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SCHOLARLY ARTICLE

Creating an Effective Mediation Scheme for Business-Related Human Rights Abuses: The Case of Ukraine

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Abstract

Non-judicial remedies for corporate human rights abuses have a viable and complementary role to judicial remedies in mature jurisdictions, although in Ukraine the 'bouquet' of effective remedies is more of a still-life. The national mediation community is gaining momentum and the authors argue that mediation may take place within state-based non-judicial remedies when institutionalized by the office of the Ombudsman. The objective of this article is to scrutinize the rule of law, access to justice, and the effectiveness criteria of the UNGPs with regard to mediation. The authors conclude that mediation can meet all of the effectiveness criteria requirements and special effort should be devoted to addressing the challenges of power imbalances between parties, the confidential nature of mediation and the public demand for transparency, to ensure that mediation outcomes are in accord with internationally recognized human rights. Based on the findings, the authors suggest that a state-based business and human rights mediation scheme, in line with the UNGPs' effectiveness criteria, should have its own three pillars, namely, accessibility, availability and awareness, with quality assurance as its cornerstone.

Keywords: access to justice; access to remedy; mediation; UNGP effectiveness criteria; remedy

I. Introduction

The United Nations Guiding Principles on Business and Human Rights[1] (UNGPs) endorsed by the Human Rights Council in 2011 have launched extensive work both by practitioners and academics in sharpening the human rights protection framework. The framework, premised on three pillars to 'protect, respect and remedy' human rights violations, has been and will be questioned for its effectiveness, the cornerstone of the latter being the third pillar. The 'remedy' pillar is, in its turn, tripartite based on state-based judicial mechanisms (Principle 26), state-based non-judicial grievance mechanisms (Principle 27), and non-state-based grievance mechanisms (Principle 28). Since 2016, key actors in the business and human rights (BHR) sphere have focused on the third pillar, conducting substantial and

[1] 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).

regular analysis of the effectiveness of judicial and grievance mechanisms, their strengths and weaknesses, the ways of coordinating and reinforcing each other, and the third pillar's ability to meet the criteria of the rule of law and access to justice. Non-judicial remedies, believed and, in some cases, already proven, to be able to compensate for some deficiencies of state-based judicial mechanisms, nevertheless bear certain risks of not meeting the effectiveness criteria and the rule of law standards.

The bouquet of remedies generally envisaged by the UNGPs differs in its composition from one jurisdiction to another, depending on national context and legal traditions. A particular type of remedy may appear to be of different relevance, suitability and effectivity, and these circumstances force states, businesses and civic society to compose their national bouquet. So far, Ukrainian state bodies have been reluctant to engage in building an effective BHR framework.[2] Ukraine faces challenges connected with rule of law development, in particular, access to justice barriers, corruption, lack of trust in government and courts, etc. Civil-law remedies against business-related human rights abuses are quite scarce, encompassing only general tort liability for inflicting property and non-property damage. In practice, there are no special effective procedures against human rights violations perpetrated by business corporations.[3]

Although the 'bouquet' of effective remedies in Ukraine seems to be a still-life, we argue that mediation may breathe life into the bouquet. Mediation has earned its place within BHR non-judicial mechanisms in both mature and developing jurisdictions, providing enough experience which has been observed, and reflected in numerous reports and research articles. This article contributes to the debate on effective remedies for BHR violations, focusing on mediation, and hypothesizes that the effectiveness criteria of the UNGPs may be met within a BHR mediation scheme, when institutionalized by a National Human Rights Institution.

The article conducts a literature review as a basis for the analytical framework underlying the conceptual legal analysis. Furthermore, it examines empirical materials of completed mediation procedures in business-related human rights disputes to assess how mediation in BHR disputes works in practice.

The article is set up as follows. The authors first explore alternative dispute resolution methods and mediation within the broader concept of access to justice, which is an integral component of the rule of law, and query the focus on access to court barriers in the BHR area (Section II). This is followed by an analysis of mediation among the BHR non-judicial remedies of key international actors. The central part of the article investigates how every single UNGP effectiveness criterion (legitimacy, accessibility, predictability, equitability, transparency, rights compatibility, and a source of continuous learning) may be met by a mediation scheme. The authors discuss under what conditions mediation can constitute a viable venue to remedy and contribute to access to an effective remedy (Section III). In the following section, the authors describe recent developments in the Ukrainian mediation community and analyse one of the BHR-mediated cases, which took place in 2021. The article also elaborates on the building blocks of a BHR mediation scheme to enable its availability, accessibility, quality, and awareness within society (Section IV). Section V concludes the article.

[2] Olena Uvarova, *Business and Human Rights: National Baseline Assessment* (Kharkiv and Kyiv: Yaroslav Mudryi National Law University and the Ministry of Justice of Ukraine, 2019), https://minjust.gov.ua/files/general/2019/07/10/20190710170838-51.pdf (accessed 1 April 2022).

[3] Ibid, 22–23.

II. Access to Remedies in BHR Cases in Terms of Access to Justice: Procedural Pluralism Perspective

The right to access to justice and effective remedy is recognized at the international level as a fundamental one.[4] There are two main interpretations of access to justice – narrow and broad. The former focuses primarily on access to courts and can be explained through the idea of 'procedural centralism',[5] which considers the court to be the dominant institution among other methods of dispute resolution and the centre of the 'dispute resolution world'.[6] The broad interpretation, instead, is based on 'procedural pluralism',[7] which accepts a variety of dispute resolution methods, not only judicial and quasi-judicial (such as arbitration), but also consensual ones (such as negotiation, mediation, conciliation, etc.).[8] Under this view, alternative dispute resolution (ADR) methods become an 'appropriate dispute resolution method' for each particular case concerning the nature of the dispute, its parties, what is at stake for parties, etc. In this context, Bingham emphasizes that the existence of a dispute resolution system in civil cases, which allows a dispute to be considered without excessive costs and delays, is one of the elements of the rule of law.[9] Such a system refers not only to the judicial guarantees of a fair trial but also to alternative ways of dispute resolution, which are better to call 'appropriate' (additional) ways of resolving disputes. Hence, the courts should be considered as the last resort for disputants in case of ineffectiveness of other methods.[10]

The broad interpretation of access to justice can be seen in the practice of European human rights institutions such as the European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ). The European Convention on Human Rights (ECHR) enshrines two separate rights of procedural nature – the right to a fair trial (article 6 ECHR) and the right to an effective remedy (article 13 ECHR) – while the European Union Charter of Fundamental Rights proclaims a right to an effective remedy before a tribunal (article 47). In interpreting the above-mentioned notions, the European Union Agency for Fundamental Rights (FRA) endorses an even broader meaning of access to justice and recognizes three 'paths to justice': (1) procedures, which can help to protect the violated rights; (2) courts and administrative organs, which can protect the rights and resolve disputes, and (3) ADR methods.[11]

In this context, access to remedy in BHR disputes should be deemed as a part of the international access to justice standard. However, the concept of access to remedy in BHR cases within the access to justice context calls for clarification of the term 'remedy', which can be interpreted in different ways. In the commentary to Principle 25, substantive and procedural aspects of the access to effective remedy are distinguished. On the one hand, a remedy can include 'apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines),

[4] In article 8 of the Universal Declaration of Human Rights, article 14 of the International Covenant on Civil and Political Rights, para 1 article 6, article 13 of the ECHR, article 47 of the European Union Charter of Fundamental Rights, etc.

[5] John M Lande, 'Getting the Faith: Why Business Lawyers and Executives Believe in Mediation' (2000) 5 *Harvard Negotiation Law Review* 137, 147.

[6] John M Lande, 'Shifting the Focus from the Myth of the Vanishing Trial to Complex Conflict Management Systems, or I Learned Almost Everything I Need to Know about Conflict Resolution from Marc Galanter' (2000) 6:2 *Cardozo Journal of Conflict Resolution* 191, 199.

[7] Lande, note 5, 147.

[8] Ibid, 149.

[9] Tom Bingham, *Rule of Law* (London: Penguin, 2011) 85.

[10] Ibid, 85–86.

[11] European Union Agency for Fundamental Rights, *Handbook on European Law Relating to Access to Justice* (Luxembourg: Publications Office of the European Union, 2016).

as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition'.[12] This list clearly relates to the substantive aspect of the remedy. On the other hand, 'remedies' may also denote concrete procedures or mechanisms through which we can protect our rights. In the UNGPs, such procedures are called 'grievance mechanisms'.[13] This term reflects the procedural aspect of the remedy. From the procedural perspective, the right to access to remedy in BHR cases can be seen as access to different types of judicial and non-judicial dispute resolution procedures (grievance mechanisms) which can be used to protect such rights. This second aspect is the focal point of this article because the existence of effective procedures plays a crucial role in the protection of human rights and in obtaining any substantive form of remedy.

Remedy effectiveness is a core issue for the right to access to justice in BHR cases. The ECtHR evaluates common criteria of remedial effectiveness in its case law addressing article 13 ECHR. The remedy is considered effective if it is available and sufficiently certain.[14] Also, the remedy must be effective in practice[15] and its effectiveness does not depend on the certainty of a favourable outcome for the applicants.[16] The ECtHR does not specify any particular types of remedies: the state has the right to choose the type of remedy or set of remedies deemed appropriate and suitable to protect rights in a particular case, taking into account the significance of the substantive right of the applicant, the circumstances of a particular case, the political context, etc.[17]

The UNGPs state that 'effective judicial mechanisms are at the core of ensuring access to remedy'.[18] The effectiveness of judicial remedies should be evaluated by taking into account their compatibility with notions regarding the right to a fair trial, enshrined in paragraph 1, article 6 ECHR, which is considered to be *lex specialis* to article 13 ECHR.[19] Judicial remedies can be civil, administrative and criminal by nature. In this article, we will not cover administrative and criminal proceedings but instead will analyse the civil aspects of judicial remedies, and will compare them with non-judicial mechanisms, in particular, mediation.

The right to a fair trial in civil cases includes three groups of guarantees – access to courts, institutional guarantees (an independent and impartial tribunal, established by law) and procedural guarantees (a fair and public hearing, reasonable time of a trial, execution of court decisions, etc.).[20] Surveys show that courts are considered to be the most popular path to justice in BHR cases in spite of the obvious problems with effectiveness, which can be described through the well-known civil procedural concept of access to court barriers. Access to court barriers are divided into different groups, namely, legislation, procedural, practical, financial.[21]

[12] Human Rights Council, note 1, 27.

[13] Ibid, 27.

[14] *McFarlane v Ireland* 31333/06, §114 (ECHR 10 September 2010).

[15] *Kudła v Poland* 30210/96, § 152 (ECHR 26 October 2000).

[16] Ibid, §157.

[17] *Halford v the United Kingdom* 20605/92, § 64 (ECHR 25 June 1997); note 18, §114; note 19, §§ 152, 157.

[18] Human Rights Council, note 1, 28.

[19] *Kudła v Poland*, note 15, § 139.

[20] David Harris et al (eds.), *Law of the European Convention on Human Rights*, 3rd edn (Oxford: Oxford University Press, 2014) 373–490; Cristoph Grabenwarter, 'Fundamental Judicial and Procedural Rights' in Dirk Ehlers (ed.), *European Fundamental Rights and Freedoms* (Berlin: De Gruyter Recht, 2007) 151, 162–164; Vyacheslav Komarov and Tetiana Tsuvina, 'The Impact of the ECHR and the Case Law of the ECtHR on Civil Procedure in Ukraine' (2021) 1:9 *Access to Justice in Eastern Europe* 79, 88–90.

[21] Human Rights Council, note 1, 26; European Union Agency for Fundamental Rights, *Business and Human Rights – Access to Remedy* (Luxembourg: Publications Office of the European Union, 2020) 6.

One of the main barriers is of a legislative nature and is connected with the lack of regulation in this area or the fragmented or limited scope of such regulation. It is interrelated with procedural barriers – the absence of special procedures and rules of procedural regulation. According to the UNGPs, the barriers include 'inadequate options for aggregating claims or enabling representative proceedings (such as class actions and other collective action procedures), and this prevents effective remedy for individual claimants'.[22] Class or collective actions are recognized as an effective remedy for such types of cases, but the latest surveys show that not all European jurisdictions provide such a remedy at the national level. Moreover, in some jurisdictions, even though such a remedy does exist, it can be used only in a particular situation, such as in the fields of consumer or environmental protection.[23] Thus, the scope of collective redress in EU countries is not homogeneous, which diminishes the effectiveness of judicial remedies in BHR cases. Also, the effectiveness of the judicial remedy is defined to a great extent by the national rules of evidence, especially as it concerns the possibility to obtain evidence and access to the disclosure procedure for claimants and their representatives as well as rules on the burden of proof. In general, in tort law, the burden of proof lies on the claimant. However, for BHR abuses, such situations often make the remedy illusory.[24] Last, but not least, a lot of BHR cases become even more complicated because of their cross-border character. Under these circumstances, jurisdiction issues can constitute a serious procedural barrier, which can cause trial delays. In some cases, especially connected with supply chains, the court decision on jurisdictional issues may take several years.[25] For tort damages, the time of a trial has a decisive role because of the significance of the case for the claimants. That is why an unreasonably long trial time can also be recognized as a procedural barrier to access to a judicial remedy.

Practical barriers are connected with a lack of information on such remedies, as even if they exist, the problems of so-called 'diffuse interests' and the inequality of arms between the parties in such a category of cases present a challenge. 'Diffuse interests' were described by Cappelletti and Garth in the 1970s as:

> 'collective or fragmented interests such as that in clean air or in the enforcement of consumer protection measures; the basic problem they present – the reason for their diffuseness – is that either no-one has a right to remedy the infringement of a collective interest or the stake of any one individual in remedying the infringement is too small to induce him to seek enforcement.[26]

Due to these 'diffuse interests', it is difficult to organize all interested persons and develop a litigation strategy. The situation is further aggravated by resource inequality between parties. For example, in cases of corporations versus groups of ordinary people (workers, consumers, victims of discrimination, etc.), corporations have huge resources and claimants

[22] Human Rights Council, note 1, 29.

[23] European Union Agency for Fundamental Rights (2020), note 30, 62–67; EUR-Lex, 'Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC', https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32020L1828 (accessed 1 April 2022); Herbert Smith Freehills, 'The Representative Actions Directive: Get Set for a New Wave of European Class Actions', https://www.herbertsmithfreehills.com/insight/the-representative-actions-directive-get-set-for-a-new-wave-of-european-class-actions (accessed 1 April 2022).

[24] Ibid, 76–78.

[25] Ibid, 13–14; European Law Institute, *Business and Human Rights: Access to Justice and Effective Remedies (with input from the EU Agency for Fundamental Rights, FRA)* (Vienna: European Law Institute, 2022).

[26] Mauro Cappelletti, Bryant Garth and Nicolò Trocker, 'Access to Justice, Variations and Continuity of a World-Wide Movement' (1976) 40 *Rabels Zeitschrift Für Ausländisches und Internationales Privatrecht* 664, 680.

are always in a worse position due to economic and psychological reasons or a lack of knowledge, etc.

Financial barriers refer to the costs of litigation and the lack of legal aid schemes in the BHR area. Legal fees, court costs, costs for legal representation as well as expert evidence in complicated cases can also constitute barriers to access to judicial remedy because of a lack of funds. That is why it is vitally important to introduce legal aid schemes at a national level for such types of cases, as well as other rules on court fees that could help ordinary people overcome said barriers (e.g., third-party funding schemes, success fees, etc.).

The above-mentioned barriers to access to court are more profound in Eastern European countries because of the problems in the judicial sector in the region. For example, in Ukraine, we can see a lack of regulation of the BHR area, the absence of class or collective redress mechanisms, effective court-fees management rules (third-party funding schemes, success fees, etc.), and legal aid schemes for such types of cases. Other complications lie with the corruption risks and the stagnation of the judicial system caused by the blocking of the judges' evaluation process by the high qualification commission of judges for four years. All these aspects put in question the effectiveness of judicial remedies and open the discussion on alternatives, to them, known as a 'bouquet of non-judicial remedies', which can be more appropriate for such types of cases.

III. The Bouquet of Non-Judicial Remedies

Mediation Within Non-Judicial Mechanisms

The UNGPs envisage the following three types of mechanisms to provide access to effective remedy in business-related human rights abuses: state-based judicial mechanisms, state-based non-judicial grievance mechanisms, and non-state-based grievance mechanisms. Principle 27 stipulates that states should provide effective and appropriate non-judicial grievance mechanisms to complement judicial remedies. The commentary for Principle 27 provides for 'mediation-based, adjudicative or other culturally appropriate and rights-compatible processes – or involve some combination of these – depending on the issues concerned, any public interest involved, and the potential needs of the parties'.[27]

Mediation as a dispute resolution mechanism finds its place within state-based non-judicial grievance mechanisms and non-state-based grievance mechanisms. There are numerous examples of mediated BHR disputes[28] and one recent example from Ukraine will be analysed further. Moreover, well-known mediation bodies have started to focus on BHR mediation.[29]

It is hard to find research on BHR remedies that would not point out the important role of non-judicial remedies and praise their accessibility, swiftness, affordability, and long-lasting

[27] Human Rights Council, note 1, 30.

[28] Caroline Rees, 'Grievance Mechanisms for Business and Human Rights: Strengths, Weaknesses and Gaps', John F. Kennedy School of Government, Corporate Social Responsibility Initiative, Working Paper No. 40 (January 2008); Victoria Harrison, 'Mediation: An Effective Tool in the Resolution of Human Rights Disputes?' *Unilag Law Review* (22 January 2021), https://unilaglawreview.org/2021/01/22/mediation-an-effective-tool-in-the-resolution-of-human-rights-disputes/ (accessed 1 April 2022); Victor Schachter, 'Human Rights, the Rule of Law, and Mediation' (2017) 23:4 *Dispute Resolution Magazine* 26–29; Sara L Seck, 'Business, Human Rights, and Canadian Mining Lawyers' (2015) 56:2 *Canadian Business Law Journal* 208–237.

[29] See the Centre for Effective Dispute Resolution, 'Mediation for Business and Human Rights', https://www.cedr.com/foundation/currentprojects/mediation-for-business-and-human-rights/ (accessed 1 April 2022) and the International Mediation Institute's experience – Elise Groulx Diggs, 'Mediation in the Field of Business and Human Rights', *International Mediation Institute* (7 July 2021), https://imimediation.org/2021/07/07/mediation-in-the-field-of-business-and-human-rights/ (accessed 1 April 2022).

results. However if we would try to 'measure' that important role, we can rely on the impartial measurement that has been provided by the UN Office of the High Commissioner for Human Rights' Accountability and Remedy project, which states that the '... involvement of State-based non-judicial mechanisms was reported in around one-quarter of the cases reviewed... (2014–2017 period)'.[30] Mediation tends to be predominantly used in land and development issues.

The UN Office of the High Commissioner for Human Rights (OHCHR) distinguishes four types of state-based non-judicial mechanisms depending on fact-finding powers and abilities to determine and enforce remedies on their own initiative, where the strictness of mandate results in the scope of investigating and enforcement powers. Mediation is classified as a 'Type D' mechanism, which relies 'on the cooperation and goodwill of participants' for its effectiveness, 'with few (if any) investigative powers and no formal powers to issue legally binding determinations'.[31]

Key international and European organizations have been widely engaged in examining BHR remedies, providing in-depth insights and valuable recommendations to obtain a greater understanding of the nature and types of remedies[32] and grievance mechanisms relevant to business' respect for human rights presently in use around the world.

The UN Office of the High Commissioner for Human Rights established the Accountability and Remedy project to examine the barriers complainants face in accessing justice and securing remedies from businesses, and to enhance the effectiveness of judicial, non-judicial and grievance mechanisms based upon good practice lessons observed.[33]

In 2017, the UN Committee on Economic, Social and Cultural Rights adopted General Comment No. 24 on state obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities.[34] The document focuses on preventing and addressing the adverse impacts of business activities on human rights and the subsequent duties of states party to the International Covenant on Economic, Social and Cultural Rights.

[30] UN Office of the High Commissioner for Human Rights, 'State-Based Non-Judicial Mechanisms for Accountability and Remedy for Business-Related Human Rights Abuses: Supporting Actors or Lead Players?', Accountability and Remedy Project Part II: State-based non-judicial mechanisms, Discussion Paper Prepared for the 6th UN Annual Forum on Business and Human Rights (27–29 November 2017), https://www.ohchr.org/sites/default/files/Documents/Issues/Business/DomesticLawRemedies/ARPII_DiscussionpaperonPhase2forUNForum_FINAL.pdf (accessed 1 April 2022).

[31] Ibid, 10.

[32] The authors stick to the wide definition of the NJMs provided by the OCHCR: 'mechanisms (other than courts) by which individuals (or groups of individuals) whose human rights have been adversely impacted by business activities can seek a remedy with respect to those impacts'. See UN Office of the High Commissioner for Human Rights, '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 (17 February 2017), https://www.ohchr.org/sites/default/files/Documents/Issues/Business/ARP/ARPII-Scoping-Paper.pdf (accessed 1 April 2022).

[33] The Accountability and Remedy project has produced three consecutive reports on each of the mechanisms in the UNGPs third pillar, which can be found at UN Office of the High Commissioner for Human Rights, 'OHCHR Accountability and Remedy Project: Improving Accountability and Access to Remedy in Cases of Business Involvement in Human Rights Abuse', https://www.ohchr.org/en/business/ohchr-accountability-and-remedy-project (accessed 1 April 2022).

[34] UN Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No. 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities', E/C.12/GC/24, (10 August 2017).

The OECD Guidelines for Multinational Enterprises require governments adhering to the guidelines to set up a National Contact Point (NCP). The NCP's main role is to assist enterprises and their stakeholders in taking appropriate measures to further the observance of the guidelines, raise awareness of available non-judicial grievance mechanisms and handle enquiries. NCPs provide a mediation and conciliation platform for resolving practical issues that may arise when implementing the guidelines. The annual report[35] provides a profound analysis of cases and the experience observed provides for a better understanding of ways to enhance mediation effectiveness.

The European Union Agency for Fundamental Rights (FRA) issued its opinion in 2017 and recommended that EU Member States should consider strengthening the role of non-judicial mechanisms in the field of business and human rights.[36] Subsequent research pointed out that non-judicial mechanisms can usefully supplement judicial mechanisms as they are generally more accessible, less costly, and swifter than the latter. Such mechanisms may facilitate dialogue which may help identify systemic issues and potentially open up a wider range of settlement outcomes between the parties.[37]

The European Law Institute recently published its report 'The Business and Human Rights: Access to Justice and Effective Remedies', which focuses on access to remedy in the EU and ensuring corporate human rights compliance. ADR is viewed as a viable supplement to judicial remedies, with regard to the functions of the Ombuds.[38] The report stresses that the design of ADR schemes in BHR disputes must incorporate the need to protect the victims' rights as a weaker party. Moreover, the report calls for the necessity of strong regulatory frameworks for ADR schemes in BHR disputes in order to establish quality, transparency and balance between a stronger and a weaker party to a dispute.

In Ukraine, BHR problems are currently not often discussed in governmental, academic and business circles.[39] However, some steps have been taken, such as the publication of a National Baseline Assessment on Business and Human Rights in 2019.[40] Furthermore, in 2020, the Conception for the Implementation of State Policy in the Field of Promoting the Development of Socially Responsible Business in Ukraine until 2030 was adopted.[41] Implementation of the UNGPs is recognized as one of the strategic aims of the Ukrainian Parliament's Commissioner for Human Rights.[42] Since 2017, the Panel Discussion on Business and Human Rights within the Kharkiv International Law Forum, organized by

[35] OECD, *National Contact Points for Responsible Business Conduct: Providing Access to Remedy: 20 Years and the Road Ahead* (Paris: OECD, 2020).

[36] European Union Agency for Fundamental Rights (FRA), *Improving Access to Remedy in the Area of Business and Human Rights at the EU Level: Opinion of the European Union Agency for Fundamental Rights* (Vienna: European Union Agency for Fundamental Rights (FRA), 2017).

[37] European Law Institute, *Access to Justice and Effective Remedies* (Vienna: European Law Institute, 2022).

[38] European Law Institute, note 25.

[39] Olena Uvarova, 'Business and Human Rights in Times of Global Emergencies: A Comparative Perspective' (2020) 26 *Comparative Law Review* 225; Olena Uvarova, 'Business and Human Rights in Conflict: An Interdisciplinary Search for a New Concept' (2019) 1 *Philosophy of Law and General Theory of Law* 112 (in Ukrainian); Bohdan Karnaukh, 'Ukraine: The Untapped Potential of Tort Law' in Ekaterina Aristova and Uglješa Grušic (eds.), *Civil Remedies and Human Rights in Flux Key Legal Developments in Selected Jurisdictions* (Bloomsbury: Hart Publishing, 2022) 331.

[40] Yaroslav Mudryi National Law University and the Ministry of Justice of Ukraine, note 2.

[41] Order of the Cabinet of the Ministers of Ukraine, 'About an Approval of the Conception for the Implementation of State Policy in the Field of Promoting the Development of Socially Responsible Business in Ukraine until 2030' (transl. by authors), No. 66-p (24 January 2020).

[42] Order of the Commissioner for Human Rights of Ukraine, 'Strategic Aims of the Ukrainian Parliament Commissioner for Human Rights Activities in 2022' (transl. by authors), No. 84.15/21 (29 December 2021).

the Yaroslav Mudryi National Law University, has become the annual international platform for discussing BHR problems not only in Ukraine but also all over the world.[43]

Mediation is an alternative dispute resolution method widely used in various areas and exercised both within state non-judicial and corporate grievance mechanisms for human rights complaints. Jacquelyn discusses reliable means of upholding the protections of the UNGPs and praises ADR as the avenue most effective to obtain recourse for victims. She argues, that 'one possibility would be to establish a collective process involving mediation and arbitration to find a middle ground solution. This would begin with a form of mediation to foster a private and collaborative environment for negotiation'.[44] The place of mediation within Jacquelyn's framework is a bridge between negotiation and arbitration, as the latter will provide the necessary structure for the enforcement of human rights.[45]

UNGPs Effectiveness Criteria for Mediation

The last principle of the UNGPs provides 'Effectiveness Criteria for non-judicial grievance mechanisms' and covers both state and non-state mechanisms, which may be adjudicative or dialogue-based. According to the UNGPs, 'a grievance mechanism can only serve its purpose if the people, it is intended to serve, know about it, trust it and are able to use it'.[46] The criteria for evaluating a non-judicial remedy are legitimacy, accessibility, predictability, equitability, transparency, rights compatibility and a source of continuous learning.

In the commentary of Principle 31, there is a recognition that quality control of remedies will be essential for their success, and thus these criteria 'provide a benchmark for designing, revising or assessing a non-judicial grievance mechanism to help ensure that it is effective in practice'. The commentary stresses that a poorly designed and executed grievance mechanism can only 'compound a sense of grievance amongst affected stakeholders by heightening their sense of disempowerment and disrespect by the process'.[47] The efficacy criteria are interdependent and mutually referential, although in our research we will examine each criterion separately with regard to the BHR mediation process, in order to make clear conclusions about what an effective BHR mediation framework should look like.

Legitimacy

According to the wording of the UNGPs, a non-judicial grievance mechanism is legitimate when it enables 'trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes'.[48] The commentary underscores that the trust of stakeholders stems from fair operation of the mechanism. Legitimacy in mediation is twofold – both for the mediation process and its outcomes – and reflects the way it is seen by participants and society. Caution regarding the legitimacy of mediation and its compatibility with the rule of law has been expressed both by practitioners and scholars. The most famous critique was pronounced by Fiss in his work, 'Against Settlement':

[43] Yaroslav Mudryi National Law University, 'Business and Human Rights: Search for Sustainable Models: Programme', *Kharkiv International Legal Forum* (20–24 September 2021), https://legalforum.nlu.edu.ua/wp-content/uploads/2021/09/biznes_i_prava_liudyny0209-1.pdf (accessed 1 April 2022).

[44] Silva Jacquelyn, 'Case Note: Transnational Corporations & International Human Rights Disputes: Alternatives to Litigation' (2021) 61 *Santa Clara Law Review* 867, 891.

[45] Ibid, 899.

[46] Human Rights Council, note 1, 34.

[47] Human Rights Council, note 1, 34.

[48] Ibid, 33.

> 'Parties might settle while leaving justice undone [...] Although the parties are prepared to live under the terms they bargained for, and although such peaceful coexistence may be a necessary precondition of justice, and itself a state of affairs to be valued, it is not justice itself. To settle for something means to accept less than some ideal'.[49]

Crowe and Field have argued that mediation is legitimized by its consensual character, although the problem seems to be deeper as 'consent to mediation is likely to be based on expectations that have no basis in the reality of the process'.[50] Archarya has provided a more complete view that 'there is a need for the framework for legitimate mediation that holds at its core the values of equality and dignity, along with the values inherent to mediation – recognition that parties are capable of engaging in consensual, mutual ordering and a recognition of their right to self-determine the resolution of their dispute in accordance with the norms that they themselves create'.[51] An OECD report emphasized the inclusion of 'insiders' (persons who enjoy societal respect) within the mediation process, so as to add to its legitimacy.[52] Astor stresses that the neutrality of the mediator is the cornerstone of mediation legitimacy.[53]

In our opinion, trust in the mediation process is also twofold, because the stakeholders should trust the mediation mechanism to engage in the mediation procedure and not to withdraw from the procedure at some of its stages. At the same time, the stakeholders' trust in the mediator remains a necessary condition for mediation's functioning and for its outcomes to be perceived as legitimate.

Legitimacy and trust in the BHR mediation scheme should be underpinned by BHR mediation rules and standards, adopted by a mediation provider body. The mediation rules and standards have developed over the last 30 years in different areas, accompanied by fruitful discussions for and against the regulation of mediation services. Opponents of regulation have expressed their concerns about ruining the ADR philosophy of flexibility and creating a professional monopoly, while proponents have stressed the need for minimum standards and raising awareness about the mediation procedure, believing that certain uniformity should provide increased predictability and confidence in mediation, leading to greater acceptance.[54] MacGregor stresses that:

> 'Given the significant risks to complainants in accessing non-judicial grievance mechanisms, it is critical that the circumstances in which such processes can be used and the standards required of them are clearly set out and embedded in the design and roll-out of such processes. Otherwise, complainants could be exposed to significant risks, thereby diminishing, rather than realizing, their right to an effective remedy'.[55]

[49] Owen M Fiss, 'Against Settlement' (1984) 93:6 *Yale Law Journal* 1073, 1085–86.

[50] Jonathan Crowe and Rachael Field, 'The Problem of Legitimacy in Mediation' (2008) 9:1 *Contemporary Issues in Law* 48.

[51] Nayha Archarya, 'Mediation, the Rule of Law, and Dialogue' (2020) 46:1 *Queen's Law Journal* 69, 85.

[52] OSCE, 'Support to Insider Mediation Strengthening Mediation Capacities, Networking and Complementarity', https://www.osce.org/files/f/documents/9/5/289101.pdf (accessed 1 April 2022).

[53] Hilary Astor, 'Mediator Neutrality: Making Sense of Theory and Practice' (2007) 16:2 *Social & Legal Studies* 221.

[54] Forrest S Mosten, 'Institutionalization of Mediation' (2004) 42:2 *Family Court Review* 292.

[55] Lorna MacGregor, 'Activating the Third Pillar of the UNGPs on Access to an Effective Remedy', *EJIL: Talk!* (23 November 2018), https://www.ejiltalk.org/activating-the-third-pillar-of-the-ungps-on-access-to-an-effective-remedy/ (accessed 1 April 2022).

BHR mediation rules and standards should promote public confidence and trust in mediation by raising awareness, and provide guidance for stakeholders on:

- the mediation procedure itself;
- the mediator's role within the procedure;
- the suitability of mediation;
- the rights and duties of the parties involved in mediation and third persons;
- the principles of the mediation procedure;
- the selection of the mediator and the appointment rules;
- the financing of the mediation procedure;
- the mediator complaint procedure;
- the status of a mediated settlement agreement;
- the model mediation agreement and settlement agreement.

The OHCHR Discussion paper, which presents a list of illustrative features of non-judicial methods relevant to the effectiveness criteria, sees legitimacy more like 'building awareness' and it also fits into our position as we do support the necessity for 'publication of enforcement and compliance procedure, of policies for engagement with different stakeholder and user groups, etc.'.[56] The OHCHR Discussion paper also includes 'what to expect' literature on the BHR mediation scheme, which may include a model mediation agreement, a model settlement agreement, videos of mock mediation sessions, case studies, etc.

Accessibility

The UNGPs accentuate the need for the withdrawal of barriers to access to BHR non-judicial mechanisms and the importance of enhancing awareness of the non-judicial mechanisms in relevant communities. The commentary describes possible barriers of language, literacy, costs, physical location, and fears of reprisal. These general accessibility issues should be completed with inclusivity requirements and covered within different categories of stakeholders.

The OHCHR report notes that removing or reducing financial barriers to access to remedy for individual claimants and complainants appears to be a strategic priority of many (if not virtually all) state-based non-judicial mechanisms.[57] Financial accessibility lies at the heart of the effectiveness criteria and a BHR mediation scheme involves costs for mediator's (mediators') professional fees, maintaining the mediation programme (for example, administrative staff responsible for overall workflow, promotion and outreach campaigns, initial assessment and support services, etc.).

Language barriers seem to be rather obvious and there are examples of successful removal thereof. For example, New Zealand's Human Rights Commission has made efforts to respect the diversity of stakeholders by providing information on how to submit a

[56] UN Office of the High Commissioner for Human Rights, 'Enhancing Effectiveness of Non-State-Based Grievance Mechanisms in Cases of Business-Related Human Rights Abuse', Accountability and Remedy Project, Part III: Non-State-Based Grievance Mechanisms (November 2019), https://www.ohchr.org/sites/default/files/Documents/Issues/Business/ARP/ARPIII_Discussion_Paper_Nov2019.pdf (accessed 1 April 2022).

[57] UN Office of the High Commissioner for Human Rights, note 33, 15. The report also states that a significant proportion (39%) of State NJMs were either free to use or only charged a nominal fee to users.

complaint in six minority languages.[58] The Australian Human Rights Commission has also translated 'The Making a Complaint Fact Sheet' into 63 languages.[59]

The availability of translation services for the mediation procedure should be covered by the BHR mediation provider for complainants. Additionally, there may be the need to provide a mediator who speaks the complainant's native language.

Predictability

Under the UNGPs, an effective non-judicial mechanism should provide 'a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation'.[60] Building predictability into mediation may be a challenge, however, due to the flexibility of the dispute resolution method itself. Although the mediation procedure tends to stick to certain stages and principles, the vision of the procedure may be presented to the parties. Without undermining the importance of 'what to expect' materials that also cover the 'legitimacy' criteria, such materials are also needed to enhance predictability, yet nevertheless bear the risk of over-reliance.

The OHCHR scoping paper on state-based non-judicial mechanisms[61] addresses such predictability issues such as non-judicial mechanisms' web resources, downloadable complaints forms, 'self-help' guides and further information about stages of the dispute resolution or complaints process and likely timescales. Regarding a BHR mediation scheme, special attention should be devoted to the necessity of mediation rules and standards as the basis for building predictability for different categories of stakeholders.

Shipman et al cite Gray's eternal question: 'What is "real" mediation?' because of different approaches and broad ranges of mediation activities, styles of practice, etc. The mediation procedure may involve an evaluative element (when a mediator with no authority to make decisions uses skills to assist parties to negotiate settlement terms and may express some view on the merits of issues) or be purely facilitative (a mediator does not express a view in any way or challenge parties' perceptions).[62] Although 'distinctions may be blurred', there may be 'varying levels of evaluation'. Additionally, there is also a transformative model of mediation,[63] which includes narrative and therapeutic models.[64] Due to the broad range of mediation models, the predictability criteria may be met by providing the necessary details in mediation rules and standards, to address the role, rights and duties of the mediator and the scope of the principle of self-determination.

[58] Te Kāhui Tika Tangata, Human Rights Commission, 'Making a Complaint', https://www.hrc.co.nz/how-we-can-help/how-make-complaint (accessed 1 April 2022).

[59] Australian Human Rights Commission, 'Translated Information', https://humanrights.gov.au/about/translated-information?_ga=2.112034436.1680344240.1651062180-1139667414.1651062180 (accessed 1 April 2022).

[60] Human Rights Council, note 1, 33.

[61] UN Office of the High Commissioner for Human Rights, '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. Office of the UN High Commissioner for Human Rights Accountability and Remedy Project II (17 February 2017), https://media.business-humanrights.org/media/documents/files/images/ARPII_FINAL_Scoping_Paper.pdf (accessed 1 April 2022).

[62] Shirley Shipman et al, Brown & Marriott's *ADR Principles and Practice*, 4th edn (London: Sweet & Maxwell) 125.

[63] Robert A Baruch Bush and Joseph P Folger, *The Promise of Mediation: The Transformative Approach to Conflict*, 2nd edn (San Francisco: Jossey-Bass Publishers, 2004).

[64] Shipman, note 62, 40.

Equitability

The parties to mediation should engage in the process on fair and equitable terms and the UNGPs convey the same criterion in terms of 'reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms'.[65] The importance of equitability criteria stems from the power imbalance inherent to corporate human rights abuses, when the corporate side possesses vast sources of legal representation. The OECD paper[66] points out that 'many companies choose to involve lawyers, which leads to larger volumes of documents being exchanged, or key information being withheld, generally formalizing a process which otherwise would remain more flexible. Submitters may then also need to seek legal advice but lack resources to do so'. Subtler dynamics of a power imbalance may also result in complainants feeling compelled to settle out of concern that they will not be believed in court, regardless of the strength of the case or the evidence.[67]

The other side of the equitability criteria 'coin' appears to be that 'intimidation or fear of reprisals may also prevent submitters from participating fairly in the process, taking various forms, from threats to the submitters'[68] life, employment, or family. Compensation for power imbalances in BHR mediation should be provided before and within the mediation procedure to ensure that the power imbalance does not adversely affect the mediation outcomes. It may be presumed that corporate abuse complainants should be supported to provide informed consent to engage in mediation, and this task lies with the BHR mediation provider. It is the mediator's task and responsibility to overcome the 'inequality of arms', as it appears to be a pre-requisite for principles of self-determination and voluntariness in mediation. Although it is a controversial issue, Moore points out that 'the independent mediator, because of his or her commitment to neutrality and impartiality, is generally ethically barred from direct advocacy for the weaker party, yet it also ethically obligated to assist the parties in reaching a relatively fair, acceptable and durable agreement'.[69] Redressing a power imbalance requires strong mediation skills and securing the mediator's neutrality and independence. Rees also stresses the importance of the quality of the mediator because it is a mediator's role to mitigate the power disparities of parties through limiting advisers on both sides to equal numbers; engaging the parties directly, rather than just through lawyers; addressing human rights (whether or not they are articulated in national law); and conveying information equally to both parties.[70] Breaching the equitability criteria may result in a domino effect of failure to meet other effectiveness criteria, i.e., the legitimacy criterion.

We suggest that the equitability criteria in a BHR mediation scheme may be met through the conditions of (a) effective performance of the mediation provider, by enabling the weaker party to obtain the needed support for informed consent to engage in the mediation procedure and for maintaining principles of self-determination and voluntariness in mediation; and (b) highly trained and experienced mediators who would lead the mediation procedure ensuring the power balance of the parties

[65] Human Rights Council, note 1, 33.

[66] OECD, note 35.

[67] Simon Roberts, 'Alternative Dispute Resolution and Civil Justice: An Unresolved Relationship' (1993) 56 *Modern Law Review* 452, 462.

[68] OECD, note 35.

[69] Christopher W Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, 4th edn (Hoboken: Wiley, 2014) 519.

[70] Caroline Rees, 'Mediation in Business-Related Human Rights Disputes: Objections, Opportunities and Challenges', John F. Kennedy School of Government, Corporate Social Responsibility Initiative, Working Paper No. 56 (February 2010), https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/workingpaper_56_rees.pdf (accessed 1 April 2022).

Transparency

The UNGPs call for transparency of non-judicial mechanisms, in order to keep parties to a grievance informed about its progress, and provide sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake. The mediation procedure is often praised for its confidentiality, and this is the reason parties to a dispute engage in mediation, not in litigation, so as to keep confidential the dispute issues, mediation procedure development and the settlement agreement, if reached. Confidentiality in mediation relates to the confidentiality of the process and the matters it deals with, as well as to the mediator who cannot disclose confidential information received from one party to another both during and after a mediation procedure. Confidentiality issues in mediation may be governed (a) on a statutory basis (normally, national laws provide for inadmissibility in subsequent proceedings of information presented within the mediation procedure, evidential privileges for mediators, parties and other participants to mediation) with certain exceptions for over-riding considerations of public policy, etc.; or (b) by a mediation agreement; or (c) by the code of conduct a mediator adheres to; or (d) by mediation rules; or (e) all of the above.

Under certain circumstances, a court may decline to uphold confidentiality. Shipman et al point out such circumstances as an abuse of procedure, allegations made of fraud, misrepresentation, economic duress, or undue influence, when a court wishes to determine whether an agreement was concluded, where there is an allegation of negligence, where a court wishes to interpret an agreement.[71]

The rather extensive demand for transparency and the public exposure of BHR mediation requires an attentive approach to limiting confidentiality in order not to undermine the effectiveness and demand of mediation itself. Rees stresses that 'identifying the right levels of transparency is a significant challenge that mediation faces in terms of its credibility as a pathway for addressing human rights-related disputes'.[72] In the *Bralima v Bralima and Heineken* case, dealt with by the Dutch NCP, it was noted that 'while the promise of confidentiality may create a positive pull for businesses to engage with the NCP process, it is regrettable that confidentiality also prevents the complete array of lessons learned to be available to other NCPs and stakeholders'.[73]

This challenge may be met by first, identifying clear goals for transparency in BHR mediation, and second, identifying the necessary extent of transparency at certain stages of the mediation procedure. The transparency criteria regarding a BHR mediation scheme should be met in order to build trust for the stakeholders and reinforce the legitimacy criterion. Rees points out that 'enabling public confidence that the outcomes of such processes respect minimum human rights standards and that complainants are not being pressured to concede these rights' is needed.[74] It enhances the demand for BHR mediation, as the authors believe that clear boundaries of transparency and confidentiality may encourage the stakeholder to provide informed consent to engage in a BHR mediation procedure; and support systemic change in the realm of human rights protection. Rees also includes here the UNGP criterion of 'a source of continuous learning', stating that transparency is 'enabling others in society to benefit from a growing body of knowledge of how human rights disputes are being resolved, with the objective of disseminating the

[71] Shipman, note 62, 320–325.

[72] Rees, note 70, 18.

[73] Dutch Ministry of Foreign Affairs National Contact Point OECD Guidelines for Multinational Enterprises, *Final Statement: Former Employees of Bralima v Bralima and Heineken* (The Hague: Dutch Ministry of Foreign Affairs, 18 August 2017).

[74] Rees, note 70, 19.

learning and supporting future dispute prevention'; provide deterrence reasons for corporate human rights abuses protect the interests of third parties not directly involved in the mediation procedure although affected by corporate human rights abuse (for example, health concerns and remedial issues).[75]

The UNGP criterion wording encompasses three aspects of transparency: the procedure's progress, the mechanism's performance, and protection of public interest. In our opinion, the mediation procedure's progress should be kept confidential, although a mediation provider should issue public statements on the initiation of the mediation procedure (so people affected by a corporate human rights abuse may engage in the procedure), on interim progress (without disclosing sensitive information while informing the community that the procedure is still active), and on settling a case (or not reaching a settlement). The OECD Guidelines suggest that good offices proceedings (an effort to contribute informally to the resolution of an issue) should remain confidential, but that the NCP should issue public statements when closing a case. Such publicity ensures visibility and transparency of the process, and may also contribute to remedying and holding a company accountable where relevant.

The OHCHR Discussion paper discusses such a mechanism for meeting the transparency criterion as 'publication of outcomes of processes (subject to confidentiality commitments)',[76] which enhances the public interest approach and is practised by some NRIs. For example, the Australian Human Rights Commission produces a case register of anonymized cases to demonstrate the types of cases they receive and the ways in which they deal with them.[77]

The next aspect of the transparency criterion's 'mechanism's performance' may be effectively covered by documents listed for the 'legitimacy' criterion and also by creating a database of ongoing and completed mediations. A good example comes from the 'Cases Center' by The Office of the Compliance Advisor Ombudsman[78]. Following Parker's position of 'the need for clear guidelines regarding what will become part of the public record, and a recognition of the limits of confidentiality, particularly with regard to publicizing the outcomes of dispute resolution processes',[79] the authors would suggest that a BHR mediation provider should prescribe confidentiality limits in mediation rules, model mediation agreements and model settlement agreements.

Rights-Compatibility

The rights-compatibility criterion sums up the effectiveness criteria by putting forward the obligation to ensure 'that outcomes and remedies accord with internationally recognized human rights' as it mentioned in Principle 31 (f) UNGP. It is not a coincidence that this criterion is final, as we would argue that a BHR mediation may lead to an effective remedy provided that the previous criteria have been met. Victims of gross violations of international human rights law are entitled to adequate, effective and prompt reparation

[75] Ibid.

[76] UN Office of High Commissioner for Human Rights, note 56, 25.

[77] Australian Human Rights Commission, 'Conciliation Register', https://humanrights.gov.au/complaints/conciliation-register (accessed 1 April 2022).

[78] The Office of the Compliance Advisor Ombudsman is the independent accountability mechanism for IFC and MIGA. The Cases Center is available at Compliance Advisor Ombudsman, 'Welcome to Cases Center', https://www.cao-ombudsman.org/cases (accessed 1 April 2022).

[79] Tara Parker, 'Human Rights Dispute Resolution: Protecting the "Public Interest"' (1999), 15, https://cfcj-fcjc.org/sites/default/files/docs/hosted/17464-rights_dr.pdf (accessed 1 April 2022).

for harm suffered and for reparations, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[80]

The OHCHR Scoping Paper states that remedy functions may include compensation for those affected; reconciliation of parties in dispute; restoration of a previous state of affairs or rectification of harm; detection of breaches of the law; enforcement and sanctioning of wrongdoers; prevention of future harm (including through deterrence and the promotion of social dialogue); and review of administrative (i.e., governmental) decisions.[81]

The outcome of mediation should be – under the best of circumstances – a resolution of the dispute and the creation of a mutually accepted agreement, although not every mediation may appear to be successful to the full extent. The outcomes of mediation may constitute 'resolution of underlying issues, costs savings, absence of publicity, elimination of the risks – some terms that meet mutual needs and interests'[82] of the parties. Menkel-Meadow speaks about 'tailored remedies on restitution (or partial restitution), rehabilitation, and satisfaction through agreement-based processes'.[83] The flexibility of mediation outcomes appear to be both a strength and a weakness, as flexibility is constrained by the indispensable nature of human rights and a rather strict understanding of remedies for human rights abuses in international law. The indispensable nature of human rights has often been called to support the view that only adjudication-based remedial processes may effectively address human rights abuses. Such cases possess extremely high public interest, underpinning the need for publicity, precedents and reparation. Rees argues that 'the specific nature of human rights and the creative potential of mediation to encompass interests suggest the relationship between the two may in many instances be one of mutual benefit and reinforcement'.[84] McGregor et al state that when set against these potential objectives, courts may not always be best situated or fully able to address all of the objectives, particularly with regard to guarantees of non-repetition. Therefore, there may be a role for ADR, instead of, or in conjunction with, the courts depending on the particular case.[85] Complainants may simply have broader ideas of what constitutes remedy, such as reinstatement to their job, assurances that an incident will not recur, recognition and an apology, or alternative means to restore their livelihood or well-being other than monetary awards. It may even be that it is the opportunity to have their perspective heard by those responsible for the abuse, directly at the mediation table, that drives their sense of remedy.[86]

The main challenges for BHR mediation outcomes to meet international human rights standards have already been highlighted in this article, such as the power imbalances between the sides of corporations and claimants, and maintaining a certain level of transparency despite the cornerstone mediation principle of confidentiality. McGregor

[80] UN Office of the High Commissioner for Human Rights, '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', G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (16 December 2005).

[81] UN Office of the High Commissioner for Human Rights, '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. Office of the UN High Commissioner for Human Rights Accountability and Remedy Project II (17 February 2017), https://media.business-humanrights.org/media/documents/files/images/ARPII_FINAL_Scoping_Paper.pdf (accessed 1 April 2022).

[82] Shipman, note 62, 37.

[83] Carrie Menkel-Meadow, 'Whose Dispute is it Anyway? A Philosophical and Democratic Defense of Settlement (in Some Cases)' (1995) 83 *Georgetown Law Journal* 2663, 2672.

[84] Rees, note 70, 6.

[85] Lorna McGregor, Rachel Murray and Shirley Shipman, 'Should National Human Rights Institutions Institutionalize Dispute Resolution?' (2019) 41:2 *Human Rights Quarterly* 309, 319.

[86] Rees, note 70, 11.

questions how ADR contributes positively to the goals of human rights dispute resolution in practice and Rees calls for the need for systemic change toward a better, more rights-compliant, rights-respecting society.

The underlying questions seem to be 'how to ensure that outcomes and remedies accord with internationally recognized human rights, and who is in charge of ensuring this?' and the answers should be multifaceted, because of the essence of human rights protection. Moreover, the answers should indicate the directions of further research.

Firstly, the human rights abuse incurred should be examined to determine whether it is suitable for mediation, as it has its limitations. Mediation practice and research have recognized the situations and factors that determine when mediation is inappropriate as well as when it can proceed with caution and reservation. Such examinations would be conducted by a mediation provider, appointed mediator(s), and the parties to a dispute themselves, the latter obviously needing certain guidelines or checklists to make preliminary evaluations.

Secondly, procedural justice within the mediation procedure should be maintained. Adherence to the mediation principles enshrined in the mediation rules and the mediation agreement is key to reaching a fair settlement agreement. Nevertheless, there is an obvious need for the parties involved and for the mediator(s) to have basic knowledge of the human rights area. The latter is a safeguard that the parties and mediator(s) would terminate or withdraw from the mediation procedure in order to avoid concluding a settlement agreement that breaches internationally recognized human rights.

We strongly agree with the position that the institutionalization of ADR may offer the best prospects for the development of standards of justice. Additionally, it would enhance the prospects of systemic human rights issues to be identified and addressed, in addition to facilitating an individual's right to a remedy and reparation.[87]

IV. Recent Developments on Mediation in Ukraine and Further Steps to Make it an Effective Remedy in BHR Cases

The Ukrainian legal framework is generally favourable for ADR, as it allows for arbitration and mediation with the related laws and provisions of procedural legislation. In Ukraine, two types of arbitration exist – arbitration tribunals (treteyski sudy), which deal with domestic disputes[88] and international commercial arbitration.[89] The Law of Ukraine 'On mediation'[90] was adopted in 2021 and identified key issues such as the definition of mediation, requirements for mediators and their status and scope, as well as where the mediation is applicable and the main principles of mediation, etc.

Mediation has been gradually developing in Ukraine over the last 25 years with the extensive support of human rights donor organizations, which have been widely absorbed by the non-governmental organizations and the academic world, and partially by the judicial system. At the moment, mediation in Ukraine is represented by more than 3,000 trained mediators; an all-Ukrainian network of mediators' associations and centres that have adopted its ethics codes, mediation rules and mediator standards; some regional

[87] McGregor, note 85, 338.

[88] The Law of Ukraine, 'On Arbitration Tribunal', https://zakon.rada.gov.ua/laws/show/1701-15#Text (accessed 1 April 2022).

[89] The Law of Ukraine, 'On International Commercial Arbitration', https://zakon.rada.gov.ua/laws/show/4002-12#Text (accessed 1 April 2022).

[90] The Law of Ukraine, 'On Mediation', https://zakon.rada.gov.ua/laws/show/en/1875-20?lang=uk#Text (accessed 1 April 2022).

courts; and free legal aid centres which provide office space for private mediators' rooms.[91] The only thing Ukrainian mediators definitely lack is wide demand for their services. However, another long-awaited goal was achieved at the end of 2021 with the adoption of the Law of Ukraine 'On Mediation', which opened more doors for mediation development in Ukraine. The authors argue that the Ukrainian mediators' community, often equipped with dialogue and facilitation skills, can constitute the central building block of the BHR mediation scheme, and contribute to the development of BHR mediation standards. The war in Ukraine has affected the judicial system and community of mediators immensely; however, they have shown enormous potential to effectively react to challenges and proven their sustainability.[92]

There is also an example of using mediation as an effective remedy in BHR cases in Ukraine. In June 2018, citizens of three villages – Olyanytsya, Zaozerne and Kleban – in the Vinnitsa region, filed a complaint with the support of NGOs to the offices of the Compliant Advisor Ombudsman and the European Bank for Reconstruction and Development's Project Complaint Mechanism. The complaint was filed against Myronivsky Hliboproduct Publichne AT (the Company), one of the biggest poultry producers in Ukraine and was related to the impact of dust, noise and odours, air, soil and water pollution, inappropriate public consultations, health issues, bad working conditions and additional issues. During the facilitation of the process by CAO and PCM, the parties decided to use mediation. The mediation process lasted from February 2018 until July 2021 when the Company left the mediation process because of its concerns about the confidentiality principle. During the mediation procedure, 23 joint mediation sessions and 14 online joint dialogue sessions were organized as well as multiple separate sessions between mediators and one of the parties. In spite of the fact that a settlement agreement resulting from mediation was not signed in this case, the mediation process had positive results on the whole dispute. In particular, the parties agreed that the Company will open the constructed bypass road around the village of Olyanytsya and will open a railway crossing for its vehicles; a communication protocol was approved to address any issues affecting the Company development project; a methodology for assessing the impact on buildings in the village of Olyanytsya was approved; the Company provided the communities with the list of the pesticides used, their dosage and method of usage; the format of communication between the Company and landlords connected with the land lease agreements was discussed.[93] As it is stated in the report on dispute settlement, in this case the main factors which helped the negotiation process were the combined development of rules of mediation by the parties, the direct participation of senior management of the Company in the mediation process, as well as communication training for the parties to improve their capacity and negotiation skills. At the same time, the main obstacles to a settlement were the lack of fulfilment of the mediation rules by the parties and the reaction of the mediators to their violations. It was mentioned in the report that

[91] Luiza Romanadze, 'Mediation in Post-War Restoration in Ukraine' (2022) 4-2:17 *Access to Justice in Eastern Europe* 202–217; Tetiana Tsuvina and Sasha Ferz 'The Recognition and Enforcement of Agreements Resulting from Mediation: Austrian and Ukrainian Perspectives' (2022) 4:16 *Access to Justice in Eastern Europe* 32–54; Tetiana Tsuvina and Tetiana Vakhonieva, 'Law of Ukraine "On Mediation": Main Achievements and Further Steps of Developing Mediation in Ukraine' (2022) 1:13 *Access to Justice in Eastern Europe* 142–153; Tatiana Kyselova, *Integration of Mediation into Ukrainian Court System: Policy Paper* (Kyiv: Council of Europe, 2017).

[92] Luiza Romanadze, 'Access to Justice: The Role of Mediation in War and Post-War Times' (2022) 124:5 *Foreign Trade: Economics, Finance, Law* 13–29.

[93] CAO, 'Report on the Results of the Dispute Resolution Procedure', Ukraine, Mhp-01/Vinnitsa #34041 (January 2022).

these factors could destroy the trust not only between the parties but also trust in the mediation and mediators. Other barriers to effective dispute resolution were financial issues and the inequality of arms between the parties.[94] In spite of the fact that in this case, parties could not agree on all issues, we can say that mediation could help them to reach a partial settlement on some important issues.

At the same time, this example lets us think about the integration of mediation into other judicial and non-judicial remedies in terms of proportionality. One of the main trends in the current civil procedure is the proportionality principle, according to which the procedures used for the particular case should be proportionate to the specifics of the case. In particular this refers to its nature, the parties involved, what is at stake for the claimant, the sum of the claim and available evidence, etc.[95] In such circumstances, ADR methods which are more suitable for some types of cases become increasingly popular on the one hand, while on the other, we can see hybridization[96] between judicial and non-judicial procedures as well as between different types of non-judicial procedures. That is why we should talk not about the dichotomy between judicial/non-judicial mechanisms for BHR cases, but rather about an appropriate effective remedy or sets of remedies, depending on the nature of a particular case and its specifics in terms of the proportionality principle. That is why nowadays we can see the integration of mediation into judicial remedies as well as in other non-judicial grievance mechanisms.

Ukraine may follow the foreign experience of mandating the National Human Rights Institution[97] (NHRI) – the Ombudsman – with handling complaints and providing mediation services. However, NHRIs do not generally provide mediation and the Paris Principles do not require NHRIs to have a complaints-handling function, although it does take place in jurisdictions with judicial systems with low effectivity (such as Uganda, Cameroon, Malawi, Kenya, Venezuela[98] and Peru[99]). Moreover, international documents envisage such a possibility: article 33a of The Nairobi Declaration of 2008[100] and article 13C of The Edinburg Declaration.[101] Institutionalization of BHR mediation within the office of the Ombudsman may be among the ways to meet the effectiveness criteria of the UNGPs as discussed above.

V. Conclusions

The access to justice perspective in the BHR area is currently associated mostly with access to courts and leaves non-judicial mechanisms in the shadow. At the same time, amicable

[94] Ibid.

[95] European Law Institute and UNIDROIT, *Model European Rules of Civil Procedure* (Vienna/Rome: ELI and UNIDROT, 2021).

[96] Carrie Menkel-Meadow, 'What is an Appropriate Measure of Litigation? Quantification, Qualification and Differentiation of Dispute Resolution' (2021) 11:2 *Onati Socio-Legal Series* 321, 335.

[97] Nicola Jägers, 'National Human Rights Institutions: The Missing Link in Business and Human Rights Governance?' (2020) 14:3 *ICL Journal* 289–325.

[98] Beata Faracik, 'The Role of Non-EU National Human Rights Institutions in the Implementation of the UN Guiding Principles on Business and Human Rights, with a Focus on Eastern Partnership Countries, EXPO/B/DROI/2012/08 (October 2012), https://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/457112/EXPO-DROI_ET(2012)457112_EN.pdf (accessed 1 April 2022).

[99] GIZ, 'National Human Rights Institutions', https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/Publikationen/e-info-tool_national_human_rights_institutions_01.pdf (accessed 1 April 2022).

[100] The Nairobi Declaration, A/HRC/10/NI/6 (adopted by the Ninth International Conference of National Institutions for the Promotion and Protection of Human Rights on 18 February 2009).

[101] The Edinburgh Declaration, International Co-Coordinating Committee of National Human Rights Institutions for the Promotion and Protection of Human Rights (ICC) (10 October 2010), https://www.ohchr.org/Documents/AboutUs/NHRI/Edinburgh_Declaration_en.pdf (accessed 1 April 2022).

dispute resolution with its 'win-win' approach sometimes can give more favourable results for both parties – business and human beings, as well as a broader effect on the whole society. Numerous financial, legislative, practical and other access to court barriers can make judicial protection much harder if not impossible for some types of disputes, which cause deepening conflict and further violations of human rights. The above-mentioned factors influence not only people, whose rights have been violated, but also the business climate. From such a perspective, mediation can provide amicable dispute resolution with its benefits (economy of time, resources, confidentiality, etc.) for all players in the BHR area.

Improving access to remedy in cases of business-related human rights abuse remains a challenge both for judicial and non-judicial mechanisms in Ukraine. Mediation may be seen as a viable alternative or a supporting tool to judicial proceedings for those seeking remedies for corporate human rights abuses, provided a complex set of challenges are effectively addressed. The Ukrainian mediation community is on the rise, backed by the long-awaited Law of Ukraine 'On Mediation', that opens many doors for a pilot BHR mediation scheme as well. The article has shown that evident challenges to BHR mediation (power imbalances between parties, the confidential nature of mediation and public demand for transparency, ensuring that mediation outcomes accord with internationally recognized human rights) may be effectively addressed if underpinned by a scrupulous work by a mediation provider and suitably qualified mediators.

The Ukrainian experience shows that the power imbalance between parties is the central challenge and risk of BHR mediation. While the business boasts resources (material, financial, human) and experience, the other party to mediation needs more confidence, knowledge, skills, and understanding of mediation and how it should proceed. That is why mediators need to focus on explaining the basics of mediation, answering all the questions about the mediation procedure, strengthening negotiation skills, and supporting adequate evaluation of the interests and needs of the weaker party. The proper usage of caucuses may help in achieving these goals. Also, a favourable climate for a settlement can be created by directly involving a company's top management in the mediation procedure, signalling strong commitment of the business to settling the dispute.

The analysis of the UNGPs' effectiveness criteria from a mediation perspective leads to the conclusion that their interdependent and mutually referential character emphasizes requirements and red lines for BHR mediation. The latter when piloted should have its own three pillars: accessibility, availability and awareness, with quality assurance as its cornerstone.

Taking into account such considerations, establishing an effective BHR mediation scheme in Ukraine requires:

- Strong support from NHRIs, as they should be engaged as mediation providers to enable the BHR mediation scheme to be available, accessible, and known to main stakeholders. A sufficient number of staff must be trained in mediation to maintain awareness campaigns, provide preliminary identification of cases suitable for mediation, inform complainants about the mediation procedure and encourage them to give informed consent to engage in mediation;
- Sufficient collaboration with national mediators' associations and human rights non-governmental organizations;
- In order to meet the UNGPs' criteria of legitimacy, predictability, transparency and others, the NHRI as the specific mediation provider has to adopt mediation rules and a range of guidance for stakeholders. Such tasks would presuppose the participation of international experts, foreign practitioners and lawyers;

- The development of a special training programme for BHR mediators, which would require input from the national mediation community and Ukrainian human rights organizations. A BHR mediation provider body should maintain a list of mediators skilled enough for BHR mediation procedures;
- The development of an evaluation scheme that would include quotative and qualitative criteria.

More work is needed to set up all the UNGP criteria for BHR mediation, as well as good collaboration between national human rights institutions, the mediation community, non-governmental organizations and corporations.

Competing interest. The authors declare none.