

This item is the archived peer-reviewed author-version of:

The UN "Guiding Principles on Business and Human Rights": methodological challenges to assessing the third pillar: access to effective remedy

Reference:

Lizarazo Rodriguez Claudia Liliana.- The UN "Guiding Principles on Business and Human Rights": methodological challenges to assessing the third pillar: access to effective remedy
Nordic journal of human rights - ISSN 1891-8131 - 36:4(2018), p. 353-370
Full text (Publisher's DOI): <https://doi.org/10.1080/18918131.2018.1547525>
To cite this reference: <https://hdl.handle.net/10067/1560010151162165141>

The UN Guiding Principles on Business and Human Rights

Methodological challenges to assess the third pillar: Access to effective remedy

The UN Guiding Principles on Business and Human Rights

Methodological challenges to assess the third pillar: Access to effective remedy

This article presents methodological challenges for legal analysis when dealing with the third pillar of the United Nations Guiding Principles on Business and Human Rights (UNGPs), and particularly, principles 26 and 27 regarding the State-based non-judicial and judicial mechanisms that provide ‘effective’ access to an ‘effective’ remedy. The article reflects on the challenges encountered during the execution of a research project whose goal it was to map and evaluate the State-based mechanisms available in Belgium for business-related human rights abuses perpetrated in Belgium or by Belgian businesses in third countries. The focus is on the methodological challenges for legal analysis regarding the evaluation of the effectiveness of these mechanisms to provide access to justice and remedy in line with the UNGPs.

Keywords: Business and human rights; access to remedy; access to justice; legal and empirical methods in human rights; Belgium

Subject classification codes:

1 Introduction

The *United Nations Guiding Principles on Business and Human rights* (UNGPs)¹ promote an international framework for business activities, compatible with the duties of

¹ UN Human Rights Council (HRC), ‘Guiding Principles on Business and Human Rights Implementing the United Nations “Protect, Respect and Remedy” Framework, New York and Geneva.’ Resolution 17/4/2011

respecting, protecting and fulfilling human rights recognised by International Human Rights Law. The three pillars are well known: State responsibility, Corporate Social Responsibility (CSR), and access to remedy. This article connects to the three pillars but focuses on the challenges the states face to grant access to remedy as proposed by principles 26 and 27 of the UNGP. The state has to implement and, in principle, guarantee ‘effective’ access to an ‘effective’ remedy as a component of its duty to protect human rights in its territory and/or jurisdiction² (UNGP 2011, principle 25). Non-judicial remedy mechanisms provided by businesses are not part of this analysis because, as mentioned before, the research project focused on the state-based mechanisms.

Methodology, method and approaches are the terms to indicate the way research is/should be conducted in a specific field. Recently, a handbook on research methods in human rights pointed out the challenges to tackle human rights issues and the limits of a pure disciplinary legal analysis of human rights enforcement³. However, research dealing with the identification and evaluation of a specific human rights regulatory framework, needs a combination of a pure disciplinary legal approach and complementary research methods, from other social sciences to accurately evaluate the impact and effectiveness of this framework. In this article I argue that the identification and mapping of the existing state-based mechanisms that victims of business-related human rights abuses and other

² ‘Jurisdiction’ is a component of state sovereignty expressed in its power to enact and enforce laws. Usually it has the scope of the state territory. Cf. Cedric Ryngaert, ‘Chapter 2: The Concept of Jurisdiction in International Law’ in Alexander Orakhelashvili (ed), *Research Handbook on Jurisdiction and Immunities in International Law* (2015). 50. However, in some areas, such as Business and Human Rights, the challenge is to create extraterritorial state jurisdiction to control the extraterritorial activities of actors under its jurisdiction.

³ Bård A Andreassen, Hans-Otto Sano and Siobhán McInerney-Lankford, *Research Methods in Human Rights: A Handbook* (Edward Elgar Publishing 2017). 1-17.

stakeholders can use should basically rely on binding legal sources and therefore on an accurate disciplinary legal analysis (which I refer to as *ex-ante* legal analysis), whereas the assessment and evaluation of their impact, scope or effectiveness require an *ex-post* empirical analysis. The reason is that the latter looks at issues such as how the legal framework is being applied and which are the consequences of the application and enforcement of this legal framework beyond pure anecdotal evidence.

I also argue that in general, legal scholarship on business and human rights analysing access to remedy mostly performs an *ex-ante* disciplinary legal analysis, and when a critical assessment is performed, often emblematic cases are basically reviewed by means of legal analysis of the rules in force and of specific judgments, but lacking solid empirical research and evidence.

I finally argue that even if legal research on access to effective remedy for business-related human rights abuses within the framework of the UNGP is recent, the topics are not new and, on the contrary, it focuses on the identification and evaluation of administrative and judicial procedures to claim rights. The UNGP seek to guide victims, stakeholders, and even businesses through the existing mechanisms to avoid that business activities violate human rights law, and when an abuse is perpetrated, the UNGP also seek to increase awareness about the possibilities that victims have to claim remedy⁴. The success of the UNGP lies in that they make explicit how judicial and administrative procedures can be used by victims to hold the businesses or their parent corporations accountable in the country where the abuse was perpetrated, or in the country where they have been incorporated.

⁴ On the awareness to claim rights cf. William L.F. Felstiner, Richard L Abel and Austin Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .' (1980) 15 Law & Society Review 631.

In addition, the legal and conceptual framework to which the UNGP refer is complex, as many topics are at stake. The methodology and methods to evaluate how states are fulfilling their duty to grant ‘effective’ access to an ‘effective’ remedy are also diverse and depend on the topic, on the geographical and economic context, and on the availability of data.

The identification, classification and evaluation of these judicial and administrative procedures that victims can use, combine hard law with soft law guidelines and criteria that seek to implement the UNGP. The difficulty of this process depends on the national legal system and in particular, on whether specific human rights procedures have been implemented. This article is grounded in the context of a European Union (EU) country, more precisely, a founding EU Member State: Belgium. For this reason, the observations should be interpreted with caution, as conclusions could vary in the context of a non-European developing country, for instance.

Another nuance is that the criteria to evaluate the effectiveness of the state-based mechanisms to provide effective remedy do not have a concrete framework but refer rather to vague concepts used to evaluate bureaucratic and judicial systems in general. There are no robust empirical data that provide concrete results in this respect either.⁵ These circumstances facilitate that states generally show compliance with the third pillar of the UNGP precisely because of the difficulty to evaluate the effectiveness of these remedies. Criticisms also benefit from these difficulties but it is hard to show that they can be generalised. This analysis presents a balanced assessment between the claims of

⁵ The effectiveness of access to justice has been evaluated by several organisations, such as the World Bank (The Doing Business Report), the indicators of Judicial Independence or the EU justice scoreboard but they have incomplete figures or the indicators do not capture the criteria indicated by the UNGP.

governments arguing that they provide the requested mechanisms to grant ‘effective’ access to an ‘effective’ remedy to victims of business related human rights abuses, and the criticisms related to the lack of willingness or non-compliance of states with their duties in this respect. It also shows that regarding human rights enforcement, an *ex-ante* disciplinary legal analysis cannot provide a comprehensive panorama of the problem at stake, but also that without a disciplinary legal analysis, the perspective is limited as well⁶. A disciplinary legal approach helps in identifying, conceptualizing and *ex-ante* evaluating the available state-based mechanisms that can, *ex-ante*, provide ‘effective’ remedy. However, if the evaluation refers to the effectiveness of these mechanisms in practice, then this is only possible by performing *ex-post* empirical research.

In section 2, I refer to the methodological challenges related to the identification, classification and mapping of state-based mechanisms that can be used to claim effective remedy in the context of business-related human rights abuses. In section 3, I refer to the methodological challenges regarding the concepts at stake. In section 4, I address the methodological challenge to evaluate the effectiveness of these mechanisms; and section 5 concludes.

2 Methodological challenges regarding the identification and mapping of state-based mechanisms that can provide ‘effective’ remedy *ex ante*

There are several methodological challenges related to identifying, classifying and mapping state-based mechanisms that can provide ‘effective’ remedy to victims of business-related human rights abuses *ex ante*. The point of departure is the international

⁶ Andreassen, Sano and McInerney-Lankford (n 3).

and national human rights law in force that provides enforcement mechanisms that victims can trigger when their rights are violated⁷. The considered international human rights framework consists of the UN system, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the EU Charter of fundamental rights (the EU Charter)⁸. The EU Charter (Title IV) in particular, includes solidarity rights, environmental protection, sustainable development and consumer protection⁹ which are salient rights in business-related human rights abuses. Most of the civil and political rights, as well as economic, social and cultural rights, have been incorporated in constitutions, which give them a stronger binding enforcement; however, their self-executing character¹⁰ depends on the scope given to them at the national level by the

⁷ The ratification of human rights treaties creates the duty to the State to adopt ‘appropriate measures of a legislative, judiciary, administrative or other nature to guarantee the exercise of the rights specified for all individuals falling within their jurisdiction’ (UN, Vienna Declaration and Programme of Action, (9/10/1993). Moreover, the UN Charter obliges the States to mutually cooperate in human rights protection matters. V Van Der Plancke, G Paul Van Goethem and E Wrzoncki, *Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Recourse Mechanisms* (3rd., Paris: FIDH – International Federation for Human Rights 2016). 24-5.

⁸ Cf. (EU OJ C83 30/03/2010) and Treaty of Lisbon.

⁹ The EU system of consumer protection is a well-structured framework to claim reparation when business-related human rights abuses are perpetrated against consumers and gives special protection to vulnerable consumers such as children.

¹⁰ The concept of self-executing treaty is understood as the possibility to directly enforce it before domestic courts without their implementation by means of legislation. David Sloss, ‘Non-Self-Executing Treaties: Exposing a Constitutional Fallacy’ (2002) 36 U.C. Davis Law Review 81. David Sloss, ‘Treaty Enforcement in Domestic Courts: A Comparative Analysis’ in David Sloss and Derek Jinks (eds), *The Role of Domestic Courts in Treaty Enforcement: a Comparative Study* (Cambridge University Press 2009). Curtis A Bradley, ‘Self-Execution and Treaty Duality’ (2008) 2008 The Supreme Court Review 131. quoted by Philippe De Lombaerde and Liliana Lizarazo Rodríguez, ‘International Regionalism and National Constitutions: A Jurimetric Assessment’ (2015) 24 Journal of Transnational Law & Policy 23_64. 31-2.

constitution and by national courts¹¹.

Although international human rights law is in principle binding and in principle justiciable, the direct enforcement of human rights before national courts has encountered resistance in some parts of the legal community. A progressive position accepts that human rights are enforceable before national courts and that the state must control that its organisms and officers and non-state actors, such as businesses, respect human rights law¹².

This discussion is particularly relevant when looking at remedy mechanisms in the framework of the UNGP, because the key concern is about how human rights can be enforced when there is a concrete violation perpetrated by a business. In most of the EU Member States, the only options are the ones of ordinary procedure law but, the first difficulty is whether human rights are justiciable by these ordinary ways. This is relevant for methodological purposes and it also represents a challenge for victims, because these mechanisms are not framed in a human rights language and the outcome, this is, whether the use of these mechanisms can grant effective remedy for human rights violations, is not certain.

For these reasons, the first step of inquiry is to identify and to map the

¹¹ The Belgian Constitution only refers to the competence of the Belgian Constitutional Court to rule by means of judgments based on specific human rights as well as on the rights of foreigners; however, the Special Act of 6/1/1989, on the Constitutional Court, extended this competence towards the whole of title II. In general, the Belgian Constitutional Court has followed the criteria of the European courts (European Court on Human Rights (ECtHR) and of the Court of Justice of the European Union (CJEU)), but sometimes it has also granted more extensive human rights protection. André Alen and Willem Verrijdt, 'The Rule of Law in the Case Law of the Belgian Constitutional Court: History and Challenges', *Constitutional Court of the Republic of Slovenia 25 Years* (2016). 21-2.

¹² Yves Lejeune, *Droit constitutionnel belge: Fondements et institutions* (Groupe Larcier SA 2014). 131-9.

relevant state-based mechanisms in force in the concerned jurisdiction. Most of the literature on business and human rights remedies mainly focuses on civil (tort law) and criminal issues. However, these mechanisms have been almost unanimously criticized because the outcome has not systematically enforced human rights. However, this criticism is not supported by a systematic and comprehensive evaluation of the outcomes in these areas during a specific period and in a specific territorial jurisdiction. As mentioned before, as far as these mechanisms are not framed in human rights terms, even if there are some favourable judgments, they are not automatically identified as human rights claims, although they are protecting rights¹³.

Here, an *ex-ante* legal analysis is unavoidable and necessary. Most of the work published follows in fact a disciplinary *ex-ante* approach that identifies the state-based mechanisms that best fit into the scope of the UNGP. This work is rather descriptive and it does not reflect the effectiveness and impact of the mapped mechanisms in a specific jurisdiction, which can only be done by an *ex-post* empirical evaluation (cf. below).

The data to be used for the identification, selection and mapping of the available mechanisms are legal texts that regulate the remedies offered by any branch or agency of

¹³ Cees van Dam, 'Tort Law and Human Rights: Brothers in Arms on the Role of Tort Law in the Area of Business and Human Rights' (2011) 2 Journal of European Tort Law 221. Cees van Dam and F Gregor, 'Corporate Responsibility to Respect Human Rights Vis-à-Vis Legal Duty of Care' in Juan José Alvarez Rubio and Katerina Yiannibas (eds), *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union* (Taylor & Francis 2017). Cees van Dam, 'Human Rights Obligations of Transnational Corporations in Domestic Tort Law State' in Cernic Letnar and T van Ho (eds), *Human Rights and Business - Direct Corporate Accountability for Human Rights* (Wolf Legal Publishers 2015).

the State, or “*by an independent body on a statutory or constitutional basis*”¹⁴. Although it might look as a pure listing exercise, the complexity is high as several legal areas are considered: Public International Law, Private International Law, EU Law (Liability, Consumer Protection, Competition Law, Public Procurement, Environmental Law, Criminal Law etc.), National Law (Constitutional Law, Administrative Law, Corporate Law, Liability, Procedural Law, Civil Law, Labour Law, Criminal Law etc.).

This disciplinary *ex-ante* analysis, however, should be guided by the ultimate aim, which is the identification of available procedural ways to obtain ‘effective’ remedy in the framework of business-related human rights claims. For this reason, such *ex-ante* legal analysis cannot rely on a pure legal positivist perspective (based exclusively on hard law) either, because this ultimate aim and context have been mainly systematised by soft law guidelines that, even if they are based on human rights law, emphasise the goal of holding businesses accountable for human rights abuses. A progressive approach is therefore needed here as well, by considering the “soft law” framework as a normative requirement for states to comply with its human rights duty of granting ‘effective’ access to an ‘effective’ remedy for business-related human rights violations. The soft law framework considered for this purpose includes first, the UNGP¹⁵. Earlier initiatives such as the Tripartite Declaration of Principles concerning Multinational Enterprises (MNEs) and Social Policy¹⁶ of the International Labour Organisation (ILO) and the Organisation

¹⁴ UN Human Rights Council (HRC), ‘Guiding Principles on Business and Human Rights Implementing the United Nations “Protect, Respect and Remedy” Framework, New York and Geneva:’ (n 1). 27.

¹⁵ Other guidelines that complemented the UNGP such as the UNGP on Human Rights Impact Assessments of Trade and Investment Agreements (UN Report A/HRC/19/59/Add.5) and the UNGP for Responsible Contracts for State-Investor Contracts (UN A/HRC/17/31/Add.3), were also considered.

¹⁶ They were adopted in 1977 and amended in 2000, 2006 and 2017.

of Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises (MNEs)¹⁷, are also part of this international soft law framework. UN General Comment 16/2013 complemented this framework by looking at the impact of businesses on children's rights. Regarding the third pillar, the UN Human Rights Council (HRC) report on The Accountability Research Project (ARP I)¹⁸ focused on judicial mechanisms that may grant the right to effective access to remedy for business-related human rights abuses in the context of global supply chains. It emphasised the need to link secondary liability (parent corporation) with primary liability (subsidiaries)¹⁹. The Accountability and Remedy Project II (ARP II)²⁰ in turn, focused on state-based non-judicial mechanisms that may grant access to an effective remedy²¹.

The Van Boven Bassiouni Principles²², were considered because they are the only

¹⁷ They were adopted in 1976 and updated in 2011.

¹⁸ UN Human Rights Council (HRC), 'Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse Report of the United Nations High Commissioner for Human Rights'. UN A/HRC/32/19/Add.1 of 12/05/2016

¹⁹ Cf. also Rolf H Weber and Rainer Baisch, 'Liability of Parent Companies for Human Rights Violations of Subsidiaries' (Social Science Research Network 2015) SSRN Scholarly Paper ID 2625536 <<https://papers.ssrn.com/abstract=2625536>> accessed 1 November 2017.

²⁰ UN Human Rights Council (HRC), 'Access to Remedy for Business-Related Human Rights Abuses: A Scoping Paper on State-Based Non-Judicial Mechanisms Relevant for the Respect by Business Enterprises for Human Rights: Current Issues, Practices and Challenges'. 2017.

²¹ Agenda 2030 was also considered because some targets of some Sustainable Development Goals (SDG) are of relevance for the mapping. In particular, targets of Goal 8 'inclusive and sustainable economic growth, employment and decent work for all'; Goal 12 on 'sustainable consumption and production', and Goal 17 on 'global partnership for sustainable development'.

²² UN General Assembly (GA) on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Rights Law and Serious Violations of International Humanitarian Law, Res.60/147: U.N. Doc. A/RES/60/147 (21/06/2006).

international soft law document that provides clarity on the scope of the concept of remedy. The UNGP adopts a similar approach but these principles are more complete.

Second, In Europe, the Recommendations of the Council of Europe²³ sought to identify which state-based mechanisms should be enforced and improved by member states to grant ‘effective’ remedy.²⁴ At the EU level, the Commission Staff Working Document on “*Implementing the UN Guiding Principles on Business and Human Rights - State of Play*”²⁵, the Council of the EU Conclusions on Business and Human Rights²⁶ and the Opinion of the EU Agency for Fundamental Rights on access to remedy²⁷ provide a normative framework to further identify, map and evaluate state-based remedy mechanisms in force in EU member states.²⁸

Within this vast and complex framework, the remedy mechanisms were included in the mapping if they were relevant from two perspectives: the victim’s perspective (as

²³ Committee of Ministers Council of Europe, ‘Recommendation CM/Rec(2016)3 on Human Rights and Business and Its Explanatory Memorandum’ <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c1ad4>.

²⁴ The CoE Greta, *Compendium of Good Practices on the Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings* (CoE Greta 2016) addressed the actions to be taken to fight modern slavery.

²⁵ European Commission, SWD, 2015, 144 final, 14.7.2015.

²⁶ The Council of the EU, ‘EU Action Plan on Human Rights and Democracy’ <https://ec.europa.eu/anti-trafficking/eu-policy/action-plan-human-rights-and-democracy-2015-2019_en>.

²⁷ EU Agency for Fundamental Rights -FRA, ‘Improving Access to Remedy in the Area of Business and Human Rights at the EU Level. Opinion.’ <<http://fra.europa.eu/en/opinion/2017/business-human-rights>>.

²⁸ The recommendations of the UN special rapporteurs on business-related issues, the National Action Plans (NAP) and studies on CSR are also important documents to identify mechanisms to grant access to remedy. CSR particularly emphasises how businesses are concerned about the respect for human rights, and which are the incentives to comply with them, as e.g. the protection of their reputation.

they are the weak party in the cases) and the perspective of transnational litigation. Besides the national mechanisms that can grant ‘effective’ access to remedy for violations perpetrated in the territory of the state, transnational human rights litigation is crucial to hold (mostly) parent corporations accountable for violations perpetrated by subsidiaries or within their global value chains, even in third countries. Transnational litigation is also the way to overcome the bottleneck of the Westphalian international legal order that rejects the possibility to hold corporations accountable for human rights abuses at the international level.²⁹ As a result, national judiciaries become the main hope to hold businesses accountable for human rights violations, even beyond their territorial jurisdiction³⁰. Therefore, the identification and mapping should include national mechanisms that victims can trigger to sue businesses and/or their parent corporations or commercial partners even beyond the country where the abuse was perpetrated and this

²⁹ The Maastricht Principles on Extraterritorial Obligations of States in Economic, Social and Cultural Rights (ESCR) (The Maastricht Principles) have also flagged the relevance of transnational litigation.

³⁰ Weber and Baisch (n 18). Liesbeth Enneking and others, *Zorgplichten van Nederlandse Ondernemingen Inzake Internationaal Maatschappelijk Verantwoord Ondernemen* (2016) <<https://www.rijksoverheid.nl/documenten/rapporten/2016/04/21/zorgplichten-van-nederlandse-ondernemingen-inzake-internationaal-maatschappelijk-verantwoord-ondernemen>>. Wouter Vandenhole, ‘Obligations and Responsibility in a Plural and Diverse Duty-Bearer Human Rights Regime’, *Challenging Territoriality in Human Rights Law: Building Blocks for a Plural and Diverse Duty-Bearer Regime* (Routledge 2015) <<https://www.routledge.com/Challenging-Territoriality-in-Human-Rights-Law-Building-Blocks-for-a-Plural/Vandenhole/p/book/9781138799455>> accessed 6 November 2017. Gwynne Skinner, ‘Parent Company Accountability Ensuring Justice for Human Rights Violations’. Gwynne Skinner and others, ‘The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business’. Liesbeth Enneking, ‘Judicial Remedies: The Issue of Applicable Law’ in Juan José Alvarez Rubio and Katerina Yiannibas (eds), *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union* (Taylor and Francis 2017).

explains the relevance of International Private Law for an *ex-ante* legal analysis³¹.

The EU level is the most sophisticated and advanced transnational regime that enlarges national jurisdiction of national courts to transnational human rights violations and has progressively improved the options of the victims by limiting the application of some fora (such as the *forum non conveniens* doctrine)³² and promoting, in exchange, the application of the *forum necessitates*³³. This development is not only important for EU

³¹ Juan José Alvarez Rubio and Katerina Yiannibas, *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union* (Taylor & Francis 2017). Susan Ariel Aaronson and Ian Higham, “‘Re-Righting Business’: John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms’ (2013) 35 *Human Rights Quarterly* 333. Lorand Bartels, ‘The EU’s Human Rights Obligations in Relation to Policies with Extraterritorial Effects’ (Social Science Research Network 2014) SSRN Scholarly Paper ID 2394670 <<https://papers.ssrn.com/abstract=2394670>> accessed 7 November 2017. Iman Prihandolo, ‘Barriers to Transnational Human Rights Litigation against Transnational Corporations (TNCs): The Need for Cooperation between Home and Host Countries’ (2011) 3 *Journal of Law and Conflict Resolution* 89. Geert Van Calster, ‘The Role of Private International Law in Corporate Social Responsibility’ (2014) 7 *Erasmus Law Review* 125. Ah Aukje Van Hoek, ‘Private International Law: An Appropriate Means to Regulate Transnational Employment in the European Union?’ (Social Science Research Network 2014) SSRN Scholarly Paper ID 2536317 <<https://papers.ssrn.com/abstract=2536317>> accessed 6 November 2017. van Dam, ‘Human Rights Obligations of Transnational Corporations in Domestic Tort Law State’ (n 11). Daniel Augenstein and Nicola Jagers, ‘Judicial Remedies: The Issue of Jurisdiction’ in Juan José Alvarez Rubio and Katerina Yiannibas (eds), *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union* (Taylor and Francis 2017). M Kuijer, ‘Effective Remedies as a Fundamental Right: The Importance of Effective Domestic Remedies from a Human Rights Perspective.’ Cedric Ryngaert, ‘Transnational Private Regulation and Human Rights: The Limitations of Stateless Law and the Re-Entry of the State’ in Cernic Letnar and T van Ho (eds), *Human Rights and Business - Direct Corporate Accountability for Human Rights* (Wolf Legal Publishers 2015).

³² CJEU preliminary ruling C-281/02 of 1/3/2005: *Owusu v. Jackson* ruled that the *forum non conveniens* theory was incompatible with the Brussels Convention of 1968.

³³ Amnesty International (ed), *Injustice Incorporated: Corporate Abuses and the Human Right to Remedy* (Amnesty International 2014). Alvarez Rubio and Yiannibas (n 30). A Pigrau Solé and others, *Human Rights in European*

member states because they have a well-developed transnational business sector that may cause damages in third countries directly (primary liability) or indirectly by its subsidiaries or business partners (secondary liability). Besides jurisdiction in transnational litigation, the choice of the applicable law and the execution of judgments from countries outside the EU are the central concerns of the literature on access to remedy in business and human rights, although most of them are an *ex-ante* analysis with sporadic references to case law that have gained relevance internationally. However, whether transnational litigation is the most effective mechanism to claim remedy, is an issue that has not been empirically tested.

3 Conceptual challenges

The second methodological challenge of this identification, selection and mapping of mechanisms that grant ‘effective’ access to ‘effective’ remedy is about how to define the scope and deal with human rights concepts in an ordinary procedural framework. Several conceptual difficulties arose. First, the identification of the actors involved in the processes that seek to provide an ‘effective’ remedy. This is, who are the duty bearers that must grant remedy for business³⁴-related human rights abuses? The challenge is how to define who is the perpetrator of the abuse; and who is liable for the damage caused.

Business: A Practical Handbook for Civil Society Organisations and Human Rights Defenders (Tarragona Centre for Environmental Law Studies, Universitat Rovira i Virgili, 2016) <http://humanrightsinbusiness.eu/wp-content/uploads/2016/09/HUMAN_RIGHTS_IN_EUROPEAN_BUSINESS_EN.pdf>. Skinner and others (n 29). International Law Association (ILA), ‘Sofia Guidelines On Best Practices For International Civil Litigation For Human Rights Violations: The 75th Conference of the International Law Association’. (2012).

³⁴ The term ‘businesses’ was selected because it is the most general one, independently of their legal form. Businesses are indeed mainly legal entities (corporations) but not exclusively; this term has also been adopted by the EU Agency for Fundamental Rights (FRA).

From a human rights law perspective the state is the main duty bearer at both the national and the international level and this should clearly appear in the mapping. However, the primary and secondary liability among corporate groups and/or global value chains should also be highlighted.

Who are the rights holders? This question refers to who can be considered as actual or potential victim of the business-related human rights violations. This is controversial as there is no legal definition of the concepts of right holder or victim. The difficulty is that only soft law guidelines and related documents are the main source for defining the scope of these terms.³⁵ In addition, case law of the ECtHR refers to the concept of “injured party” as synonymous to victim, in accordance with the ECHR (Art.41) on just satisfaction. The Van Boven Bassiouni Principles also encounter this difficulty when defining the scope of the concept of victim in (§8 and 9) and adopted one that applies for gross violations of international human rights law and serious violations of international humanitarian law. Therefore, a victim is someone ‘who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization’. Other stakeholders such as NGOs, trade unions or public

³⁵ The UNGP did not define who are the victims but its Interpretive Guide did so. Cf. UN OHCHR, ‘The Corporate Responsibility to Respect Human Rights: An Interpretive Guide.’ <<http://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf>>.

institutions have also adopted a similar definition when claiming the rights of victims³⁶.

A second challenge is to identify and to distinguish between mechanisms exclusively addressed against the state as regulator or as controller (exercise of state authority - *acta iure imperii*), and mechanisms that can be addressed against the state and/or businesses. This classification by duty bearers makes explicit that the state is the main responsible to promote, protect and fulfil human rights within its jurisdiction, and it is the only responsible in the international and European legal order. Therefore, the classification and mapping follow the logic of national state-based procedures, because the requirement of exhaustion of domestic remedies before European/international courts makes it unavoidable to start by the national level³⁷. At the national level, the mapping refers first to non-judicial mechanisms and then to the judicial ones, because usually judicial mechanisms are the last resort of victims when they did not find effective remedy by other more expedite and effective ways. The UNGP did not define the conceptual scope of the state-based judicial and non-judicial mechanisms either; the understanding should therefore rely on the judicial mechanism considered as such by the national legal systems; regarding non-judicial mechanisms, the UNGP set various criteria that these mechanisms should fulfil to be considered as effective. However, the challenge is how to map *ex-ante* non-judicial mechanisms that can be considered as: legitimate, accessible, predictable, equitable, transparent, rights-compatible (in line with internationally human

³⁶ Cf. International Commission of Jurists, 'The Right to a Remedy and to Reparation for Gross Human Rights Violations – A Practitioners' Guide' <<http://www.icj.org/wp-content/uploads/2016/10/Universal-OEWG-session-2-ICJ-submission-Advocacy-Analysis-brief-2016-ENG.pdf>>. UN Human Rights Council (HRC), 'Guiding Principles on Business and Human Rights Implementing the United Nations "Protect, Respect and Remedy" Framework, New York and Geneva:' (n 1). 28.

³⁷ Malcolm N Shaw, *International Law* (7a, Cambridge University Press 2014). 595.

rights law), constructive and policy influencing.³⁸ However, the *ex-ante* application of these criteria partially remains in the terrain of speculation because the evaluation of effectiveness is only possible by means of *ex-post* empirical evaluation.

Third, the concept and scope of remedy is particularly controversial because in human rights law, there is no clarity in this respect either and even less in business-related human rights abuses whose remedy is claimed by ordinary procedural ways. The UNGP refer to ‘apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines)’ which also include state-based interim measures to avoid an irreparable harm³⁹ and the right to truth, linked to the right to information and to disclosure of human rights abuses⁴⁰. Again, until today the most detailed definition of these concepts has been the victims’ right to remedy concept provided by the Van Boven/Bassiouni Principles. These Principles define, the scope of these remedies as follows: a reparation⁴¹ for actions or omissions (e.g. noncompliance with legal duties) that cause harm, can be considered as an ‘effective’ remedy when a full and effective reparation is secured. This reparation can have different forms: redress or restitution⁴², appropriate and proportional compensation for any corporal, material or moral damage⁴³, in the same way as the ECHR (Art.41) refers to just

³⁸ UN Human Rights Council (HRC), ‘Guiding Principles on Business and Human Rights Implementing the United Nations “Protect, Respect and Remedy” Framework, New York and Geneva:’ (n 1). 33-34.

³⁹ UN Human Rights Council (HRC), ‘Guiding Principles on Business and Human Rights Implementing the United Nations “Protect, Respect and Remedy” Framework, New York and Geneva:’ (n 1). 27.

⁴⁰ Skinner and others (n 29). 17. UN OHCHR (n 33). 7. The Maastricht Guidelines, Principle 38.

⁴¹ ‘Reparation’ is used as synonymous to ‘remedy’.

⁴² To ‘restore the victim to the original situation before the (...) violations (...) occurred’ (Van Boven/Bassiouni Principles §19).

⁴³ For a detailed description of damages and compensations, cf. Van Boven/Bassiouni Principles (§20-1).

satisfaction; rehabilitation, satisfaction⁴⁴ and guarantees of non-repetition, which also involves prevention⁴⁵. As it can be observed, even if these Principles show progress in defining the scope of effective remedy, they are still not clearly defined and in some cases, can overlap or be confused.

Once the conceptual issues were elucidated, the inclusion of a non-judicial or a judicial mechanism into the mapping⁴⁶ was basically made by applying the following three criteria: first, whether they can protect human rights⁴⁷; second, whether victims and/or stakeholders that represent them can use these mechanisms, and third, whether the outcome can be considered as a direct remedy for victims, a sanction to the offender, a way to cease the abuse, a satisfactory settlement of the conflict or a guarantee of non-repetition.

4 Methodological challenges in evaluating the effectiveness of the selected mechanisms: *ex-post* empirical analysis, beyond disciplinary case law analysis.

When the objective of the analysis is to evaluate the mapped mechanisms vis-à-vis the effectiveness parameters mentioned by the UNGP, this is, whether victims can effectively use them without encountering barriers to obtain “effective” remedy, *ex-ante* legal

⁴⁴ ‘Satisfaction’ includes the ‘cessation of continuing violations’, disclosure of the truth, when it does not cause further harm, public apology and recognition of liability, judicial and administrative sanctions and tributes to victims (Van Boven/Bassiouni Principles §22).

⁴⁵ This concept refers mainly to institutional and regulatory quality, but it also refers to the promotion of codes of conduct of public institutions and of business.

⁴⁶ Mechanisms that businesses could use, as e.g. complaints for unfair competition, were excluded from the mapping because they do not directly seek to protect human rights of victims but rather to protect the interests of the affected business and the remedy for victims is not necessarily included in the claim.

⁴⁷ Human rights considered were the ones recognised by treaties ratified by Belgium and by the Belgian Constitution.

approaches and methods appear unsatisfactory, because the reality goes beyond the ‘law in force’. The challenge is to evaluate whether these mechanisms grant victims ‘effective’ access to ‘effective remedy’. The effectiveness parameters proposed by the UNGP (principles 26, 27 and 31) are not specific for business-related human rights abuses, and they are not even specific for human rights enforcement. In addition, the *ex-ante* legal analysis and *ex-post* evaluation should focus on three key aspects: whether there are systematic obstacles/limitations to obtaining ‘effective’ access to justice; whether there are systemic obstacles/limitations to obtaining ‘effective’ remedy; and whether these barriers are specific for victims of business-related human rights abuses. The latter part is addressed in the conclusions, as it refers to the three parts of the article.

4.1 Effectiveness of the mapped mechanisms to grant effective access to justice

Access to justice is a human right protected by the international and European⁴⁸ levels because it is the way to enforce human rights. Its legal scope has been extensively developed by case law⁴⁹; in environmental protection, access to justice is also protected by the Aarhus Convention (9(3)).⁵⁰ The core content of this right is the possibility to have a fair judicial system that grants the principles of due process (fair trial): impartiality and integrity.

The literature on business and human rights (expert NGOs, reports and academic

⁴⁸ The ECHR (art. 6(1) and 13) and the EU Charter (art. 47) as well as the Treaty of the EU (TEU) (art. 41 and 19(1)) oblige member states to grant effective judicial protection, which is supported by case law of the ECtHR and the CJEU. European Union, European Court of Human Rights and EuroParat (eds), *Handbook on European Law Relating to Access to Justice* (Publications Office of the European Union 2016).

⁴⁹ European Union, European Court of Human Rights and EuroParat (n 47).

⁵⁰ Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

articles) focus on the practical and financial procedural obstacles⁵¹ and technical barriers to access information as the main barriers to have effective access to remedy⁵². In fact, the business and human rights framework is basically an eye-opener on the options that victims have when their human rights are violated by businesses, but these options are not different from ordinary state-based mechanisms. This awareness is positive but the victims are also aware of multiple obstacles. The first obstacle is that these mechanisms are not structured in human rights terms, and this is difficult for the claimant but also for the defendant and even for judges⁵³. Therefore, an effective access to justice depends rather on the quality of administrative and judicial institutions and can be determined by the institutional capacity of the States. This explains the relevance of transnational litigation for business-related human rights claims and, the effectiveness of transnational litigation depends on its ability to grant access to justice to victims to whom the state

⁵¹ E.g. the lack or deficient legal aid, corruption or obstacles to enforce judgments. Cf. UN Human Rights Council (HRC), ‘Guiding Principles on Business and Human Rights Implementing the United Nations “Protect, Respect and Remedy” Framework, New York and Geneva:’ (n 1). European Union, European Court of Human Rights and Europarat (n 47).

⁵² Amnesty International (n 32). European Union, European Court of Human Rights and Europarat (n 47). 103; EU Agency for Fundamental Rights -FRA (n 27). J Zerk, ‘Corporate Liability for Gross Human Rights Abuses Towards a Fairer and More Effective System of Domestic Law Remedies’ <<http://www.ohchr.org/documents/issues/business/domesticlawremedies/studydomesticlawremedies.pdf>>. Skinner and others (n 29). EU Agency for Fundamental Rights -FRA (n 27). Van Der Plancke, Van Goethem and Wrzoncki (n 5). Enneking and others (n 29). Alvarez Rubio and Yiannibas (n 30). Weber and Baisch (n 18). Pigrau Solé and others (n 32). Skinner and others (n 29). Skinner (n 29).

⁵³ The Economist Intelligence Unit (EIU), ‘The Road from Principles to Practice. Today’s Challenges for Business in Respecting Human Rights’ (*Perspectives from The Economist Intelligence Unit (EIU)*, 13 October 2015) <https://www.dlapiper.com/~media/Files/Insights/Publications/2015/03/Challenges_for_business_in_respecting_human_rights.pdf> accessed 20 November 2017. Aaronson and Higham (n 30). UN OHCHC (n 33).

where the abuse is perpetrated by transnational businesses cannot grant a fair trial⁵⁴. Case law on access to justice has pointed to the need to establish criteria to evaluate the effectiveness of national remedies by considering international standards to grant a certain level of objectivity⁵⁵. For the case of Belgium, these standards were found in case law from the ECtHR and CJEU which refer to very similar UNGP criteria⁵⁶.

Regarding State based non-judicial mechanisms, UNGP principles 27 and 31 refer to the effectiveness criteria mentioned above and principle 26, on judicial mechanisms, added some criteria such as the integrity and ability to accord due process, the availability of impartial, independent (from economic or political pressures) and non-corrupt courts and the availability of effective mechanisms to enforce judgments.

The case law parameters from the ECtHR and of the CJEU further add criteria to evaluate the effectiveness of judicial mechanisms in providing access to justice⁵⁷. They are, whether the judiciary can issue binding decisions⁵⁸, whether their competences and procedures are predetermined in the law⁵⁹; and whether courts have jurisdiction⁶⁰, are

⁵⁴ UN Human Rights Council (HRC), ‘Guiding Principles on Business and Human Rights Implementing the United Nations “Protect, Respect and Remedy” Framework, New York and Geneva:’ (n 1). Principles 3-10. Council of Europe (n 22). 31-34; The Maastricht Guidelines (2011. 36-8). Skinner and others (n 29). At. 14-17.

⁵⁵ European Union, European Court of Human Rights and Europarat (n 47). International Commission of Jurists (n 34). 142-3.

⁵⁶ E.g. legal assistance should be granted ‘to ensure total equality of arms’ when a party cannot use these mechanisms without been in a concrete ‘disadvantageous position’ (European Union, European Court of Human Rights and Europarat (n 47). 63.

⁵⁷ European Union, European Court of Human Rights and Europarat (n 47). 31.

⁵⁸ European Union, European Court of Human Rights and Europarat (n 47). 31.

⁵⁹ European Union, European Court of Human Rights and Europarat (n 47). 31-33.

⁶⁰ European Union, European Court of Human Rights and Europarat (n 47). 31.

permanent and include an *inter-partes* procedure⁶¹. These characteristics mainly refer to the verification of the existence of a fair trial and also coincide with the parameters of the UNGP.

Therefore, the method to evaluate the mapped mechanisms can consist of identifying obstacles, failures or gaps at the legal, financial, administrative or procedural level that bloc ‘effective’ access to legal remedies. This analysis has been performed by the UN, CoE and EU documents, mentioned above⁶², that address the generalized concerns about access to remedy for business-related human rights abuses. An *ex-ante* legal analysis of these criteria allows to assume that countries with a solid institutional organisation, such as most of the EU member states fulfil these criteria because the state-based mechanisms are created by the state, according to constitutional, legislative and administrative procedures and therefore, they enjoy formal legitimacy. *Ex-ante* legal analysis may also allow to assume that they are accessible and predictable for victims. However, the application of these criteria does not give any indication about whether they are effective in practice, i.e. whether they are being triggered without major problems and with successful results.

Some indicative examples of when *ex ante* legal analysis can shed light on the effectiveness of the mapped mechanisms to grant access to justice are the following: First,

⁶¹ I.e. whether the claimant and the defendant have access to documents, can present arguments and evidence and can argue against documents and evidence filed by the other party European Union, European Court of Human Rights and Europarat (n 47). 32-3.

⁶² These are the reports of UN Human Rights Council (HRC), ‘Accountability and Remedy Project I (ARPI)’ (n 16). UN Human Rights Council (HRC), ‘Accountability and Remedy Project II (ARP II)’ (n 17). Council of Europe (n 22), the EU Agency for Fundamental Rights -FRA (n 27) and the European Commission Staff Working Document on “Implementing the UNGP” SWD, 2015, 144 final.

European case law has used ‘effectiveness’ criteria to evaluate whether non-judicial mechanisms provide access to justice⁶³; they refer, first, to their ability to provide binding decisions, the possibilities to challenge arrangements that violate human rights, and the possibility to suspend the prescription deadline of judicial actions during the settlement procedure; second, whether they are affordable to anyone, and third, whether interim measures can be taken in exceptional cases. However, other criteria that may indicate the weaknesses of these mechanisms, such as whether they grant integral compensation (just satisfaction) cannot be evaluated by *ex-ante*, abstract and pure disciplinary legal analysis. In fact, the analysis of these procedural rules can flag the gaps and obstacles at the level of regulations but the evaluation of the effectiveness in practice should be performed *ex-post* and by means of empirical analysis⁶⁴. Moreover, the fragmentation of non-judicial mechanisms that provide similar and/or overlapping remedies, justified by the specialisation/mandate of public entities, can reduce the possibilities to clarify whether they can provide ‘effective’ remedy.

Second, regarding the judicial mechanisms, the criteria to verify whether courts are impartial and independent are usually considered together, because independence is linked to the structure of the court and impartiality of the judges themselves⁶⁵. The ECtHR and the CJEU mostly refer to mechanisms to appoint justices or to the terms of office that can elucidate the possibilities to have external pressure. Here the effectiveness of the

⁶³ European Union, European Court of Human Rights and Europarat (n 47). 48-49. EU Agency for Fundamental Rights -FRA (n 27). 54.

⁶⁴ Andreassen, Sano and McInerney-Lankford (n 3). 1-5.

⁶⁵ European Union, European Court of Human Rights and Europarat (n 47). 34-39.

judiciary to grant access to justice is linked to legislation against corruption⁶⁶. This is relevant for business and human rights because international rules on bribery and corruption impose obligations to states to regulate extraterritorial conduct of corporate groups and their relations with the state, including the judiciary⁶⁷. An *ex-ante* legal analysis can establish some benchmarks related to the fight against corruption, by looking at e.g. whether the state signed and ratified international treaties fighting corruption, and the reservations or withdraws presented to these treaties. The reports of the monitoring organisms of these conventions can provide additional information; this is the case of the periodical evaluations to the OECD Anti-Bribery Convention, whose enforcement is evaluated by looking at resources earmarked for its enforcement, and at the availability of statistical information⁶⁸.

Third, *ex-ante* legal analysis of whether judicial mechanisms grant a fair and public trial can be supported by criteria mostly provided by European case law (for the Belgian case). Fair trial can be evaluated by looking at whether the regulations provide ‘equality of arms’ between the parties’; whether judgments are reasoned; and whether the right to adversarial proceedings (i.e. the right to know, analyse, file and contradict

⁶⁶ Cf. The Global compact, UNGP, GRI initiative, OECD guidelines and different NGOs reports. At the Eu level, the TEU (29) is the legal basis of EU anti-corruption policies in areas such as organised crime, tax deductibility of bribes and the regulation of public procurement, accounting and auditing, external aid and assistance. The most important EU initiative has been the European Anti-Fraud Office (OLAF) but this office does not deal with corruption of businesses. Cf. http://ec.europa.eu/anti-fraud/home_en

⁶⁷ Skinner and others (n 29). 59-60.

⁶⁸ Transparency International, ‘Exporting Corruption Progress Report: Assessing Enforcement of the OECD Convention on Combating Foreign Bribery’ <http://www.transparency.org/whatwedo/publication/exporting_corruption_progress_report_2013_assessing_enforcement_of_the_oecd>. 9-11.

evidence during the process) is granted⁶⁹.

Finally, as the affected persons are frequently a group or a community, *ex-ante* legal analysis of the effectiveness of procedures in business and human rights abuses can also identify whether the available mechanisms allow to present collective claims, because they are considered as a cheaper and powerful claim⁷⁰. In addition, whether other stakeholders such as NGOs or trade unions can have standing to bring claims on behalf of victims can also be inquired⁷¹.

Although *ex-ante* legal analysis can elucidate the previous issues, it fails in verifying the effectiveness of state-based mechanisms to provide effective access to remedy for victims. Most of the evaluation criteria proposed by the UNGP refer to legal regulations but also to their effectiveness, and this makes that the analysis should jump from one disciplinary method to others. When looking at most of the business and human rights literature on access to remedy, the lack of a comprehensive and interdisciplinary empirical analysis that adopts an *ex-post* perspective is remarkable. Some empirical evidence can be found in previous evaluations of the effectiveness of national judiciaries in providing effective access to justice. These assessments use criteria that, in general, are the ones referred to by the UNGP but that do not refer to business-related human

⁶⁹ European Union, European Court of Human Rights and EuroParat (n 47). 40-48.

⁷⁰ This perception should be approached with caution as well because an empirical study on the role of amicus curiae practice of human rights NGOs before the ECtHR showed discouraging results (den Eynde 2013). Council of Europe (n 22). At 39. EU Agency for Fundamental Rights -FRA (n 27). 36.

⁷¹ EU Agency for Fundamental Rights -FRA (n 27). EU Multi Stakeholder Forum on CSR 2015. UN Human Rights Council (HRC), 'Accountability and Remedy Project I (ARPI)' (n 16).

rights claims⁷². For instance, the EU periodically evaluates the effectiveness of the judiciary of member states in providing due process. This “EU Justice Scoreboard”⁷³ uses multiple indicators such as the efficiency of proceedings (length, clearance rate⁷⁴, caseload⁷⁵) and the quality of justice systems (training, budget, human resources, legal aid, gender balance in the judiciary etc.). These indicators show the difficulties to gather information and the impossibility to generalise the results, because these depend on multiple factors: the jurisdiction involved; the complexity and relevance of the claim, the conduct of the parties, of judges and of involved authorities etc.⁷⁶. Even the EU Scoreboard relies on previous empirical studies for some criteria such as the independence of the judiciary⁷⁷ or the length of certain procedures⁷⁸. This shows that a generalised evaluation of the effectiveness of state-based mechanisms in business and

⁷² The exception is perhaps the analysis of the effectiveness of the National Contact Points that apply the OECD guidelines mediations mechanism, but they also had problems with the availability of data. Cf. C Daniel and others, ‘Remedy Remains Rare: An Analysis of 15 Years of NCP Cases and Their Contribution to Improve Access to Remedy for Victims of Corporate Misconduct’ <www.oecdwatch.org>. John Gerard Ruggie and Tamaryn Nelson, ‘Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementations Challenges’ (2015) 22 *Brown J. World Aff.* 99. OECD, ‘Implementing the OECD Guidelines for Multinational Enterprises: The National Contact Points from 2000 to 2015’ <<http://mneguidelines.oecd.org/15-years-of-ncps.htm>>.

⁷³ This study focuses on civil, commercial and administrative jurisdictions. Cf. The European Union, ‘The 2015 EU Justice Scoreboard. Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions COM(2015) 116 Final’ <http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2015_en.pdf>.

⁷⁴ This is understood as the ratio of the number of resolved cases over the number of incoming cases.

⁷⁵ The amount of non-resolved cases.

⁷⁶ European Union, European Court of Human Rights and Europarat (n 47). 149-140.

⁷⁷ This criterion was evaluated using the Global Competitiveness Report of the World Economic Forum (WEF)). The European Union (n 73).

⁷⁸ Some data for the insolvency procedures were taken from the Doing Business Report of the World Bank.

human rights claims is almost unfeasible because it would involve multiple areas and jurisdictions: tort law, criminal procedures, insolvency processes, judicial review, public procurement processes, consumer protection etc. The EU scoreboard also evaluated state-based non-judicial mechanisms by measuring whether member states actively promote Alternative Dispute Resolution (ADR) in civil, commercial, labour and consumer disputes and provide incentives for their use. In this exercise *ex-ante* legal analysis⁷⁹ and *ex-post* empirical analysis were mixed⁸⁰.

Regarding judicial independence and impartiality, it is not clear how NGOs and critical academic articles that address corruption of businesses and/or state officers as an important barrier in the context of business and human rights, come to this conclusion⁸¹. At first sight, they refer to concrete cases or they rely on previous empirical studies. One of them is the Business Anti-Corruption Portal of Gan Integrity⁸² that evaluates European judiciaries but it also relies on previous studies which affects its reliability⁸³. Another one is the Corruption Perception Index (CPI), published yearly by Transparency International

⁷⁹ The incentives were evaluated by means of an *ex-ante* legal analysis: whether legal aid covers costs and refunds court fees in ADR processes; whether victims can act directly without the intervention of a lawyer, whether judges can act as mediators and whether the ADR process is coordinated in courts. The European Union (n 73).

⁸⁰ The European Union (n 73).

⁸¹ Amnesty International (n 32). 191. Van Der Plancke, Van Goethem and Wrzoncki (n 5). Pigrau Solé and others (n 32). Skinner and others (n 29).

⁸² GAN is a private initiative that provides compliance software to corporations to manage regulatory and legal compliance. GAN Integrity Inc, 'Compliance Resources | Business Anti-Corruption Portal' <<http://www.business-anti-corruption.com>> accessed 20 November 2017.

⁸³E.g. the World Economic Forum Report on Competitiveness or Transparency International, etc. Cf. also Re-Bel initiative, 'Corruption in Today's Belgium' <<http://www.rethinkingbelgium.eu/rebel-initiative-files/ebooks/ebook-17/Re-Bel-e-book-17.pdf>>. CoE /Greco RC4, 'Fourth Evaluation Round Corruption Prevention in Respect of Members of Parliament, Judges and Prosecutors. Compliance Report Belgium'.

(TI), which is the most used despite the fact that it is based on perceptions. This may explain why various studies show contradictory conclusions⁸⁴. In addition, the perception varies depending on the stakeholder.

4.2 *Effective remedies for business and human rights abuses*

The second part of the analysis of the effectiveness of available state-based remedies refers to whether they, independently of the procedural concerns, can grant ‘effective’ remedy; this is, whether they redress or duly repair the damage caused by the abuse and correspond to the second component of the right to access to justice:⁸⁵. Here, the *ex-ante* legal analysis addresses the scope of the remedy concept explained in part three, and the kind of remedy the mapped mechanisms provide. The method used for this purpose was by classifying remedies by order of satisfaction for victims, i.e. the most effective mechanism is the one that provides the most complete satisfaction⁸⁶, in accordance to the Van Boven Bassiouni Principles. As a result, the most effective remedy is restitution, *restitutio in integrum*, which is also the ‘primary objective of reparation’⁸⁷.

Compensation is the second most effective remedy to be granted by the offender and/or by the state when it fails to control or to regulate business activities or when there is a state-business nexus. Other terms are employed for this kind of remedy such as

⁸⁴ For the case of Belgium cf. Re-Bel initiative (n 83). 14.

⁸⁵ Remedy is used here as synonymous to reparation, even if in some literature and in other languages remedy is used as synonymous to procedural remedy. Therefore, effective remedy may consist of restitution (redress), compensations, injunctions, sanctions or guarantees of non-repetition International Commission of Jurists (n 34). 99.

⁸⁶ From a legal perspective, the duty of reparation arises when human rights have been violated, independently of the consequences of the violation. International Commission of Jurists (n 34). 38.

⁸⁷ International Commission of Jurists (n 34). At 113-8. ECHR (Art.41).

indemnity, reparation or even just satisfaction.⁸⁸ However, once determined that compensation can be awarded, its *ex-ante* effectiveness depends on whether it can provide a comprehensive rehabilitation, which involves three dimensions: physical, psychological and social⁸⁹. The *ex-ante* legal analysis remains short because there are other issues at stake that cannot be addressed by it: first, when the remedy provided for non-pecuniary, immaterial or moral damages is satisfactory. In that case it could be checked whether they can be granted, but then the problem is that in some jurisdictions, such as in the ECtHR before, they are not automatically awarded and therefore, the result will depend on the quality of the claim⁹⁰. Second, the seriousness of the violation, determined by ‘the intensity, consequences and duration of the violation’⁹¹, influences the qualification of the compensation as satisfactory.

The third category of remedies are injunctions because they seek to cease the abuse to avoid additional or more serious damages. The effectiveness of the mechanisms depends on whether they provide this remedy and, on their capacity, to cease the abuse on time to avoid more serious damages, without violating the human rights of the offender or of

⁸⁸ For the concrete references of these elements in a human rights context, cf. International Commission of Jurists (n 34). 123; 128-38). European Union, European Court of Human Rights and Europarat (n 47). 91.

⁸⁹ ECHR, Art. 41. Szilvia Altwicker-Hamori, Tilmann Altwicker and Anne Peters, ‘Measuring Violations of Human Rights: An Empirical Analysis of Awards in Respect of Non-Pecuniary Damage Under the European Convention on Human Rights’ (Social Science Research Network 2015) SSRN Scholarly Paper ID 2631404 <<https://papers.ssrn.com/abstract=2631404>> accessed 6 November 2017. 6. International Commission of Jurists (n 34). 145 and 154.

⁹⁰ Altwicker-Hamori, Altwicker and Peters (n 89). 14.

⁹¹ Oliver Dörr, Entschädigung und Schadensersatz, in Konkordanzkommentar Zum Europäischen Und Deutschen Grundrechtsschutz 2148, 2174 (Rainer Grote & Thilo Marauhn eds., 2d ed. 2013) quoted by Altwicker-Hamori, Altwicker and Peters (n 89). 26.

implicated third persons⁹², but the latter needs a case by case *ex post* analysis.

Fourth, sanctions are considered *ex-ante* as an effective remedy if the mechanism can apply them in accordance to the legal order⁹³. In the framework of business-related human rights abuses, their effectiveness is recognized if they punish businesses, cease the abuse and dissuade future violations. This multipurpose character makes that their nature is also diverse; they can be financial penalties (fines) and/or non-financial sanctions, such as orders for restitution, rehabilitation of victims and/or resources, satisfaction (e.g. public apologies) and guarantees of non-repetition (e.g. dissolution of corporations, withdrawal of licenses, destitution of directives, etc.). The ARP I⁹⁴ proposed some criteria to evaluate their effectiveness by checking whether the sanction is proportional to the gravity of the abuse and the damage; whether the degree of culpability of the business is considered; whether non-repetition can be granted; whether gender and vulnerable groups concerns are taken into account, and whether the state has competence to monitor its implementation. Again, this evaluation should be performed *ex-post* and on a case per case basis.

Finally, guarantee of non-repetition is the fifth category because it does not focus necessarily on actual victims but rather on potential victims. This remedy is linked to sanctions because the non-repetition of the abuse cannot depend on the will of the business but it is rather the consequence of sanctions such as dissolution of corporations or withdrawal of licenses. Structural reforms can grant non-repetition as well by

⁹² European Union, European Court of Human Rights and Europarat (n 47). 101.

⁹³ Cf. judgment 2017-750 of the Constitutional Council of France struck down part of the law that stipulates the duty of care of parent corporations, because the sanctions were not defined in detail.

⁹⁴ UN Human Rights Council (HRC), ‘Accountability and Remedy Project I (ARPI)’ (n 16). At 16.

forbidding abusive practices or by ordering strict control on its development, by means of e.g. impact assessments. An *ex-ante* legal analysis can elucidate whether the mapped mechanisms can provide this remedy, but the effectiveness depends again on the *ex-post* empirical case per case assessment.

As in the previous sub-section, the evaluation of the effectiveness of remedies requires an *ex-post* empirical assessment to provide robust conclusions. The first aspect that cannot be analysed by disciplinary *ex-ante* legal analysis is the probability to obtain these remedies. One option that remains in the legal field is a case law analysis to verify how business-related human rights claims are solved and this should include claims that are not necessarily framed as human rights claims. However, this should ideally be conducted as case study of a specific jurisdiction, or even a court. Two empirical findings reinforce this conclusion.

First, an empirical study which analysed when a compensation can be considered as just satisfaction in the judgments granted by the ECtHR pointed to the data collection difficulties because different types of remedies can redress different types of violations of different type of rights at stake.⁹⁵ On this second level of analysis, the effectiveness would depend on the particular circumstances and on the human right protected, and therefore, any *a priori*, abstract and generalised evaluation remains at speculative.

Second, empirical research on sanctions for business-related human rights abuses has found some evidence that even if monetary sanctions for corporations are the first-choice, they are unsatisfactory for gross human rights abuses because they lack deterrence or

⁹⁵ Altwicker-Hamori, Altwicker and Peters (n 89).

public condemnation of the business activities involved.⁹⁶ Non-monetary sanctions are more efficient to guarantee non-repetition of abuses. Within that category, publicity of sanctions has a dissuasive effect, because business care about their reputation, which is related with self-interest and ethical concerns. The probability of receiving negative publicity and losing reputation is an incentive to respect human rights⁹⁷. In Belgium, the Barometer on CSR Belgium⁹⁸ also found that Belgian businesses are increasingly concerned with the respect for human rights in their value chains, mainly for reputational reasons⁹⁹.

5 Conclusions

This article presented the methodological challenges to identify, map and evaluate state-based non-judicial and judicial mechanisms able to provide access to remedy to victims of business-related human rights abuses in Belgium. The main findings are summarised as follows: first, these mechanisms are the ordinary mechanisms of national legal systems which are triggered by these claims framed in terms of hard law and non-binding

⁹⁶ Zerk (n 50). 85.

⁹⁷ Judith Van Erp, 'Reputational Sanctions in Private and Public Regulation' (2008) 1 *Erasmus Law Review* 145. At 161. This is closely related to the concept of responsive regulation that seeks to influence behaviour more through incentives than through sanctions. Robert Baldwin and Julia Black, 'Really Responsive Regulation' (Social Science Research Network 2008) SSRN Scholarly Paper ID 1081748 <<https://papers.ssrn.com/abstract=1081748>> accessed 7 November 2017. John Braithwaite, 'The Essence of Responsive Regulation' (2011) 44 *UBC Law Review* 475. In the same way, an incentive can be the protection of reputation.

⁹⁸ BASF Deloitte Elia Chair on Sustainability and others, '2015 Corporate Responsibility Barometer for Belgium: On the Road towards a Sustainable Economy in Belgium.' <https://cdn.uclouvain.be/public/Exports%20reddot/iag/documents/150923_2015CRBarometer_ENG.pdf>.

⁹⁹ On this issue, the literature on responsive regulation (Braithwaite 2011) was particularly useful to analyse sanctions and incentives for business.

international guidelines. This creates challenges for victims who seek remedy but also for national authorities who apply hard law (the law in force and available case law). Moreover, the lack of a clear definition and consistency in the terms used increases the difficulties. Second, the methodology and methods to tackle this third pillar of the UNGP are necessarily interdisciplinary: *Ex-ante* legal research is relevant at the level of regulatory design and punctual enforcement. However, this approach cannot look at whether they are effective in practice. For instance, most of the state-based mechanisms can provide redress in theory, but in practice, this might not be the case because if the damage is irreparable, victims cannot return to the situation prior to the abuse. In addition, remedies do not necessarily reach just satisfaction for victims and sanctions may grant non-repetition but they do not necessarily compensate actual victims. Fines go to the public budget instead of going to victims, and offenders can find ways to restart business activities without taking measures to protect and respect human rights. Neither can *ex-ante* legal analysis check the plausibility, frequency, patterns, and intensity of the granted remedies or assess whether specific actions, such as mechanisms that publicise bad practices that may undermine business reputation, are more effective than long judicial processes with structural procedural obstacles unlikely to be solved in the short run. Therefore, *ex-post* empirical methods are unavoidable.

Third, the evaluation criteria, proposed by the UNGP are in line with case law from international courts such as the ECtHR or the CJEU, but they mainly refer to the quality of the national institutions and not to the remedy. These criteria cannot be exclusively analysed from an *ex-ante* legal perspective either. The effectiveness of the mechanisms should be evaluated by using *ex-post* empirical methods which requires reliable data and data collection which is also a challenge.

Finally, there is a clear difficulty in reaching robust conclusions about the ability of national legal systems to provide ‘effective’ access to ‘effective’ remedy, but it is even more difficult to do it by only using a disciplinary *ex-ante* legal research. This article provides a balanced view on the claims of governments that they provide the requested mechanisms to assure access to effective remedy to victims of business-related human rights abuses, on the one hand, and the systematic criticism towards these national legal systems and their (in)capacity to provide relief to victims, on the other.