including 22 of the 27 EU countries; moreover, several non-OECD countries adhere to the OECD Guidelines: <https://www.oecd.org/about/document/ratification-oecd-convention.htm> and <http://mneguidelines.oecd.org/ncps/> (accessed 1 December 2022).

<sup>31</sup> Brabant et al, [note 19](#); Nahla Davies, 'Are US Businesses Falling Behind on Human Rights Due Diligence', *Business and Human Rights Resource Centre Blog* (17 February 2022), <https://www.business-humanrights.org/en/blog/are-us-businesses-falling-behind-on-human-rights-due-diligence/> (accessed 1 December 2022).

which NCPs complement judicial remedy. Given this focus and space limitations, the article does not engage with EU law specificities, e.g., competences. Moreover, except for some further research perspectives indicated in the conclusion, it does not cover the potential role of NCPs as supervisory agencies (government authorities charged with monitoring of business conduct) for the purposes of the CSDDD.

Section II sets the context through a brief overview of human rights due diligence, the organization and function of NCPs including remedial strengths and weaknesses and the CSDDD proposal. Section III reviews literature on challenges confronting substantive remedy with judicial institutions, and the role of non-adversarial conflict resolution. Section IV then explains NCPs' grievance handling and provides examples of NCP contributions to substantive remedy in forms recognized by the UNGPs. Taking the CSDDD as an example of legislation introducing civil liability of companies in their home states, section V discusses what complementary role NCPs may play under such a regime, with an emphasis on the provision of substantive remedy for victims. Section VI concludes that combining access to NCPs and judicial remedy offers important opportunities to address challenges for victims' access to substantive remedy.

## II. Context

### *Human Rights Due Diligence*

A management process proposed by the PRR Framework as a way for companies to 'know and show' that they respect human rights,<sup>32</sup> human rights due diligence is an essential element in the corporate responsibility to respect human rights as defined by the UNGPs. The objective is to identify, prevent and mitigate adverse impact on human rights, to account for how impact is addressed, and to provide remedy for harmful impacts that have occurred.<sup>33</sup> Following a 2011 revision, the OECD Guidelines apply the same concept under the term 'risk-based due diligence'.<sup>34</sup>

A process to attain the overall objective of not causing harm, rather than a simple standard of conduct,<sup>35</sup> human rights due diligence (and risk-based due diligence according to the OECD Guidelines) differs from the transactional due diligence approach well-known from legal practice related to identifying economic risks or legal liability, typically connected to mergers and acquisitions.<sup>36</sup> According to the UNGPs and the OECD Guidelines, a company should not only exercise due diligence if connected to human rights risks or actual harm by causing or contributing to it, but also if (risks of) harmful impacts are directly linked to its operations, products or services by its business relationship with another entity.<sup>37</sup>

Aiming at preventing harm, human rights due diligence is largely informed by an *ex-ante* perspective.<sup>38</sup> Except for preventative remedy like injunctions or a company's guarantee of non-repetition, remedy is generally *ex-post* because it relates to harm that has occurred.

<sup>32</sup> Human Rights Council, PRR Framework, [note 17](#), para 25.

<sup>33</sup> UNGPs, [note 1](#), Principle 17 with commentary.

<sup>34</sup> OECD, [note 5](#), II.A.10, commentary 14.

<sup>35</sup> Human Rights Council, PRR Framework, [note 17](#), paras 24–25; John G Ruggie and John F Shermann III, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights: Reply to Professors Bonnitcha and McCorquedale' (2017) 28:3 *European Journal of International Law* *European Journal of International Law* 921.

<sup>36</sup> Karin Buhmann, 'Neglecting the Proactive Aspect of Human Rights Due Diligence? A Critical Appraisal of the EU's Non-Financial Reporting Directive as a Pillar One Avenue for Promoting Pillar Two Action' (2017) 3:1 *Business and Human Rights Journal* 23.

<sup>37</sup> UNGPs, [note 1](#), Principle 17 with commentary; OECD, [note 5](#), II commentary 14, IV.5, commentary 41–43.

<sup>38</sup> Buhmann, [note 36](#).



Ideally, any harm resulting from inadequate due diligence should give rise to access to remedy with state-based remedy institutions. However, victims of business-related human rights abuse struggle to achieve effective remedy for harm suffered.<sup>39</sup>

### NCP Organization and Remedy Function

NCPs have their legal basis in the OECD Guidelines, an Annex to the OECD Declaration on International Investment and Multinational Enterprises. The Guidelines cover various issue areas, including human rights, industrial relations (labour), the environment and anti-corruption. They have been revised at intervals to respond to developments in responsible business conduct expectations, implementation or remedy. Introduced with the 1984 revision to promote awareness of the Guidelines, NCPs' grievance-handling function was added through the 2000 revision.<sup>40</sup> A 2011 revision incorporated a human rights chapter consistent with the UNGPs,<sup>41</sup> and added risk-based due diligence to the Guidelines' 'General Principles', defined in accordance with the UNGPs but applying to most issue areas covered by the Guidelines.<sup>42</sup> Accordingly, NCPs are empowered to handle complaints on BHR issues, including due diligence for human rights (as well as for the environment, also covered by the CSDDD proposal).

As grievance-handling organizations, NCPs are state-based non-judicial remedy institutions according to the typology deployed by the PRR Framework and the UNGPs. Being non-judicial, they do not make enforceable decisions, but they can issue determinations (statements) criticizing business conduct and recommending improvements. The significance of NCPs as remedy institutions for business-related human rights abuse, and as remedy institutions for the UNGPs, is recognized in theory<sup>43</sup> and practice.<sup>44</sup> The PRR Framework observed that while non-judicial mechanisms may be particularly significant in countries where courts are unable to provide adequate and effective access to remedy, they are also important in societies with well-functioning rule-of-law institutions as a more immediate, accessible, affordable, and adaptable point of initial recourse than judicial remedy.<sup>45</sup> Studies have also highlighted the significance of NCPs' ability to offer their good offices, including mediation and engaging closely with victims in ways that courts cannot.<sup>46</sup>

<sup>39</sup> See, e.g., Jena Martin, Karen E Bravo and Tara Van Ho, 'Introduction' in Jena Martin, Karen E Bravo and Tara Van Ho (eds.), *When Businesses Harm Human Rights: Affected Communities are Dying to be Heard* (London: Anthem Press, 2020) 1; Human Rights Council, [note 10](#), para 4; Nicola Jägers, 'Access to Justice for Victims of Corporate-Related Human Rights Abuse an Echternach-Procession?' (2015) 33:3 *Netherlands Quarterly of Human Rights* 269.

<sup>40</sup> OECD, *Implementing the OECD Guidelines for Multinational Enterprises: The National Contact Points from 2000–2015* (Paris: OECD, 2016) 22–24.

<sup>41</sup> OECD, [note 5](#), chapter IV.

<sup>42</sup> *Ibid.*, II.A.10, commentary 14.

<sup>43</sup> Holm, [note 9](#); Bhatt and Türkelli, [note 11](#); Ceyhan, [note 9](#); Sander van't Foort, *Effectiveness of National Contact Points of the OECD* (Nyenrode Business University, 2020); Herman Mulder and Sander van't Foort (eds.), *OECD Guidelines for Multinational Enterprises: A Glass Half Full* (Paris and Nyenrode: OECD and Nyenrode Business University, 2018); Ruggie and Nelson, [note 9](#); Karin Buhmann, 'Business and Human Rights: Understanding the UN Guiding Principles from the Perspective of Transnational Business Governance Interactions' (2015) 6:1 *Transnational Legal Theory* 399.

<sup>44</sup> OECD, *Cases Handled by the National Contact Points for the OECD Guidelines for Multinational Enterprises* (Paris: OECD, 2015); OECD Watch, 'The State of Remedy under the OECD Guidelines', *OECD Watch Briefing Paper* (2018), [https://media.business-humanrights.org/media/documents/files/documents/State\\_of\\_Remedies\\_2018-06-15\\_final.pdf](https://media.business-humanrights.org/media/documents/files/documents/State_of_Remedies_2018-06-15_final.pdf) (accessed 1 December 2022); Caitlin Daniel et al, *Remedy Remains Rare: An Analysis of 15 Years of NCP Cases and their Contributions to Improve Access to Remedy for Victims of Corporate Misconduct* (OECD Watch, 2015).

<sup>45</sup> PRR Framework, [note 17](#), para 84.

<sup>46</sup> Human Rights Council, [note 10](#), paras 11, 24; Holm, [note 9](#); van Putten, [note 6](#).

As the OECD Guidelines apply to companies operating in or from OECD and non-OECD states that have decided to adhere to the Guidelines, an NCP may receive and handle grievances relating to a company registered in the NCP's state but operating elsewhere.<sup>47</sup> As a result of their extra-territorial jurisdiction, NCPs may handle grievances relating to a company operating in non-adhering countries, if the main (for example, sourcing or investing) company is directly related to that company through its operations, products or services.

NCPs differ considerably in their organizational structure, funding and application of powers. The OECD Guidelines set overall requirements to ensure 'functional equivalence' across NCPs<sup>48</sup> but an NCP's actual effectiveness is shaped by decisions by its state on the organization and resources and occasionally procedures. Some NCPs are independent organizations; others are hosted within government agencies. Some mainly consist of a secretariat with civil-servant-staff handling the entire grievance process; others have more complex structures, typically an expert committee representing various stakeholders, supported by a secretariat.<sup>49</sup> Associated in part with those organizational and resource differences, uneven patterns of grievance acceptance and handling across NCPs are acknowledged by the OECD,<sup>50</sup> academics<sup>51</sup> and civil society.<sup>52</sup> Still, NCPs are recognized by civil society organizations (CSOs)<sup>53</sup> and scholars<sup>54</sup> to offer unique remedy opportunities, and for their capacity to advance corporate learning and corrective measures, such as revised BHR policies to prevent future abuse.<sup>55</sup>

Some recent improvements in NCP performance were noted by OECD Watch, an NCP watchdog,<sup>56</sup> during an OECD-initiated review of the Guidelines. The review has led the OECD to propose measures to address the recognized weaknesses of less independent and/or resourced NCPs and provide for more effective, visible, transparent, accessible and accountable NCPs overall.<sup>57</sup>

<sup>47</sup> OECD, note 5, Commentary on Implementation Procedures, para 39.

<sup>48</sup> Ibid, Procedural Guidance, I, Commentary I.9.

<sup>49</sup> OECD (2020), note 8; OECD (2018), note 8.

<sup>50</sup> Ibid.

<sup>51</sup> Martijn Scheltema and Constance Kwant, 'Alternative Approaches to Strengthen the NCP Function' in Mulder and van't Foort (eds.), note 43, 55; Buhmann, note 9; Leyla Davarnejad, 'In the Shadow of Soft Law: The Handling of Corporate Social Responsibility Disputes under the OECD Guidelines for Multinational Enterprises' (2011) *Journal of Dispute Resolution* 351; Jernej Letnar Cernic, 'The Divergent Practices of NCPs under OECD Guidelines for Multinational Enterprises: Time for a More Uniform Approach?' (2021) 7:1 *International Labour Rights Case Law* 11.

<sup>52</sup> OECD Watch (2018), note 44; Daniel et al, note 44.

<sup>53</sup> OECD Watch, 'ANZ Launches Human Rights Grievance Mechanism in a First for the Global Banking Sector' (2021), <https://mailchi.mp/74a079dfc28c/anz-launches-human-rights-grievance-mechanism-in-a-first-for-the-global-banking-sector?e=0a38711cb9> (accessed 1 December 2022); OECD Watch, 'Case against Rockwool Results in First Determination of Breach of the OECD Guidelines in the US' (2021), <https://mailchi.mp/c8500b62b5b3/complaint-against-health-company-mlnlycke-groundbreaking-final-statement-in-rockwool-case?e=0a38711cb9> (accessed 1 December 2022); SOMO, 'Historic Agreement between Heineken and Former Congolese Workers Seeking Remedy in Labour Rights Dispute' (18 August 2017), <https://www.somo.nl/historic-agreement-heineken-former-congolese-workers-seeking-remedy-labour-rights-dispute/> (accessed 24 March 2023).

<sup>54</sup> European Law Institute, *Business and Human Rights: Access to Justice and Effective Remedies* (Vienna: ELI, 2022); Bhatt and Türkelli, note 11; Mulder and van't Foort, note 43; van Putten, note 6; Ceyhan, note 9; Ruggie and Nelson, note 9.

<sup>55</sup> Holm, note 9; on learning, compare with Judith Schrempf-Stirling and Florian Wettstein, 'Beyond Guilty Verdicts: Human Rights Litigation and its Impact on Corporations' Human Rights Policies' (2017) 145:3 *Journal of Business Ethics* 545.

<sup>56</sup> OECD Watch, 'Second Evaluation of NCPs Shows Persistent Gaps in Performance' (2021), <https://www.oecdwatch.org/second-evaluation-of-ncps-shows-persistent-gaps-in-performance> (accessed 1 December 2022).

<sup>57</sup> OECD, *Consultation Draft: Targeted Update of the OECD Guidelines for Multinational Enterprises and Their Implementation Procedures* (OECD – Public consultation 13 January–10 February 2023); OECD (2022), note 8, 73–82.



Part of the implementing arrangements for the OECD Guidelines,<sup>58</sup> so far, most NCPs do not enjoy a statutory basis. In 2012, the Danish government provided a statutory basis for its NCP, simultaneously enhancing the NCP's independence and powers.<sup>59</sup> This exemplifies that national legislation may be deployed to strengthen NCPs.

### *The CSDDD Proposal*

The CSDDD proposal establishes due diligence obligations for companies regarding actual and potential adverse impacts for human rights and/or the environment, with respect to their own operations, those of their subsidiaries, and operations carried out by their business partners in companies' chains of activities; it also proposes liability for violations of those obligations.<sup>60</sup> If adopted, the CSDDD will make it a duty for EU member states to ensure that companies covered by the directive exercise such due diligence as defined in the final version of the directive (still work in progress, given the ongoing political process),<sup>61</sup> and to establish a remedy regime consisting of administrative enforcement<sup>62</sup> and civil liability.<sup>63</sup> The proposal introduces civil liability for companies with full compensation for victims for damages caused by intentional or negligent failure to comply with the due diligence obligations, under conditions further detailed in the proposal.<sup>64</sup> That liability must be of over-riding mandatory application in cases where third-country law otherwise applies to the claim.<sup>65</sup>

Beyond obligations of member states to establish liability for companies and a right to 'full compensation',<sup>66</sup> the proposal is little developed as to victims' rights or standing. The CSDDD and the preceding EC proposal refer to ensuring 'effective compensation of victims of adverse impacts' for damages arising due to a company's failure to comply with the due diligence obligation;<sup>67</sup> yet arguments for the proposed liability regime in the Explanatory Memorandum forming part of the EC proposal referred to a model favourable to company interests (competition/competitiveness, level playing field, limiting 'the risk of excessive litigation').<sup>68</sup>

The CSDDD leaves it to member states to regulate through national law who can bring a civil liability claim before national courts, and under what conditions. Thus, a member state may decide that only victims can bring a claim before national courts, or that CSOs or other legal entities can bring claims on behalf of victims.<sup>69</sup>

The proposed civil liability regime is additional to administrative enforcement of companies' due diligence compliance, to be exercised by governmental supervisory agencies that must be independent and enjoy adequate resources and powers to carry out their tasks, such as requesting information and making investigations.<sup>70</sup> In response to

<sup>58</sup> Human Rights Council, [note 10](#), para 8.

<sup>59</sup> Act on NCP Denmark (Lov om Mæglings- og klageinstitutionen for ansvarlig virksomhedsadfærd), Act No. 546 18/06/2012. The Danish NCP actively deploys its powers to issue critique: Buhmann, [note 9](#).

<sup>60</sup> CSDDD proposal, [note 28](#), art 1.

<sup>61</sup> *Ibid*, arts 4, 5–11.

<sup>62</sup> *Ibid*, arts 17–21.

<sup>63</sup> *Ibid*, art 22.

<sup>64</sup> *Ibid*, art 22 read with arts 7–8.

<sup>65</sup> *Ibid*, art 22(5).

<sup>66</sup> *Ibid*, art 22.

<sup>67</sup> EC proposal, [note 27](#), recital 56; CSDDD proposal, [note 29](#), recital 56.

<sup>68</sup> EC proposal, [note 27](#), Explanatory Memorandum, pp 12–13, 17.

<sup>69</sup> *Ibid*, recital 58.

<sup>70</sup> CSDDD proposal, [note 28](#), arts 17–20.

identification of company failure to comply, supervisory authorities may order the cessation of infringements, abstention from repetition, and/or remedial action. They may impose penalties and adopt interim measures to counter urgent risk of severe and irreparable harm.<sup>71</sup> A member state may designate more than one supervisory authority, ensuring that the competences of those authorities are clearly defined and that they cooperate closely and effectively.<sup>72</sup> This would apply if one or more member states charge NCPs with such tasks.

The EC proposal frequently refers to the system established under the OECD Guidelines, indicating support for that system and an aim of consistency with the Guidelines.<sup>73</sup> By observing silence on NCPs, the CSDDD proposal in principle allows member states flexibility to assign NCPs remedy roles as well as supervisory tasks.

### III. Factors Framing Substantive Remedy

#### *Power-Disparity Between Parties*

A core aspect of international human rights law,<sup>74</sup> remedy is fundamental in the interdisciplinary BHR field. Access to remedy forms the third pillar of the UNGPs.<sup>75</sup> Pillar III complements Pillar I (the state duty to protect against business-related human rights abuse) and Pillar II (the corporate responsibility to respect human rights, to a large extent through the exercise of due diligence).

If an adverse impact occurs in a company's host country, victims will normally be expected to lodge a case with the courts of the host country. It has been noted that national remedy mechanisms in host states are sometimes poorly designed or fragmented,<sup>76</sup> but as discussed below, judicial remedy institutions in countries where many MNCs are domiciled are also not easily accessible for victims, nor are the procedures necessarily supportive of victims' needs. Jurisdictional limits typically cause considerable barriers to host-state-based victims' options to seek remedy with courts in companies' home states, especially in civil law countries but also in countries applying common law.<sup>77</sup> Judicial remedy mechanisms are often under-equipped to provide effective remedies for victims of corporate abuse, including those seeking personal reparation as

<sup>71</sup> Ibid, arts 18, 20.

<sup>72</sup> Ibid, art 17(4).

<sup>73</sup> EC Proposal, note 27, recitals 2, 6, 9, 11, 15, 21, 28–34, 40.

<sup>74</sup> Universal Declaration of Human Right, UN Doc A/810, art 8; International Covenant on Civil and Political Rights, UN Doc A/6316 (1966) 999 UNTS 171, art 2(3); David Weissbrodt, *The Right to a Fair Trial under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights* (Leiden: Brill, 2001) 111; Asbjørn Eide and Theresa Swinehart, *The Universal Declaration of Human Rights: A Commentary* (Oxford: Oxford University Press, 1992) 143. See also European Court of Human Rights, 'Guide on Article 13 of the Convention on Human Rights: Right to an Effective Remedy' (2021) 20, [https://www.echr.coe.int/Documents/Guide\\_Art\\_13\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_13_ENG.pdf) (accessed 1 December 2022); and *Pine Valley Developments Ltd and Others v Ireland* (Commission decision), Application No. 12742/87, 1989.

<sup>75</sup> Human Rights Council, PRR Framework, note 17.

<sup>76</sup> Ibid; Human Rights Council, note 20, paras 4–7; OECD Watch (2018), note 44.

<sup>77</sup> Lucas Roorda, 'Adjudicate this! Foreign Direct Liability and Civil Jurisdiction in Europe' in Angelica Bonfanti (ed.), *Business and Human Rights in Europe: International Law Challenges* (Abingdon: Routledge, 2018) 195; Daniel Augenstein and Nicola Jägers, 'Judicial Remedies: The Issue of Jurisdiction' in Juan José Álvarez Rubio and Katerina Yiannibas (eds.), *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union* (Abingdon: Routledge, 2017) 7; Lucas Roorda and Cedric Ryngaert, 'Business and Human Rights Litigation in Europe and Canada: The Promises of Forum of Necessity Jurisdiction' (2016) 80:4 *Rabel Journal of Comparative and International Private Law* 783.

opposed to more general sanctions of the corporation through a fine or administrative remedies.<sup>78</sup>

The legal challenges are exacerbated by practical aspects. Limited awareness of the scope and operation of remedy institutions impedes access to remedy.<sup>79</sup> Victims' use of judicial remedy in their own states as well as in companies' home states is affected by needs to master the language of the legal system, by adequate legal counsel being geographically out of reach, and social and cultural practices.<sup>80</sup> Needs to fund legal counsel and costs related to opening cases, whether in companies' host or home states, cause significant barriers.<sup>81</sup> All of this places victims at a disadvantage when challenging companies at court.

The technicalities of litigation during a court case pose additional challenges for obtaining substantive remedy. Litigation involves a battle on legal arguments which aim to convince the court to rule in favour of the party with the most persuasive argument.<sup>82</sup> The better a party's knowledge of the relevant law in all its aspects relevant to the legal system applying to the case (typically the law of the state in which the court is based), the higher the likelihood that that party will be able to convince the court to rule in its favour. This is particularly prevalent in civil cases where the court's role normally is to follow the arguments of the parties. In criminal cases, courts may have a stronger role in ensuring *de facto* equality between the parties.<sup>83</sup> The problem can be further exacerbated by the fact that many companies either have internal legal resources or the funds to hire experienced legal counsel from expert law firms in order to defend themselves against claims of negligence or for damages. Such counsel can be costly as attorneys operate at market-based conditions and the price typically reflects the expertise for the case at hand.<sup>84</sup> This may cause a *de facto* disparity of powers between the parties that can impede the opportunity of victims to turn access to procedural remedy into a substantive outcome.

Thus, even where access to procedural remedy exists, it does not in and by itself provide reparation, nor constitute a state's adequate protection of relevant rights through the provision of remedy.<sup>85</sup> Underscoring the importance of the connection between procedural and substantive remedy, the UNGPs warn that remedy deficiencies may enhance victims' sense of loss and disrespect:<sup>86</sup> access to procedural remedy may contribute to an initial sense of justice, but if the process leads to an outcome that does not provide the substantive remedy victims were hoping for, the result may be a sense of double loss – not only due to the harmful impacts suffered, but also due to a lack of recognition.

<sup>78</sup> Human Rights Council (2016), note 20; Human Rights Council, PRR framework, note 17, para 88.

<sup>79</sup> Prado and Trebilcock, note 23; Meredith Wilkie, 'Enforcing the Prohibition of Racial Discrimination' (1990) 59:1 *Nordic Journal of International Law* 64; Lazerson, note 24.

<sup>80</sup> O'Brien and Martin-Ortega, note 29, 43; Human Rights Council, note 20, para 4; Prado and Trebilcock, note 23, at 59–60.

<sup>81</sup> Oxford Pro Bono Publico, note 21; Human Rights Council, PRR Framework, note 17, para 89.

<sup>82</sup> Cory S Clements, 'Perception and Persuasion in Legal Argumentation: Using Informal Fallacies and Cognitive Biases to Win the War of the Worlds' (2013) 2 *Brigham Young University Law Review* 319; Edward L Rubin, 'Trial by Battle: Trial by Argument' (2003) 56 *Arkansas Law Review* 261; Lazerson, note 21.

<sup>83</sup> Omkar Sidhu, *The Concept of Equality of Arms in Criminal Proceedings under Article 6 of the European Convention on Human Rights* (Cambridge: Intersentia, 2011).

<sup>84</sup> See, e.g., The Counsel Network, '10 Elements to Determine Market Value for In-House Lawyers', <https://www.thecounselnetwork.com/10-elements-to-determine-market-value-for-in-house-lawyers/> (accessed 1 December 2022); Public Legal, 'Salaries of Legal Professionals', <https://www.ilrg.com/employment/salaries> (accessed 1 December 2022).

<sup>85</sup> Wilkie, note 79, at 66.

<sup>86</sup> UNGPs, note 1, Principle 31, commentary.

Obstacles to host-state victims' access to procedural and substantive judicial remedy are well-documented in the literature<sup>87</sup> and CSO analyses.<sup>88</sup> Substantive remedy challenges involve dimensions related to the situation of victims that have also been of concern to critical and socio-legal studies exploring the effectiveness of law in attaining its objectives in a wider societal context.<sup>89</sup> Emphasizing the winner-loser orientation of a court case, a focus on enforceable remedy like economic compensations and injunctions rather than personalized reparation, as well as the significance of legal and litigation expertise in civil liability cases, studies in the 1970s and 1980s shed important light on the challenges that victims face in front of courts with regard to substantive remedy, and proposed solutions.<sup>90</sup> Non-adversarial dispute-resolution (mediation, conciliation) was noted to offer better opportunities for handling power-disparities between the parties, as well as win-win outcome potential and wider ranges of substantive remedy relevant to victims' needs.<sup>91</sup>

Related to both procedural and substantive remedy, OHCHR reports have noted that accountability and access to remedy for business-related human rights abuses are often best served by providing affected individuals/communities with diverse redress options, including judicial mechanisms, non-judicial mechanisms (such as NCPs) or a combination. They also observe that state-based non-judicial and judicial mechanisms may mutually complement and support each other; and that states should ideally provide rights-holders with a choice of remedial outcomes appropriate to the circumstances of their case.<sup>92</sup>

OHCHR recommendations for enhanced complementarity between judicial and non-judicial state-based remedy include that state-based non-judicial mechanisms (such as NCPs) or rights-holders may transfer a complaint and/or dispute for adjudication by judicial mechanisms, and/or refer allegations or evidence of business involvement in human rights abuses to judicial mechanisms.<sup>93</sup> Moreover, procedural rules and practices of judicial mechanisms are recommended to provide for the participation of state-based non-judicial mechanisms (again, e.g., NCPs) in judicial proceedings as representatives, expert witnesses or other functions to support victims. The OHCHR also recommended that financial assistance be made available to rights-holders to help to cover their expenses.<sup>94</sup> However, those proposals are yet to lead to explicit complementarity between NCPs and courts.

A study for the European Parliament noted that victims' access to remedy can be impeded by inequality of arms and limited access to legal representation, information and evidence.<sup>95</sup> However, the connection between victims' access to procedural remedy with EU-based courts and obtaining substantive remedy, including the implications of power-disparities, was not dealt with in detail. An inherent element of procedural fairness based on European

<sup>87</sup> Richard Meeran, 'Multinational Human Rights Litigation in the UK: A Retrospective' (2021) 6:2 *Business and Human Rights Journal* 255; Martin et al, [note 39](#); Augenstein and Jägers, [note 77](#); Roorda and Ryngaert, [note 77](#).

<sup>88</sup> OECD Watch, 'Submission to the OECD WPRBC: Stocktaking on the OECD Guidelines' (2021), <http://mneguidelines.oecd.org/OECD-Watch-public-consultation-OECD-Guidelines-for-MNEs.pdf> (accessed 1 December 2022); OECD Watch, [note 44](#); Daniel et al, [note 44](#); Oxford Pro Bono Publico, [note 21](#).

<sup>89</sup> Brian Z Tamanaha, *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law* (Oxford: Oxford University Press, 1997); Jorgen Dalberg-Larsen, *Pragmatisk retsteori* (Copenhagen: Jurist-og Økonomforbundets Forlag, 2001).

<sup>90</sup> Lazerson, [note 24](#); Abel, [note 24](#); Christie, [note 24](#).

<sup>91</sup> Jerold S Auerbach, *Justice Without Law?* (Oxford: Oxford University Press, 1983); Sally Engle Merry, 'The Social Organization of Mediation in Nonindustrial Societies: Implications for Informal Community Justice in America' in Abel (ed.), [note 24](#), 17; Bryant Garth, 'The Movement toward Procedural Informalism in North America and Western Europe: A Critical Survey' in Abel (ed.), [note 24](#), 183; Christie, [note 24](#).

<sup>92</sup> Human Rights Council, [note 10](#), para 21, Annex: 3.1–3.8, 4.1.

<sup>93</sup> Ibid, Annex: 3.3–3.7.

<sup>94</sup> Ibid, Annex: 7.3.

<sup>95</sup> O'Brien and Martin-Ortega, [note 29](#), 43.

Court of Human Rights (ECtHR) case law, the principle of equality of arms concerns the procedural equality of the parties to present their case, thereby framing the delivery of the substantive outcome.<sup>96</sup> It recognizes that unequal conditions for parties to present their case during a judicial procedure has implications for the substantive outcome. For example, recognizing that legal counsel can be significant for a party's opportunities in court (and that it is costly), the ECtHR has established that financial support may be required to allow a person of limited means to pay for legal counsel.<sup>97</sup>

In criminal law, equality of arms aims at equalizing the power between the prosecutor who (as a state agent with legal training) typically has legal knowledge and the defendant who may lack that knowledge. From that perspective, the weaker party may be the alleged perpetrator. In civil liability cases involving a company and a victim, although the company will be the one facing civil liability, it is not likely to be in an inferior position, due to companies' access to in-house or external lawyers familiar with the legal system to be applied, and to funds for legal counsel to help convince the court of their version of the case. As civil cases are based on the power of argument, the judge is not under similar expectations to ensure the argumentative power of the parties as in criminal cases. This underscores the procedural vulnerability of BHR victims to obtain substantive remedy in civil cases involving companies where significant disparities exist between the parties' (practical and financial situation affecting their access to) legal expertise and argumentative power.

### Forms of Substantive Remedy

Underscoring cultural contextuality, scholars recognize a wide range of substantive remedy.<sup>98</sup> In European tort law, reparation often takes the form of monetary compensation for economic damage suffered. As noted by Meeran, even if judicial remedy may deliver economic compensation, this may not be what victims are looking for.<sup>99</sup> Human rights harms can be difficult to classify as torts or related legal concepts suited for civil liability cases, and BHR cases may cause challenges in proving standard conditions for torts or compensation such as foreseeability and causality.<sup>100</sup>

While NCP cases comprise singular apparent success-stories involving monetary compensation,<sup>101</sup> instances of operational BHR remedy confirm the cultural complexities that can be involved in such compensation.<sup>102</sup> Indeed, in the BHR context, non-financial

<sup>96</sup> Weissbrodt, note 74, 111.

<sup>97</sup> *Airey v Ireland* (App no. 6289/73) [1981] ECHR 1. See also Shaded Akhter and Rohaida Nordin, 'Equality of Arms: A Fundamental Principle of Fair Trial Guarantee Developed by International and Regional Human Rights Instruments' (2014) 1 *Legal Network Series* 1–22; Sidhu, note 83.

<sup>98</sup> Nora Götzmann, 'The Concept of Accountability in HRIA' in Nora Götzmann (ed.), *Handbook of Human Rights Impact Assessment* (Cheltenham: Edward Elgar, 2019) 373; Robyn Carroll, 'Apologies as a Legal Remedy' (2013) 35:2 *Sydney Law Review* 317; Lieselotte Viaene, 'Life is Priceless: Mayan Q'eqchi' Voices on the Guatemalan National Reparations Program' (2010) 4:1 *International Journal of Transitional Justice* 4; Hilary K Josephs, 'The Remedy of Apology in Comparative and International Law: Self-Healing and Reconciliation' (2004) 18 *Emory International Law Review* 53.

<sup>99</sup> Meeran, note 87.

<sup>100</sup> Holly and O'Brien, note 13, 13–19.

<sup>101</sup> A lead example is the NCP of the Netherlands, 'Final Statement: Former Employees of Bralima vs. Bralima and Heineken' (18 August 2017); compare OECD Watch (2017), note 53.

<sup>102</sup> Regarding the Barrick Gold remedy mechanism in Porgera, Papua New Guinea, see Evelyn Gaupe et al, 'Disproportionate Impacts of Business Activities on Women: Lessons from Papua New Guinea to Inform Gender Guidance to the UN Guiding Principles on Business and Human Rights', submission to the UN Working Group (2018); Margaret Jungk, Ouida Chichester and Chris Fletcher, 'In Search of Justice: Pathways to Remedy at the Porgera Gold Mine' (San Francisco: BSR, 2018); Yousuf Aftab, *Pillar III on the Ground: An Independent Assessment of the Porgera Remedy Framework* (Enodo Rights, 2016).

substantive remedy is significant in practice.<sup>103</sup> In addition to financial compensation, the PRR Framework and UNGPs recognize apologies, restitution, rehabilitation, punitive sanctions (whether criminal or administrative, such as fines), and the prevention of harm through, for example, injunctions or guarantees of non-repetition.<sup>104</sup> The UNGPs' listing is aligned with the UN General Assembly's overview of forms of reparation due to victims of victims of gross violations of international human rights law and serious violations of international humanitarian law,<sup>105</sup> but obviously needs to be adapted to the context of business-related human rights harm. The PRR Framework and the UNGPs highlight corporate policies as paramount for a company's overall commitment to respect human rights as well as to undertake relevant actions,<sup>106</sup> such as those to prevent future abuse. Policies may be updated to reflect lessons learned.<sup>107</sup> A human-rights-policy revision can therefore be an important element in a company's guarantee of non-repetition, as evidence of its ongoing learning and updated commitments.

### Non-Adversarial Conflict Resolution

Concern emerging in the 1970s and 1980s with challenges affecting access to substantive remedy in cases involving individuals as victims even when procedural judicial remedy exists, led critical and socio-legal scholars to propose alternative measures. Based on observations and interviews in courts and with parties, Auerbach, Lazerson, Abel and Christie highlighted the *de facto* inequality that victims frequently encounter when involved in litigation against public or private organizations, and the effects that this has on the delivery of substantive remedy.<sup>108</sup> These inequalities were found to apply not just in relation to large, powerful actors (like today's MNCs) but also smaller organizations delivering services to individuals, e.g., banks and housing companies. The juridified process of litigation as conflict resolution was noted to frequently sustain domination, to the detriment of those most in need of support to vindicate their rights and obtain reparations: the adversarial winner-loser approach of a court case disfavors victims with limited litigation expertise or access to experienced counsel. Auerbach warned against seeing courts as current days' cathedrals and lawyers as priests whose processes and approaches are treated as sacrosanct and by definition perfect.<sup>109</sup> Christie referred to attorneys as 'professional thieves' who take possession of the grievance of victims and deliver back juridified outcomes that are often alien and irrelevant to the substantive claims and needs of the individuals concerned.<sup>110</sup> Non-adversarial conflict resolution modalities, especially mediation and conciliation, were proposed as better alternatives.<sup>111</sup>

In response, several countries introduced non-adversarial conflict resolution like mediation or conciliation as an (optional) alternative to judicial processes involving individual victims. For example, Nordic countries apply non-adversarial approaches in certain criminal cases in recognition that a sincere apology by a perpetrator may constitute a significant element of redress for a victim of crime involving physical or

<sup>103</sup> OECD Watch, [note 56](#); OECD Watch (2018), [note 44](#); Daniel et al, [note 44](#).

<sup>104</sup> UNGPs, [note 1](#), Principle 25 commentary; Human Rights Council, PRR Framework, [note 17](#), para 83.

<sup>105</sup> General Assembly, [note 18](#); compare Human Rights Council, [note 10](#), Annex: 4.1.

<sup>106</sup> Human Rights Council, PRR Framework, [note 17](#), para 55; Principle 16.

<sup>107</sup> OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (Geneva: OHCHR, 2012) 27.

<sup>108</sup> Auerbach, [note 91](#); Lazerson, [note 24](#); Abel, [note 24](#); Christie, [note 24](#).

<sup>109</sup> Auerbach, [note 91](#).

<sup>110</sup> Christie, [note 24](#).

<sup>111</sup> *Ibid*; Merry, [note 91](#); Garth, [note 91](#); Auerbach, [note 91](#); Vibeke Vindelov, *Reflexive mediation* (Copenhagen: DJOEF, 2012).



mental damage.<sup>112</sup> Non-adversarial conflict resolution was also introduced in some types of civil cases.<sup>113</sup> Australia introduced and still applies optional conciliation in conflicts involving human rights abuse in the form of racial or gender-based discrimination caused by local private entities.<sup>114</sup> Conciliation under the auspices of the Australian Human Rights Commission does not preclude court proceedings<sup>115</sup> but is seen to offer ‘an informal, flexible approach to resolving complaints’.<sup>116</sup> Outcomes can include an apology, reinstatement to a job, compensation for lost wages, changes to a policy or new policies to address the conduct that led to the conflict.<sup>117</sup> UN studies recommended that remedy institutions be enabled to examine issues from the perspective of both parties, and that mediation or conciliation be deployed to help parties solve human rights issues through a process that would actively seek to address power disparities during the procedure and in the redress provided.<sup>118</sup>

Along these lines, when NCPs were charged with grievance handling, they were empowered to offer and, with the agreement of the parties involved, facilitate access to non-adversarial conflict resolution.<sup>119</sup> The aim is to assist parties in reaching an understanding and possibly an agreement in cases of non-observation of the OECD Guidelines, such as their human or labour rights provisions.<sup>120</sup>

The following section considers NCPs as remedy mechanisms for transnational business-related human rights abuse, before proceeding to discuss substantive remedy and the potential role of NCPs under a regime involving civil liability for companies and administrative supervision.

## IV. NCPs as Remedy Mechanisms

### *Grievance Handling*

NCPs handle grievances (‘specific instances’) according to the Procedural Guidance in the OECD Guidelines.<sup>121</sup> An initial assessment evaluates whether the issue(s) raised in a complaint merit further examination. If that is the case, the NCP offers its ‘good offices’ to the parties with a view to contributing to resolving the issue.<sup>122</sup> This may include facilitating access to non-adversarial procedures, such as mediation, to assist the parties in reaching an understanding and agreement.<sup>123</sup> The application of non-adversarial procedures is optional, initiated with the agreement of both parties and their commitment to participate.<sup>124</sup>

As part of its good offices, an NCP may also seek the advice of relevant authorities as well as experts, civil society, labour organizations or representatives of the business community; consult with NCPs in other countries; seek guidance with the OECD secretariat on issues

<sup>112</sup> Kaijus Ervasti, ‘Past, Present and Future of Mediation in Nordic Countries’ in A Nylund, K Ervasti and L Adrian (eds), *Nordic Mediation Research* (Cheltenham: Springer, 2018) 225.

<sup>113</sup> Vindelov, [note 111](#); Garth, [note 91](#).

<sup>114</sup> Australian Human Rights Commission Act 1986, Part II.B. Division 1.

<sup>115</sup> Ibid, Part II.B. Division 2 cf. Division 1 sec 46PE, 46PF(1)(b) and 46PH.

<sup>116</sup> Australian Human Rights Commission, ‘Conciliation: How it Works’, <https://humanrights.gov.au/complaints/complaint-guides/conciliation-how-it-works> (accessed 1 December 2022).

<sup>117</sup> Ibid; Margaret Thornton, ‘Equivocations on Conciliation: The Resolution of Discrimination Complaints in Australia’ (1989) 56:6 *Modern Law Review* 733; Margaret Thornton, ‘Anti-discrimination Remedies’ (1983–86) 9 *Adelaide Law Review* 235.

<sup>118</sup> Commission on Human Rights, [note 25](#); Wilkie, [note 79](#), at 68.

<sup>119</sup> OECD, [note 5](#), Procedural Guidance, ILC.2.

<sup>120</sup> Ibid, ILC.2.d.

<sup>121</sup> Ibid, ILC.

<sup>122</sup> Ibid, ILC.2.

<sup>123</sup> Ibid, ILC.2.d.

<sup>124</sup> Ibid, Implementation procedures, commentary 29.

related to the interpretation of the Guidelines; and offer support to the victim to present the case.<sup>125</sup> NCPs can work actively with victims to explore the grievance and help victims and present their case. This can occur in the host country or/and the NCP country (typically the company's home country). If in host countries, it enables case handling close to where the harm occurred, eliminating victims' needs to travel to companies' home countries. Whether it occurs in companies' home or host countries, NCPs can assist victims present their case and balance their situation *vis-à-vis* that of companies' access to expertise. This can help address power disparities when the company has access to expert counsel and victims do not, due to inadequate financial and relevant human resources. At the same time, such exercise of good offices requires financial and expert human resources with the NCP, and an NCP organization and practice favourable to active engagement with victims, including NCP activities in victims' locations. For example, the Netherlands NCP has engaged with victims close to their home base<sup>126</sup> and the Danish NCP may provide victims with expert assistance when preparing their grievance and presenting their case.<sup>127</sup>

If the non-adversarial process was unsuccessful or one or both parties did not wish to engage in it, the NCP may issue determinations, including findings or criticism resulting from its examination of the case.<sup>128</sup> It may also issue recommendations to the parties,<sup>129</sup> typically on how the company may improve its observation of the OECD Guidelines going forward. While some NCPs use those powers sparingly, other NCPs (typically with independent status) issue detailed determinations and recommendations.<sup>130</sup> These may assist corporate learning and corrective measures,<sup>131</sup> e.g., through revised policies and processes to better identify and prevent harm. They may provide guidance for other companies in similar situations as well.

Within the Procedural Guidance, NCPs have some leeway to introduce variations. For example, according to the statute for the Danish NCP, the NCP must undertake an actual examination (rather than a non-adversarial process) if any of the parties do not wish to engage in mediation, mediation was unsuccessful, or if the grievance concerns allegations of gross non-observation of the Guidelines (for example, forced labour).<sup>132</sup> Accordingly, the statute acknowledges that situations involving potential gross violations are not suited for non-adversarial conflict resolution. Moreover, the statute enables the NCP to take up cases on its own motion, without having received a grievance.<sup>133</sup> According to the CSDDD proposal, supervisory authorities will be given similar powers. The Danish NCP statute also expands the powers of the NCP so that in addition to grievances concerning companies it can handle cases concerning Danish public organizations or non-profit private organizations and their business relations.<sup>134</sup>

### Substantive Outcomes

In principle, the range of potential substantive agreements that parties can reach through NCP-facilitated conflict resolution is as wide as the UNGPs' suggestions for substantive

<sup>125</sup> Ibid, Procedural Guidance, I.C.2.a–c.

<sup>126</sup> NCP of the Netherlands, [note 101](#); van Putten, [note 6](#).

<sup>127</sup> Administrative regulation for NCP Denmark (No. 936, 18 September 2012), art 5(2).

<sup>128</sup> OECD Guidelines, [note 5](#), Procedural Guidance I.C.3.

<sup>129</sup> Ibid, Procedural Guidance I.C.3.c and Implementation procedures, commentary 35; OECD, *Guide for OECD National Contact Points on Issuing Recommendations and Determinations* (Paris: OECD, 2019).

<sup>130</sup> Buhmann, [note 9](#).

<sup>131</sup> Holm, [note 9](#).

<sup>132</sup> Act on the Danish NCP, [note 59](#), sec 7(4).

<sup>133</sup> Ibid, sec 3.

<sup>134</sup> Ibid, sec 3.

remedy,<sup>135</sup> including personal remedy as suggested by the PRR Framework. It includes financial compensation or non-monetary reparation to help offset harm incurred, and steps to be undertaken by the company to avoid similar issues arising in the future. For the company, this typically involves policy changes, in accordance with the overall aim of due diligence, which is to avoid harm rather than having to remedy it.<sup>136</sup>

The PRR Framework's criticism of NCP weaknesses<sup>137</sup> spurred changes with the NCP system and strengthening of certain NCPs,<sup>138</sup> although reforms remain a work-in-progress.<sup>139</sup> The ongoing review process to update the OECD Guidelines has led to proposals to enhance NCP performance, ensure well-resourced and independent NCPs and NCP deployment of powers to engage with parties, such as victims in companies' host countries, and assist parties in resolving grievances through agreement leading to substantive remedial outcomes.<sup>140</sup>

Following limited positive outcomes in the early years of NCPs' remedial role,<sup>141</sup> since 2011 more than half of all submitted cases have been accepted. Among those, half resulted in an agreement between the parties, and one-third resulted in companies changing policies in order to ensure non-repetition.<sup>142</sup> Other outcomes represent examples of economic compensation, companies accepting responsibility and taking steps to prevent repetition, also corresponding to substantive remedy according to the UNGPs. Among a large body,<sup>143</sup> a few examples serve to illustrate diverse NCP contributions to substantive remedy in cases involving business-related human rights abuse. The examples have been selected to demonstrate outcomes of grievance handling with well-resourced and independent NCPs. Regardless of the outcome of the current review of the Guidelines, OECD members and other adherent states are at liberty to increase the resources and independence of their NCP and therefore enhance their remedial capacities.

In a case involving Dutch brewery Heineken's Uganda-based subsidiary Bralima, former employees of Bralima lodged a grievance with the Netherlands NCP, requesting compensation for drastic reduction of their state pension due to retrenchment related to Democratic Republic of Congo (DRC) conflicts. Following mediation facilitated by the NCP, the complainants and the company reached agreement on compensation (reportedly around EUR 1.1 million for the 168 workers<sup>144</sup>). Moreover, Heineken committed to developing a policy and guidelines for operating in conflict-affected areas.<sup>145</sup> Accordingly, the NCP's mediation assisted victims to obtain both financial compensation and corporate commitment towards non-repetition. The NCP procedure enabled the victims to obtain advice and support from the NCP as well as NCP-funded local expertise on DRC labour law, and assisted parties in meeting on neutral ground, close to the victims' home-base.<sup>146</sup>

<sup>135</sup> UNGPs, [note 1](#), Principle 25 commentary.

<sup>136</sup> Buhmann, [note 36](#).

<sup>137</sup> Human Rights Council, [note 17](#), para 98.

<sup>138</sup> OECD (2020), [note 8](#); OECD (2018), [note 8](#).

<sup>139</sup> Human Rights Council, [note 10](#), para 27 and Annex; OECD (2020), [note 8](#); Lukas et al, [note 12](#).

<sup>140</sup> OECD (2023), [note 57](#); OECD (2022), [note 8](#).

<sup>141</sup> Daniel et al, [note 44](#).

<sup>142</sup> OECD (2022), [note 8](#); OECD (2020), [note 8](#).

<sup>143</sup> Databases of the OECD, OECD Watch and TUAC, compare Ceyhan, [note 9](#); Ruggie and Nelson, [note 9](#); Buhmann, [note 9](#).

<sup>144</sup> Business and Human Rights Resource Centre, 'Heineken & Former Workers in Democratic Republic of Congo Reach Agreement on Labour Rights Dispute through OECD Complaint Mechanism' (22 August 2017), <https://www.business-humanrights.org/en/latest-news/heineken-former-workers-in-democratic-republic-of-congo-reach-agreement-on-labour-rights-dispute-through-oecd-complaint-mechanism/> (accessed 1 December 2022).

<sup>145</sup> NCP of the Netherlands, [note 101](#); compare Bhatt and Türkelli, [note 11](#).

<sup>146</sup> NCP of the Netherlands, [note 101](#); van Putten, [note 6](#).

This all accords with OHCHR recommendations for non-judicial remedy<sup>147</sup> and underscores their practical applicability with NCPs.

In line with the UNGPs' emphasis on company-learning to prevent harm, NCP-supported mediation can also help broker a proactive forward-looking agreement as a form of substantive remedy. The World Wildlife Foundation alleged that oil exploration activities of SOCO International PLC in the Virunga National Park in the DRC conflicted with the Guidelines, including human rights risks to local communities. NCP mediation assisted the parties in reaching an agreement that the company would refrain from exploration or drilling within Virunga National Park if UNESCO and the DRC government view this as incompatible with its World Heritage Status.<sup>148</sup> The consensual agreement, of a kind that would not normally be the outcome of an adversarial judicial process, thereby targeted the human rights (and environmental) risks that affected or in future might affect local communities. Obviously, a human rights due diligence process might have led the company to never initiate steps for oil drilling. However, due diligence processes rarely keep companies completely from undertaking specific projects but rather result in adaptations. From this perspective, an agreement to withhold future activities is a significant outcome.

The Bralima and Virunga cases are widely seen – even by CSOs otherwise critical of the NCP system – to confirm the unique potential of NCPs.<sup>149</sup> Their delivery of substantive remedy, in one case retroactive, in the other proactive, underscores this. The Bralima case demonstrates that mediation may assist victims in obtaining substantive remedy in a situation where a court case might not have had a similar outcome due to the adversarial process. It also demonstrates the potential of NCPs in equalizing otherwise unequal opportunities of the victims and the multinational company to access legal counsel. Moreover, it exemplifies the capabilities of a well-funded NCP to facilitate and fund mediator-assisted dialogue between the parties, and, importantly, to do so close to the home-base of the complainants, thereby eliminating their need to travel and argue their case on the MNC's home turf. Both cases also demonstrate the potential of NCPs to facilitate proactive commitments by companies, such as for operating in environments that are particularly vulnerable from an environmental or human rights perspective. This too would not be a likely outcome of an adversarial judicial process.

Other cases show how NCPs can provide substantive remedy for local communities by issuing recommendations for the company's future conduct, again in line with BHR remedy involving company-learning to prevent future abuse. Norwegian energy company Statkraft was planning a wind farm in an area in Sweden used by an Indigenous Sámi community for their traditional reindeer herding. The community alleged inadequate meaningful stakeholder consultation and non-observance of their right to be consulted under ILO's Indigenous and Tribal Peoples Convention (Convention 169). The collaborating NCPs of Norway and Sweden found that Statkraft had not failed to undertake meaningful stakeholder engagement in accordance with the Guidelines' due diligence requirements but recommended that the company nevertheless take account of ILO Convention 169 when operating in Indigenous or tribal areas.<sup>150</sup> As Sweden has not ratified the ILO Convention 169, a court case would not be likely to impress a similar message on the company. In another case, CSOs in the US complained that Danish company Rockwool International and its US subsidiary had neglected due diligence in the planning and construction of a manufacturing facility in their area. The NCP found that the company

<sup>147</sup> Human Rights Council, *note* 10, Annex, e.g., 8.1, 9.1,

<sup>148</sup> NCP of the United Kingdom, 'WWF International and SOCO International PLC operating in the DRC' (2013).

<sup>149</sup> OECD Watch (2017), *note* 53; Bhatt and Türkelli, *note* 11.

<sup>150</sup> NCPs of Sweden and Norway, 'Jijnjevaerie Saami village and Statkraft' (2 August 2016).

had applied a transactional due diligence approach, concerned with risks to the company rather than the OECD Guidelines' risk-based approach focusing on impacts on people and the environment. It issued recommendations for the company on risk-based due diligence as an ongoing process to assess risks caused by the company to society, including meaningful engagement with affected stakeholders.<sup>151</sup>

These examples evidence the strengths of NCPs in providing substantive remedy: how NCPs can help victims' views become heard and argued in a grievance, and that mediation may assist towards substantive remedy outcomes in accordance with the wide range acknowledged by the UNGPs.

If OECD members or adherents to the Guidelines introduce civil liability for human rights and environmental due diligence, their OECD commitments mean that they must still ensure that their NCPs remain functional to deal with grievances on other issues covered by the Guidelines (e.g., corruption), as well as an option for human rights and/or environmental grievances. The following section considers opportunities for such NCPs to complement courts.

## V. What Role for NCPs under Civil Liability Regimes?

### *Addressing Victims' Challenges with Regard to Substantive Judicial Remedy*

Initiatives to provide host-country victims with access to courts in companies' home countries are a laudable response to the well-recognized challenges of victims to have access to judicial remedy for transnational business-related human rights harm. Yet, as is clear from the analysis above, even if home-state courts are enabled to handle cases involving transnational business conduct, civil litigation still presents challenges for host-state victims to present and argue their cases *vis-à-vis* companies.<sup>152</sup> Civil litigation may preserve power disparities to the detriment of the party that is already in the most precarious situation. Following arguments on civil litigation as a battle of words,<sup>153</sup> for victims to substantiate damages and prove that those are sufficiently caused by and related to the company's due diligence failures places high demands on victims, not just in terms of documentation but also for legal arguments that convincingly present the victim's case in a manner that is more persuasive, based on the legal issues, than those of the company.

Because a party to civil case must convince the court to rule in its favour, access to expert legal and litigation counsel can be crucial for the outcome. Being market-based, such counsel comes at a cost.<sup>154</sup> Many EU and other civil-law countries do not have Anglo-Saxon style no-win-no-fee or *pro bono* systems.<sup>155</sup> Legal aid schemes would need to be very generous to match the means of companies to access in-house or external legal expertise. As a result, victims may gain access to procedural remedy, only to suffer having their claim rejected due to inadequate access to legal counsel, thereby missing out on substantive remedy even if the victim has a good case. This can enhance victims' sense of loss and disrespect, as predicted by the UNGPs.<sup>156</sup>

In addition to costs for legal counsel,<sup>157</sup> other expenses cause practical barriers for victims to make use of access to judicial remedy. These problems can be exacerbated in

<sup>151</sup> NCP Denmark, 'Specific instance submitted by West Virginians for Sustainable Development regarding the activities of Rockwool International A/S and its subsidiary Rockwool North America Inc.: Final Statement' (3 June 2021); see also OECD Watch (2021), note 53.

<sup>152</sup> Christie, note 24; Lazerson, note 24; Abel, note 24.

<sup>153</sup> Compare Clements, note 82; Rubin, note 82.

<sup>154</sup> See note 84.

<sup>155</sup> DLA Piper and PILNet, 'European Bars and Pro Bono' (September 2021), <https://probonoitalia.org/wp-content/uploads/2021/10/European-Bars-and-Pro-Bono.pdf> (accessed 1 December 2022).

<sup>156</sup> UNGPs, note 1, Principle 31 commentary.

<sup>157</sup> Oxford Pro Bono Publico, note 21; PRR Framework, note 17, para 89.

situations where victims live far from places where courts are located, or where their financial resources to obtain legal representation are limited.<sup>158</sup> Host-country-based victims of business-related human rights abuse are frequently already in precarious economic situations. Financial resource constraints can reduce their possibility to take time off work to go to court or hire legal counsel to match that which the company may be able to hire (imagine the choice of legal counsel available to a transnational company operating out of Dublin or Frankfurt, but also the expense). They may be further constrained by limited language capacities to engage with institutions in a company's home country, and lack of resources to travel to countries where courts are based. Family responsibilities affecting the victim's ability to suffer missing income during days of travel and court proceedings can also impede victims' use of judicial remedy even where it does exist.

Almost paradoxically, providing third-country victims with access to judicial remedy in MNC home-states may leave them at risk of missing out on substantive remedy as a result of the adversarial civil litigation process and its dependence on legal expertise and experience. As equality-of-arms-principles expect criminal proceedings to ensure a balance between the parties, a criminal liability set-up might offer victims better opportunities, especially in jurisdictions allowing for civil claims to be handled during a criminal case.<sup>159</sup> Handling victims' civil claim as part of a criminal case on the company's (deficient) due diligence could assist victims by shifting the onus of investigating and proving deficient due diligence on the part of the company from victims to the public prosecutor or other relevant authority. Outside these situations, criminal proceedings could also ease power-disparities related to legal knowledge resources for victims or their representatives and make it easier to substantiate a subsequent civil claim for compensation.

The potential option of addressing procedural weaknesses and vulnerabilities for victims by enabling CSOs to bring cases for victims and representing them at courts<sup>160</sup> is attractive but has weaknesses too. CSOs may be as challenged regarding winning the legal battle of arguments as the victims they represent. As noted, the proposed CSDDD leaves it to member states' national legislatures to determine if CSOs could represent host-country victims. CSOs are already able to raise grievances with NCPs, yet European CSOs claim that their limited economic and expert resources affect their capacities for this.<sup>161</sup> Similar resource constraints are likely to affect CSO capacity to represent victims in civil litigation. Legal aid schemes for CSOs to engage the services of legal counsel to help them argue the case of victims will need to be very generous to match the resources of companies to obtain such counsel.

The reasoning informing the principle of equality of arms<sup>162</sup> highlights the need to ensure a balance between the power of parties to a case. Combined with the critical and socio-legal insights that Christie, Lazerton, Abel and Auerbach produced through their studies of litigation and victims' outcomes,<sup>163</sup> this highlights the importance in a BHR context of taking account of the under-privileged situation of victims and resulting power-disparities *vis-à-vis* companies in a civil case. Auerbach, Merry and Abel's studies<sup>164</sup> also underscore the pertinence of the UNGPs' and the OHCHR's recognition of substantive remedy consisting of a range of forms beyond economic compensation and injunctions.

<sup>158</sup> Vindelov, [note 111](#).

<sup>159</sup> Compare Holly and O'Brien, [note 13](#).

<sup>160</sup> See CSDDD proposal, [note 28](#), recital 58, art 19.

<sup>161</sup> OECD Watch (2021), [note 88](#); OECD Watch (2018), [note 44](#); the author's research interviews with European CSOs during 2018–2021.

<sup>162</sup> Akhter and Nordin, [note 97](#); Sidhu, [note 83](#); Airey vs Ireland, [note 97](#).

<sup>163</sup> Lazerton, [note 24](#); Abel, [note 24](#); Christie, [note 24](#); Auerbach, [note 91](#).

<sup>164</sup> Auerbach, [note 91](#), Merry, [note 91](#), Abel, [note 91](#).



The sustained practices of the Australian Human Rights Commission show that non-adversarial conflict resolution such as mediation offers ways to both ensure a balanced conflict-resolution process in which the parties' power-disparities are balanced through the good offices of the mediator, and to ensure that a wide range of substantive remedy such as apologies or corporate commitments to non-repetition can be delivered.<sup>165</sup>

These observations underscore the significance of non-judicial remedy alongside judicial remedy to assist victims in obtaining substantive remedy. In line with OHCHR recommendations,<sup>166</sup> victims should have (at least optional) access to a remedy mechanism empowered to examine a case taking the victims' perspectives into account, and to offer non-adversarial conflict resolution which is less prone than a judicial process to turn the most vulnerable party into the loser. As NCPs offer such a remedy mechanism, attention should be paid to how legislation introducing civil liability, such as the CSDDD and its national implementation, can also serve towards NCPs complementing judicial remedy institutions, for the benefit of victims.

### *NCP Complementarity to Judicial Remedy to Support Victims in Civil Liability Cases*

The CSDDD proposal is for a directive, which provides EU member states with some implementation flexibility. Through its silence on NCPs, the proposal implicitly recognizes their role and potential for states that wish to engage NCPs in complementing the civil liability regime. Initially perhaps particularly attractive for states with strong and well-performing NCPs, those could serve as models for other states to improve their NCPs. Enabling NCPs to support victims in civil liability would accord with OHCHR reform proposals,<sup>167</sup> allowing those to come to fruition. Practical and organizational inspiration for combining optional NCP access with judicial remedy can be sought in the well-established Australian model<sup>168</sup> for non-adversarial conflict resolution in cases involving human rights infringements in relations with private actors. As the CSDDD will need to be implemented in EU member states' national law, this also offers them opportunities to introduce a legislative statutory basis for their NCPs and deploy this to strengthen its powers, independence and resources, following the example of Denmark's NCP Act<sup>169</sup> and enabling NCPs to take on complementary roles to courts.

NCPs should not replace judicial remedy but could offer an optional alternative for victims. Access to NCPs could be an advantage for victims' substantive remedy because NCPs could use their good offices to address disparities between the parties in regard to legal knowledge and argumentative power, and to help parties identify and select within a wider range of substantive solutions, in line with OHCHR recommendations.<sup>170</sup> Moreover, business-related human rights abuse frequently occurs in existing relationships that are important to both parties (for example, an employer–employee relationship for which local scarcity of jobs would make it beneficial for the employee to retain employment when issues that gave rise to the complaint have been addressed; or a local community that suffers toxic fumes exhausted by a neighbouring factory but also gains income by providing the factory and its workers with services and daily goods).<sup>171</sup> Whereas judicial remedy typically defines

<sup>165</sup> Thornton (1989), note 117.

<sup>166</sup> Human Rights Council, note 10.

<sup>167</sup> Ibid, Annex: 3.3.–5.–7.

<sup>168</sup> See section III.C.

<sup>169</sup> See section II.B.

<sup>170</sup> Human Rights Council, note 10, Annex: 4.1.

<sup>171</sup> Thornton (1989), note 117; Wilkie, note 79.

a winner and as a corollary a loser, a disruptive outcome for relationships, mediation is acknowledged to be suited to restoring complex or vulnerable relationships.<sup>172</sup>

Victims agreeing to NCP-facilitated mediation should do so with no prejudice for their access to judicial remedy, or to proceed to an NCP examination if mediation proved unsuccessful. This would enable victims to proceed to a civil liability case if the NCP process does not result in substantive remedy (for example, because the parties are unable to reach an agreement, the agreement is not satisfactory to the victim, or if the company does not wish to take part in the non-adversarial conflict-resolution process). It would prevent denial of justice, for example if the NCP process does not adequately handle power-disparities between the parties. In order to support victims in making the decision on whether to proceed to judicial remedy, NCPs could provide victims with independent counsel, a practice already deployed with some well-resourced independent NCPs.<sup>173</sup> Moreover, cases of gross abuse are not suited for non-adversarial conflict resolution and should be brought directly to NCP examination or the judicial process, again exemplified by the Danish NCP Act.<sup>174</sup>

NCP examinations could be an advantage for victims because of powers that allow NCPs to engage in investigating alleged abuse in third countries. This enables NCPs to by-pass jurisdictional limits on national authorities purely set up under national or EU law, which are recognized as limitations to the effectiveness of most state-based remedy mechanisms.<sup>175</sup> NCPs can engage with parties in the host country, enabling complainants to stay close to home (as demonstrated by the Bralima and Rockwool cases),<sup>176</sup> assisting victims to obtain knowledge from local experts and negotiate compensation agreements (as in the Bralima case) or proactive agreements targeting non-repetition (as in the Virunga case).<sup>177</sup>

NCPs applying their investigative and conflict resolution powers actively operate more like a criminal court than a civil court in regard to balancing power-disparities and ensuring equality of arms. NCPs can effectively address lacking equality of arms for victims through investigating facts of the case from the perspectives of both parties and enabling victims to voice their concerns close to their home base (as demonstrated by the Bralima and Statoil cases).<sup>178</sup> Findings resulting from this might also feed into an examination even if mediation is unsuccessful, and could be combined with powers for the NCP to refer cases to judicial remedy.<sup>179</sup> Permitting victims to refer to information from NCP examinations and determinations in a subsequent court case could assist their provision of documentation to substantiate their claims.

Given the important potential complementarities between NCPs and remedy provided by the CSDDD outlined above, each EU member state could take its national CSDDD implementation process as an opportunity to also review the powers and resources of its NCP. This could be an opportunity to strengthen NCPs by providing them with a statutory basis and resources, and also establish procedures for NCP interaction with courts. The latter could include empowering NCPs to recommend that a grievance could be referred to judicial remedy at no cost to the victim if the NCP's examination were to result in findings of non-compliance or negligence on the part of the company. Similar models are applied with some

<sup>172</sup> Vindelov, [note 111](#); Merry, [note 91](#); Christie, [note 24](#).

<sup>173</sup> I.a., the Netherlands and Danish NCPs.

<sup>174</sup> See above 2.2.

<sup>175</sup> Human Rights Council, [note 20](#), para 4; Human Rights Council, PRR Framework, [note 17](#), para 89.

<sup>176</sup> NCP of the Netherlands, [note 101](#); NCP of Denmark, [note 151](#).

<sup>177</sup> NCP of the UK, [note 148](#).

<sup>178</sup> NCP of the Netherlands, [note 101](#); NCPs of Sweden and Norway, [note 150](#).

<sup>179</sup> Human Rights Council, [note 10](#), Annex: 3.3.

ombudsman institutions.<sup>180</sup> To help address the problem of victims' expenses in court cases, NCPs could also be given powers to recommend that court fees be waived, covered by the government, or paid by a respondent company.

## VI. Conclusion

Taking point of departure in challenges affecting access to substantive remedy for victims of business-related human rights harm, this article has considered the potential of NCPs to complement judicial remedy. Challenges affecting BHR victims' access to judicial remedy are well recognized. Current legislative efforts to introduce access for host-country victims to companies' home-state courts may go some way to provide for enhanced access to procedural remedy. However, even where access to procedural remedy exists, legal and economic resource factors can affect victims' ability to present and argue their case, *vis-à-vis* the ability of companies. Such power-disparities can distort the effective access to remedy. The CSDDD proposal serves as a cue to address the under-researched and inter-connected issues of substantive remedy and a role for NCPs under judicial remedy regimes that involve civil liability for companies in home-state jurisdictions. The issue goes beyond the EU as it is relevant at the level of principle for any country that is a member of the OECD or adheres to the OECD Guidelines. The current wave of legislation introducing mandatory human rights due diligence, administrative monitoring and/or liability is a likely source of inspiration for other countries to introduce similar measures. As NCPs must remain in operation in OECD states as well as in non-OECD states adhering to the Guidelines, it is logical to consider how NCPs may complement national civil liability. While not all NCPs are well-performing, those that are confirm the unique role of NCPs to assist victims obtain substantive remedy in ways that courts cannot, as exemplified above. The organization and functioning of NCPs enable them to operate in ways that state-based judicial institutions normally cannot, to the benefit of giving victims voice and a choice of substantive outcome. Courts, on the other hand, can issue enforceable decisions which NCPs cannot. Combining the strengths of conventional state-based remedy mechanisms and NCPs would offer important opportunities to address well-recognized challenges for victims' access to substantive remedy.

The provision of civil liability in MNC home states for companies for damages to host-state victims assumes that victims will have access to courts in MNC home states to make their claims, either themselves or through representatives. However, while it helps address jurisdictional challenges for victims, it leaves important challenges affecting victims' abilities to obtain substantive remedy. These include access to economic resources to enable host-state victims (or their representatives) attend court and present their case in MNC home states, as well as legal expertise relevant to the case at hand, the litigation procedure and the substantive national law applicable, in order to convince the court to rule in victims' favour. A combination of access for victims to NCPs and courts as remedy mechanisms might help address these issues.

Given their powers to act outside the MNC home state, NCP-facilitated mediation and NCP examinations can serve to counteract legal and financial resource disparities between host-state victims and home-state companies, thereby helping balance power-disparities between the parties. Practice from well-functioning NCPs demonstrates that NCPs can assist parties in obtaining substantive reactive as well as proactive remedy. Moreover, through their powers to examine a case where mediation is not successful and to make determinations, NCPs can identify and take account of views and positions of

<sup>180</sup> See, e.g., the Danish Parliamentary Ombudsman Act [Ombudsmandsloven, LBK No 349 22/03/2013] sec 23.

parties in ways that courts cannot, also balancing power disparities in a manner that a civil case does not. NCP-facilitated mediation can also contribute to substantive remedy in forms recognized by the UNGPs, exceeding the remedy forms typically available with courts.

NCPs should offer optional non-judicial remedy access without prejudice to judicial remedy. They could complement judicial remedy as optional first points of access to remedy where resource disparities could impede victims' abilities to prepare, present and argue their case in court; and for situations where mediation offers a viable option for preserving mutually valuable relationships that may be damaged by the winner/loser outcome typically resulting from a court case. Were judicial remedy to be the victim's preferred second remedy option, NCPs could assist victims and judicial remedy institutions in contributing to a well-informed basis for enforceable decisions, based on the examination undertaken. Victims or NCPs could be allowed to present NCP examination findings as documentation. Powers to refer cases to courts at no cost to the victims could further empower victims and maximize the use of NCP examinations for documenting the victim's case in civil litigation.

Strong NCPs may be better candidates for the roles suggested in this article but strengthening the functioning of NCPs that are currently under-performing is also important. Marrying the best of the NCP system and civil liability would require that states hosting NCPs make efforts to ensure the necessary resources, powers and legitimacy for their NCP to be well-functioning. The CSDDD's silence on NCPs implicitly suggests that NCPs can indeed play a role along with courts in EU member states that so decide. The review process of the OECD Guidelines includes proposals to update and strengthen NCPs. Those proposals have been developed with knowledge of the CSDDD and the general turn towards increased focus on remedy for victims. This combines into a case for states with well-resourced and independently organized NCPs to allow their NCPs to play a complementary role to judicial remedy; and for other EU member states to consider reforming their NCPs to provide for enhanced remedial effectiveness, based on the models of best-performing NCPs. Similar reasoning can be applied to non-EU NCP countries that contemplate the introduction of judicial remedy for inadequate human rights due diligence. Enabling NCPs to handle grievances related to statutorily mandated due diligence could prompt states to create a statutory basis for their NCPs. This could also be an opportunity to reform NCPs, addressing the recognized weaknesses and enhancing their powers to assist victims and complement and support judicial remedy, in line with OHCHR recommendations.

It exceeds the focus of the current article to discuss whether NCPs may also perform supervisory tasks on companies' due diligence, like those currently proposed by the CSDDD. The CSDDD proposal's provisions that member states shall ensure that supervisory authorities are independent and have adequate resources and powers explicitly address some of the well-known causes for NCP weaknesses. Further research could examine whether NCPs could be charged with examining business conduct based on substantiated concerns (complaints) or on their own motion, and follow-up related to substantive remedy for victims. Such research could also consider whether tasks related to enforcement and sanctions would be better placed with other administrative authorities, in order to prevent conflicting tasks for NCPs. Research might also consider whether charging NCPs with supervisory functions to handle complaints and undertake investigations would have the added benefits of enhancing access to investigations in third countries. Because NCPs have such powers based on the OECD Guidelines, this might assist investigations of subsidiaries or supply chains in host countries, thereby overcoming jurisdictional challenges that companies' home states authorities would normally encounter with regard to undertaking investigations in third countries or jurisdictions.

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