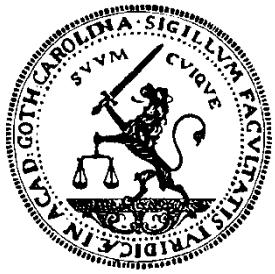

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Access to Remedy in Colombia

Examining the nexus between transitional justice and business and human rights

JURM02 Graduate Thesis

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Contents

Summary

The fields of transitional justice and business and human rights have until recently seldom been examined jointly, despite the fact that their approaches reflect plenty of opportunities for potential synergies. This thesis bears the overarching aim of contributing to a greater understanding of how the two fields interact when states are transitioning from active armed conflict to post-conflict phases. In particular, the thesis examines the nexus between access to remedy (understood as pillar III of the UNGPs) and transitional justice processes, through the contextual lens of the ongoing transitional justice process in Colombia.

The research is guided by a mixed methodological approach, interlacing an interdisciplinary method, a critical element and a method which has been labeled 'analysis of the law'. This approach allows for exploring how the issue of corporate accountability can and should be addressed in transitional justice processes, in light of access to remedy. It can also help to identify lessons which might be extrapolated and drawn upon in future transitional justice processes.

Even though the Colombian transitional justice process was shaped at a time when the business and human rights agenda was gaining significant ground – both globally and in the state itself – the remedial mechanisms established through the Peace Agreement of 2016 do not address corporate responsibility to any further extent. The mechanisms established lack jurisdiction over juridical persons, and were in the latter stages of the drafting process stripped of the mandate of summoning so-called third-party actors (non-combatants). This has not only contributed to hinder victims of corporate human rights abuses access to remedy in the Colombian context, but also negatively impacted the victims right to truth, justice, reparation and guarantees of non-recurrence. The thesis concludes that the fields of transitional justice and business and human rights have much to gain from increased engagement, and that this increased interaction needs to be intentionally, continuously and purposefully pursued.

Sammanfattning

Trots att det finns stora möjligheter för att finna synergier mellan övergångsrättvisa och företagande och mänskliga rättigheter har de två forskningsfälten fram tills nyligen sällan undersökts ihop. Denna uppsats har som övergripande mål att bidra till en bättre förståelse för hur de två fälten interagerar när stater rör sig från pågående väpnade konflikter till post-konfliktfaser. I synnerhet ämnar uppsatsen att undersöka sambandet mellan den tredje pelaren i FN:s vägledande principer för företag och mänskliga rättigheter (möjligheten att få sin sak prövad) och övergångsrättviseprocesser, i ljuset av den pågående övergångsrättviseprocessen i Colombia.

Uppsatsen tillämpar ett blandat metodologiskt tillvägagångssätt, som kombinerar en interdisciplinär metod, ett kritiskt element och en rättsanalytisk metod. Detta tillvägagångssätt möjliggör en undersökning av hur företags ansvarsskyldighet kan och bör adresseras i övergångsrättviseprocesser, i ljuset av den tredje pelaren. Det kan även bidra till att identifiera lärdomar som kan extrapoleras och tas i beaktande i framtida övergångsrättviseprocesser.

Även om den colombianska övergångsrättviseprocessen utformades under en tid då kännedomen om företagande och mänskliga rättigheter var hög – både sett ur ett globalt och colombianskt perspektiv – utformades de rättsmedel som etablerades genom fredsavtalet 2016 inte för att kunna adressera företags ansvarsskyldighet. Rättsmedlen saknar jurisdiktion över juridiska personer, och de blev i ett sent skede i fredsprocessen fråntagna sitt mandat att kalla så kallade tredje parter (icke-kombattanter). Detta bidrar inte bara till att hindra de individer som blivit påverkade när företag brutit mot de mänskliga rättigheterna från att få sin sak prövad, utan har även en klar negativ inverkan på offrens rätt till sanning, rättvisa, gottgörelse och garantier om icke-upprepning. Uppsatsen fastställer att övergångsrättvisa och företagande och mänskligheter kan gynnas av ökad interaktion, samt att detta måste eftersträvas avsiktligt, kontinuerligt och målmedvetet.

Preface

Ibland tar saker och ting lite längre tid än vad man tänkt sig, och efter nästan sex års studier finns det flera personer som jag skulle vilja tacka lite extra.

A big thank you to my supervisor, Daria Davitti, for your invaluable support and guidance.

Tack till mina vänner, som alltid funnits där – oavsett om jag befunnit mig på Stora Tomegatan eller i New Delhi.

Tack till min familj, för all hjälp, allt stöd och er oförtröttliga korrläsning.

Tack till Jonas, för att du alltid hejar på mig.

Stockholm, 4 januari 2022
Louise Warvsten

Abbreviations

ARP	Accountability and Remedy Project
ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
AUC	United Self-Defense Forces of Colombia / *Autodefensas Unidades de Colombia*
Constitutional Court	Constitutional Court of Colombia/ *Corte Constitucional de Colombia*
ELN	National Liberation Army/ *Ejército de Liberación Nacional*
FIP	*Fundación Ideas para la Paz*
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
IGWG	Intergovernmental Working Group
IHL	International Humanitarian Law
Integrated System	Integrated System of Truth, Justice, Reparation and Non-Repetition / *Sistema Integral de Verdad, Justicia, Reparación y No Repetición*
JPL	Justice and Peace Law of 2005/ *Ley de Justicia y Paz de 2005*
NAP	National Action Plan
NBA	National Baseline Assesment

Office of the Ombudsman	The Ombudsman's Office of Colombia/ *Defensoría del Pueblo de Colombia*
Peace Agreement	Final Agreement to End the conflict and Establish a Stable and Long-lasting Peace/ *Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera*
SJP	Special Jurisdiction for Peace/ *Jurisdicción Especial para la Paz*
SNARIV	National System for Integral Attention and Reparation of Victims/ *Sistema Nacional de Atención y Reparación Integral a las Víctimas*
SRSG	Special Representative of the Secretary General
The Framework	Protect, Respect and Remedy Framework
The Norms	Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights
Truth Commission	Commission for the Clarification of Truth/ *Comisión para el Esclarecimiento de la Verdad*
UDHR	Universal Declaration of Human Rights
UNCHR	United Nations Commission on Human Rights
UNHRC	United Nations Human Rights Committee
UNGPs	United Nations Guiding Principles on Business and Human Rights
Victims' Law	Victims and Land Restitution Law of 2011/ *Ley de Victimas y Restitución de Tierras de 2011*

Working Group	Working Group on the issue of human rights and transnational corporations and other enterprises

1 Introduction

1.1 Background

The end of the millennium elucidated the painstakingly clear fact that corporations could cause and contribute to human rights abuses.[1] Since then, the field of business and human rights has developed rapidly, albeit on a track paved by both dissonance and divergence.[2] The launch of the *Protect, Respect and Remedy Framework* (Framework) in 2008 and subsequent operationalization of the Framework through the *United Nations Guiding Principles on Business and Human Rights* (UNGPs) in 2011, were deemed as important landmarks to channeling human rights attention and efforts in this area of study. However, situations of armed conflict have continued to emerge in the years following the establishment of the Framework,[3] and this has brought to the fore the complexity and intricacy of business operations on the global arena. For various reasons, many corporations have consequently found themselves operating in revived or altered armed conflict environments, and therefore been forced to navigate in, adapt and relate to such developments.

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[1] From a Swedish perspective, Boliden and Lundin Oil have often been used as examples of companies whose operations have been heavily criticized from a human rights perspective. See more: Business & Human Rights Resource Centre, *Chile: UN experts demand justice for Arica residents still facing health problems almost 40 years after toxic waste dump by Swedish company Boliden Minerals AB,* 2021, https://www.business-humanrights.org/en/latest-news/chile-la-onu-hace-un-llamado-a-detener-las-afectaciones-en-arica-generadas-por-los-residuos-tóxicos-vertidos-por-boliden-mineral-ab/ [accessed 2021-12-25]; Business & Human Rights Resource Centre, *Lundin Indicted for War Crimes,* 2021 https://www.business-humanrights.org/en/latest-news/lundin-indicted-for-war-crimes/ [accessed 2021-12-25].

[2] See for example: John H. Knox, "The Ruggie Rules: Applying Human Rights Law to Corporations" in *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation*, Radu Mares (ed.), (The Netherlands: Koninklijke Brill, 2012).

[3] Uppsala Conflict Data Program, *Countries in Conflict View*, 2020, https://www.ucdp.uu.se/encyclopedia [accessed 2021-12-25].

Nevertheless, contemporary armed conflicts have a tendency to end through negotiated settlements rather than by military victory.[4] Such conditions open up for the negotiation of terms of concerned agreements, and also give a greater flexibility in regard to the shaping and the implementation of the post-conflict phase.[5] Simultaneously, the field of transitional justice has gained ground, aimed at addressing past atrocities and human rights abuses.[6] Involving non-state actors that have taken part in the armed conflict, especially paramilitaries and insurgency groups, has often been deemed crucial in transitional justice processes, but the role and engagement of corporations in such processes has not always been clearly formulated and delineated.[7] This is undoubtedly problematic since it is widely acknowledged that conflict environments pose acute challenges to business operations, and that some of the most severe business related human rights abuses occur in such environments.[8]

The apparent disconnect between the two fields is therefore regrettable, and an issue that this thesis seeks to address. It is clear that there are many areas of potential synergy between the two fields, and I would argue that one of the most tangible common denominators between business and human rights and transitional justice lies in the aspect of access to remedy. Access to remedy constitutes one of three main pillars of the Framework and is aimed at addressing "the need for greater

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[4] Sebastian von Einsiedel, "Civil War Trends and the Changing Nature of Armed Conflict", *United Nations University Centre for Policy Research* (2017), p. 3.

[5] Padraig McAuliffe, *Transformative Transitional Justice and the Malleability of Post-Conflict States*, (Cheltenham: Edward Elgar Publishing Limited, 2017), pp. 5-10.

[6] For more on the development and emergence of transitional justice, see: Susanne Buckley-Zistel, Teresa Koloma Beck, Christian Braun & Friederike Mieth (eds.), *Transitional Justice Theories*, (New York: Routledge, 2014); Michael Newman, *Transitional Justice,* (Cambridge: Polity Press, 2019); Naomi Roht-Arriaza & Javier Mariezcurrena (eds.), *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice,* (New York: Cambridge University Press, 2006); Yasmin Sooka, "Dealing with the past and transitional justice: building peace through accountability", *International Review of the Red Cross* 88:862 (2006), p. 13.

[7] Irene Pietropali, *Remedy for corporate human rights abuses in transitional justice contexts,* PhD thesis (London: Middlesex University, 2017), p. 5.

[8] United Nations Human Rights Council, 'Business and human rights in conflict affected regions: challenges and options towards State responses' (27 May 2011) UN Doc A/HRC/17/32.

access by victims to effective remedy, both judicial and non-judicial".[9] Similarly, the four cornerstones of transitional justice (i.e. truth, justice, reparation and guarantees of non-recurrence) all closely engage and intertwine with issues concerning remedy.

1.2 Purpose, research question and choice of case

The overarching purpose of this thesis is to contribute to a greater understanding of how the field of transitional justice and the field of business and human rights interact when states are transitioning from active armed conflict to post-conflict phases. More specifically, this research aims to investigate the interlinkages between access to remedy as understood under pillar III of the UNGPs and transitional justice processes.

The motivation behind the research lies in the fact that although the possibilities of holding corporations accountable for human rights abuses have been thoroughly debated and discussed within the framework of business and human rights in the last decade, the alternative opportunities and mechanisms that transitional justice processes hold have until recently often been overlooked.[10] Due to the highly contextual nature of transitional justice processes, they provide for a different set of tools in regard to addressing past atrocities, incorporating both judicial and non-judicial methods – thus posing alternative routes for victims trying to access remedy.

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[9] United Nations Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations' "Protect, Respect and Remedy" Framework' (21 March 2011) UN Doc A/HRC/17/31, para 6.

[10] Newman 2019, p. 147.

Therefore, the research question is as follows:

- *How can the responsibility of corporations for human rights abuses committed in conflict contexts be addressed in transitional justice processes to ensure access to remedy?*

For the purpose of contextualization, this research question will be explored in-depth by drawing upon the ongoing transitional justice process in Colombia. The choice of examining the Colombian peace process stems from the fact that it reflects a contemporary approach to dealing with past atrocities, and therefore provides a contextual lens for investigating the nexus between business and human rights and transitional justice.

The *Final Agreement to End the Conflict and Establish a Stable and Long-lasting Peace* (Peace Agreement)[11] which was signed by the Colombian government and the *Fuerzas Armadas Revolucionarias de Colombia* (FARC) in 2016 to bring the nearly six decade-long Colombian civil war to an end, has been described as both innovative and new-thinking.[12] A result of lengthy negotiations, the Peace Agreement sets the framework for the continued transitional justice process of the country. Due to the intricacy and the multifaceted character of the conflict, much thought has been put into identifying which actors should be involved in the process going forward and how. It has been acknowledged that many corporations have been connected to the violence of the Colombian conflict,[13] and the Peace Agreement bears the novel feature of explicitly recognizing third parties or non-combatants who participated directly or indirectly in the conflict.[14] By examining

[11] Government of Colombia and FARC, *Final Agreement to End the Conflict and Establish a Stable and Long-lasting Peace,* (Peace Agreement), 2016, https://www.peaceagreements.org/viewmasterdocument/1845 [accessed 2021-12-25].

[12] For a detailed review of the innovative features of the Peace Agreement, see: Kristian Herbolzheimer, *Innovations in the Colombian Peace Agreement,* 2016, https://noref.no/Publications/Regions/Colombia/Innovations-in-the-Colombian-peace-process [accessed 2022-02-02].

[13] Newman 2019, p. 147.

[14] See: Peace Agreement. For more information of the scope of third parties or non-combatants, see: Sabine Michalowski et al., *Guía de Orientación Jurídica: Terceros Civiles,* 2020,

the Colombian experience, this thesis aims to shed light on potential pitfalls and opportunities when it comes to holding corporations accountable for human rights abuses committed during past conflicts. It can also assist in exploring how the issue of accountability can and should be addressed in regard to access to remedy, and help identify lessons which might be extrapolated and drawn upon in future transitional justice processes.

1.3 Delimitation and definitions

It is at the outset important to briefly comment on some of the delimitations of this thesis. First of all, the transitional justice process in focus of the essay is the one that saw light of day through the Peace Agreement between the FARC-guerilla and the Colombian government in 2016. For the purpose of contextualization, some transitional justice mechanisms that have been adopted earlier in Colombia will be acknowledged and presented but examining these in greater detail in relation to access to remedy lies outside the purpose of this thesis.

Additionally, the topic of new investments in post-conflict scenarios is often noted in the nexus between business and human rights and transitional justice/ peacebuilding. The thesis will not elaborate upon the challenges associated with this topic.[15]

Furthermore, it is essential to clarify some of the terminological definitions utilized throughout this essay. The term 'corporation' is in this thesis understood to encompass all types of business entities, irrespective of their corporate structure, the nature of their activities and operations, or their national or transnational

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https://www.dejusticia.org/wp-content/uploads/2020/03/TercerosJEP-Web-Mar9.pdf [accessed 2021-12-25].

[15] For reading on the topic, see for example: Daria Davitti, *Investment and Human Rights in Armed Conflict: Charting an Elusive Intersection,* (Oxford: Hart Publishing Ltd, 2019); Tara van Ho, "Is it Already Too Late for Colombia's Land Restitution Process? The Impact of International Investment Law on Transitional Justice Initiatives", *International Human Rights Law Review* 5:1 (2016).

character. 'Businessperson' is understood as a natural person, whose activities can be linked to or motivated by the corporation.

The term 'corporate human rights abuses' is intended to cover all types of negative business impacts on human rights. In the international law discourse, a distinguishment is often made between 'human rights abuses' and 'human rights violations'. The latter is often used solely in relation to the actions of states, rooted in the understanding that corporations cannot commit violations as they are not subject to direct obligations under international human rights law. This thesis will, for the purpose of coherence, draw upon this understanding.

'Post-conflict' is a term whose definition is not always clear-cut. A post-conflict phase can be triggered by – for example – military victory, peace agreements or DDR (disarmament, demobilization, and reconciliation).[16] It does not equate an all-encompassing peace, but is on the contrary often characterized by lingering tensions. In this thesis, 'post-conflict' is understood to encompass the period after the signing of the Peace Agreement of 2016, and rests upon a notion of continuity as the agreement is still being implemented. This choice can undoubtedly be criticized, as the Peace Agreement does not cover all warring factors in Colombia, resulting in a limited and partial post-conflict phase. The challenges associated with this fact will be discussed in greater detail in *Chapter 5.2*.

1.4 Method and material

This thesis will employ a mixed methodological approach, drawing upon and interlacing three distinctive approaches. Firstly, with the aims of linking the fields of transitional justice and business and human rights, the thesis reflects a clear interdisciplinary approach. As such, the thesis will be guided by an interdisciplinary

[16] Graham Brown, Arnim Langer & Frances Stewart, *A Typology of Post-Conflict Environments,* 2011, https://static1.squarespace.com/static/5db70e83fc0a966cf4cc42ea/t/5f330e1cdc8bae025343c7fb/1597181468148/0114.pdf [accessed 2021-12-25].

method, which allows for the examination of an issue of complex character from the perspectives of two different fields of study.[17]

Secondly, the thesis will also utilize a method which has been labeled as an 'analysis of the law' by Sandberg. [18] This method tolerates the use of a broader range of sources than those by which the traditional legal method is bound. The approach is not solely concerned with establishing the applicable law in a certain situation but goes further and allows for a more in-depth analysis, evaluation and discussion of the applicable law. It also embraces the notion that there isn't always one given answer for a certain legal problem.[19] The method is less rigid, and thus suitable for approaching the interdisciplinary issue of how the responsibility of corporations for human rights abuses committed in conflict contexts be addressed in transitional justice processes to ensure access to remedy. It will guide the effort to establish the applicable law governing business operations in conflict and post-conflict contexts, as well as the applicable law governing the issue of access to remedy. Furthermore, it will allow for a thorough analysis and discussion of the subject, merging the issue with the field of transitional justice.

Thirdly, the 'analysis of the law' method described above, posits a clear critical element.[20] As the thesis aims to map out and elaborate upon lessons from the Colombian transitional justice experience in regard to access to remedy for corporate human rights abuses, it will thus be essential to engage with a critical perspective.

The material used in this thesis is of multifaceted character. On the one hand, the UNGPs and their commentaries lie at the core of this thesis. In order to provide a

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[17] Minna Gräns, "Användningen av andra vetenskaper", in *Juridisk Metodlära,* Fredric Korling & Mauro Zamboni (eds.), 1st edition. (Lund: Studentlitteratur, 2013), p. 428.

[18] English translation by author from 'rättsanalytisk metod' in Swedish, see: Claes Sandgren, *Rättsvetenskap för uppsatsförfattare: Ämne, material, metod och argumentation,* 4th edition. (Stockholm: Nordstedts Juridik, 2018), p. 50.

[19] Sandgren 2018, pp. 50–51.

[20] Sandgren 2018, p. 51.

more detailed understanding of the regulation established by the UNGPs, this thesis will also engage with reports of the UN Working Group of Business and Human Rights, and the texts produced by the Accountability and Remedy Project. On the other hand, the thesis will also employ literature and academic sources published by scholars researching business and human rights and transitional justice. The sourcing of these has been conducted by the help of a literature review, which has assisted in mapping out the relevant research done in the nexus between the two fields. As Knopf has argued, literature review can be perceived as a preliminary stage of a larger research project, and this thesis draws upon this understanding.[21] Furthermore, a combination of legal sources, academic sources and literature, have been utilized in regard to the Colombia-specific segments of the thesis – in order to paint a multidimensional picture of the conflict and the peace process, and to understand how access to remedy is reflected in the Colombian context.

The thesis does not bear the ambition of examining case law. In some instances, however, case law will be highlighted to provide relevant examples.

1.5 Outline

In the above, *Chapter 1* has presented the purpose and research question of this thesis. Additionally, it has also discussed the delimitation of the thesis, and introduced the terminology that will be utilized. The choice of material and method has also been highlighted.

Chapter 2 will set the foundations for the thesis, by presenting the research underpinnings that have guided the research. Firstly, the chapter will address the question of responsibility for human rights abuses, tracing developments from the state, individual and corporate perspective. This part will also outline the development of the field of business and human rights. Subsequently, the following part will introduce the field of transitional justice. Lastly, the final part will

[21] Jeffrey W. Knopf, "Doing a Literature Review", *PS: Political Science and Politics,* 39:1 (2006), p. 127.

highlight the connection between the field of transitional justice and the field of business and human rights.

The purpose of *Chapter 3* will be to introduce the normative framework of business and human rights in conflict settings, by drawing upon the UNGPs and their commentaries. The first part will focus on conflict environments, while the second part will target post-conflict environments. Both parts will incorporate both a state and corporate perspective. The subsequent part will address the issue of remedy and pillar III of the UNGPs. Finally, the concluding part will briefly examine access to remedy from a transitional justice stand-point.

Chapter 4 will introduce the case of Colombia. It will initially present the Colombian civil conflict and provide an overview of some of the main drivers of the conflict. Additionally, it will examine the role of corporations in the armed conflict. Subsequently, the Peace Agreement between the FARC and the Colombian government will be introduced. The second part of the chapter will highlight how access to remedy is addressed in the Colombian context, by examining both the ordinary judicial system and the mechanisms established through the Peace Agreement. For context, two earlier transitional justice mechanisms will also be presented.

The following chapter, *Chapter 5*, will examine and analyse potential pitfalls and possibilities in regard to the access of remedy for corporate human rights abuses that are visible in the Colombian context. The focus of the chapter will lie on the transitional justice mechanisms established through the Peace Agreement, but some other, more overarching challenges will also be elucidated.

Chapter 6 aims to extrapolate the Colombian experience, by drawing upon the previous chapter. It will highlight and discuss lessons that can be considered in future transitional justice processes, in order to ensure and promote access to remedy for corporate human rights abuses.

Chapter 7 will present the concluding remarks.

2 Research underpinnings

This chapter aims to set the foundations for the research project, initially by addressing the question of responsibility for human rights abuses, and subsequently by introducing the field of transitional justice and what it entails. The final sub-chapter aims to shed light and elaborate on the nexus between the field of business and human rights and the field of transitional justice.

2.1 The question of responsibility for human rights abuses

Due to the state-centric view in international law, with roots stemming from the Westphalian Peace of 1648, states are considered the prime creators and prime subjects of international law – and consequently, also the main bearers of responsibility for violations of international law.[22] However, the last decades have been characterized by a volatile geopolitical landscape, a diminishing dominance of the state in multilateral settings as well as in international relations and an increasing importance and influence of non-state actors.[23] These developments have come to challenge traditional hierarchies on the global arena, and thus also come to question the state-centric view of international law – fueling wide-spread

[22] Anders Henriksen, *International Law,* 2nd ed. (Oxford: Oxford University Press, 2019), p. 4; Jeanne M. Woods, "A Human Rights Framework for Corporate Accountability", *ILSA Journal of International & Comparative Law* 17:2, (2011), p. 322; Edith Brown Weiss, "Invoking State Responsibility in the Twenty-First Century", *The American Journal of International Law* 96:4 (2002) p. 798.

[23] David Kinley & Junko Tadaki, "From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law", *Virginia Journal of International Law* 44:4 (2004), p. 933, 945; Brown Weiss 2002, p. 798; Steven R. Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility", *The Yale Law Journal* 111:3 (2001), pp. 462-463; Lina M. Cespedes-Baez, "Colombia's Victims Law and the Liability of Corporations for Human Rights Violations", *Estudios Socio-Juridicos* 14:1 (2012), p. 200.

debate regarding which actors can be held responsible for human rights abuses.[24] This section aims to briefly untangle the question of responsibility.

The responsibility of the state

In regard to international human rights, it is firmly established that this branch of international law places three sorts of duties on states; the duty to respect, the duty to protect and the duty to fulfill human rights.[25] The implications and the limitations of the respective duties can be identified by closer a study of the various human rights treaties. Bearing in mind the limited scope of this thesis, the most relevant duty to further examine at this point is the duty to protect – as it targets the actions of, amongst other, third parties, e.g. private actors (such as corporations).[26] Naturally, the precise content of the duty can vary, but has been described by the Special Representative of the Secretary General on human rights and other business enterprises (SRSG) to in general entail that states "have a duty to protect against non-state human rights abuses within their jurisdiction, and that this duty extends to protection against abuses by business entities".[27]

As an example, we can draw upon the *International Covenant on Civil and Political Rights* (ICCPR) in order to illustrate how this duty can be formulated. The ICCPR establishes that states are obligated to "respect and ensure all individuals within its

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[24] Ratner 2001, p. 446; Surya Deva, "Human Rights Violations by Multinational Corporations and International Law: Where from Here", *Connecticut Journal of International Law* 19:1 (2003), p. 1; David Hughes, "Differentiating the Corporation: Accountability and International Humanitarian Law", Michigan Journal of International Law 42:1 (2020), p. 52. For a detailed discussion on the responsibility of non-state actors, see further: Andrew Clapham, *Human Rights Obligations of Non-State Actors*, (Oxford: Oxford University Press, 2006).

[25] United Nations Human Rights Council, 'Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts' (9 February 2007) UN Doc A/HRC/4/035.

[26] UN Human Rights Council A/HRC/4/035, para 10.

27 Ibid.

territory and subject to its jurisdiction the rights recognized in the Covenant".[28] This includes both positive and negative obligations, and the article stipulates not only that states are obligated to take preventive action for the safeguarding of human rights,[29] but are also obligated to provide access to effective remedy if and when violations occur.[30] The United Nations Human Rights Committee (UNHRC) has clarified that a breach of ICCPR-rights thus can occur when a state permits or fails "to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities".[31] As a result, state responsibility for human rights abuses can arise as a consequence of conduct committed by private actors.

Furthermore, under specific circumstances, state responsibility for human rights abuses can be established through the secondary rules of the *Articles on Responsibility of States for Internationally Wrongful Acts* (ARSIWA).[32] According to the articles, international state responsibility arises through internationally wrongful acts. Such acts constitute conduct consisting of actions or omissions, that are attributable to the state under international law and constitute a breach of an international obligation of the state.[33] Responsibility can also be attributed to a state as a result of the conduct of: state organs;[34] persons or entities empowered by the law of that state to exercise elements of the governmental authority;[35] and persons

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[28] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art. 2.

[29] ICCPR, Art 2(2).

[30] ICCPR, Art 2(3).

[31] United Nations Human Rights Committee, 'General Comment 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13.

[32] Robert McCorquodale & Penelope Simons, "Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Law", The Modern Law Limited 70:4 (2007), pp. 601-602.

[33] International Law Commission, 'Report of the International Law Commission on the Work of its 53rd Session: Draft Articles on Responsibility of States for Internationally Wrongful Acts' (23 April – 1 June and 2 July – 10 August 2001) UN Doc Supp No 10 (A/56/10), (ARSIWA), art. 1-2.

[34] ARSIWA, Art 4.

[35] ARSIWA, Art. 5.

or groups acting on instruction of, or under the direction or control of a state.[36] Hence, international state responsibility may incur as a result of the conduct of private actors, but the substantial and burdensome challenge lies in establishing a solid link between the actor and the state.[37]

The responsibility of the individual

The state-centric view in international law was severely contested through the catalytic Nuremberg Trials, and the dominance of the view has since then been repeatedly challenged. The trials acted as a starting point for the acknowledgement of the fact that individuals too have certain responsibilities under international law, predominantly governed by the body of international criminal law.[38] These responsibilities have emerged and crystalized through the establishment of ad hoc tribunals and the International Criminal Court (ICC), their jurisprudence and treaties.[39] However, the scope for individual criminal responsibility in relation to the field of human rights is narrow, primarily concerned with especially atrocious and heinous crimes – such as war crimes, crimes against humanity, genocide and torture.[40]

The responsibility of the corporation and the emergence of the field of business and human rights

In a perfect world, relying upon states to protect individuals within their jurisdiction from human rights abuses might have been sufficient. However, it has become

[36] ARSIWA, Art. 8.

[37] For further reading, see: Danwood Mzinge Chirwa, "The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights", *Melbourne Journal of International Law* 5:1 (2004); McCorquodale & Simons 2007.

[38] Hughes 2020, p. 54.

[39] Ratner 2001, p. 461.

[40] Ratner 2001, p. 491; UN Human Rights Council A/HRC/4/035, para 19.

blatantly clear that states at times can be unwilling or unable to safeguard human rights. With regard to the private sphere, it is not unusual that states give priority to other interests that are perceived as more pressing, not uncommonly the ability to attract foreign direct investment.[41] Furthermore, the opportunities posed by ARSIWA for holding states internationally responsible for the conduct of private corporations are undeniably quite restricted, and have their apparent shortcomings. As an example, many human rights violations committed by private actors cannot be linked to the state, and thus fall outside the purview of international state responsibility.[42] Besides, the last decades have witnessed a rise of massive multinational companies, which with their increasing dominance and complex corporate structures have severed themselves from the influence of and dependency on governments.[43] Insights such as these have amplified and elucidated the need to address the issue of corporate responsibility for human rights abuses, and thus contributed to the emergence and development of the field of business and human rights. The question of how to best address the responsibility of corporations, constitutes one of the core concerns of the field and has sparked multifaceted debate, involving a broad range of actors. Deva argues that these debates often have

[41] Ratner 2001, p. 461; Surya Deva, "From 'business or human rights' to 'business and human rights': what next?" in *Research Handbook on Human Rights and Business,* Surya Deva & David Birchall (eds.), (Cheltenham: Edward Elgar Publishing Limited, 2020), pp. 1-2; Erika George, *Incorporating Rights: Strategies to Advance Corporate Accountability,* (New York: Oxford University Press, 2021), p. 30. The way in which foreign direct investment (FDI) affects human rights has been source of discussion. While some argue that FDI can contribute to increase a state's overall human rights performance, others have argued that these investments grant foreign corporations certain leverage against the host state and allows them to operate in a way that negatively impacts human rights. For a mapping of the discussion, see: Dong-Hun Kim & Peter F. Trumbore, "Transnational mergers and acquisitions: The impact of FDI on human rights, 1981-2006", *Journal of Peace Research* 47:6 (2010).

[42] Chirwa 2007, p. 10.

[43] Ratner 2001, p. 463.

been centered around certain dichotomies, such as rights vs. responsibilities[44] or voluntary vs. binding rules.[45]

Early debates reflected a clear rift between those who argued that international law already placed obligations on corporations and those who opposed the idea. Clapham and Ratner – proponents of the former standpoint – argued that the debates have incorrectly focused on issues of jurisdictional accountability, and argued that the lack of legal institutions that have the capacity of trying legal persons does not mean that corporations are shielded from obligations under international law.[46] Clapham partially builds his argument by drawing parallels to the reasoning of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Tadíc* case, according to which "international legal obligations can exist independently of any international institution to enforce them".[47]

In effort to disentangle the debate, some scholars have made a clear distinction between corporate responsibility for international crimes,[48] and corporate

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[44] Deva pinpoints the rights vs. responsibilities debate to a period between 1974 – 1992, which came to a sudden halt when the UN pulled the plug on the negotiations of a Code of Conduct on Transnational Companies. Furthermore, she explains that the inability to reach consensus was largely due to differing goals of the dissonance between developing and developed countries, the former arguing for the importance of responsibilities, and the latter for the importance of rights, see: Deva 2020, p. 3.

[45] This period lasted between 1998-2004 according to Deva, with the voluntary aspect mainly reflected in the launch of the Global Compact in 2002, and the binding by the efforts to launch the *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, see: Deva 2020, p. 3.

[46] The former standpoint often illustrated by Andrew Clapham, see e.g.: Chapter 6 in Clapham 2006. See also the arguments posed by: Ratner 2001 or Florian Wettstein, "The history of 'business and human rights and its relationship with corporate social responsibility" in *Research Handbook on Human Rights and Business,* Surya Deva & David Birchall (eds.), (Cheltenham: Edward Elgar Publishing Limited, 2020), p. 30.

[47] Clapham 2006, p. 267.

[48] 'International crimes' commonly refers crimes of genocide, war crimes, crimes against humanity and crimes of aggression, which are identified in the Rome Statute as the "most serious crimes of concern to the international community as a whole", see further: Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90,

responsibility for other human rights violations under international law. The first area has often been deemed as less divisive.[49] Former SRSG on human rights and other business enterprises, Professor John Ruggie has emphasized that the area is continuously being shaped by the interaction between the development of individual responsibility by ad hoc tribunals and the ICC's governing treaty, the *Rome Statute*, and the incorporation of responsibility for international crimes for corporations under domestic regulation.[50] Even though the area is still evolving, Ruggie argues that there is no doubt of its existence.[51]

The question of corporate responsibility for human rights violations that do not amount to international crimes is however more difficult to navigate. In 2003, a sub-commission operating under the United Nations Commission on Human Rights (UNCHR) presented the *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (the Norms).[52] The Norms, which were met with both extensive critique and wide-spread praise,[53] contributed to further confusion on the matter as they claimed that the obligations posed by the entire body of international human rights law already applied to corporations. This standpoint was never endorsed by the UNCHR, who declared that the Norms had "no legal standing",[54] and they were later also rebutted by Ruggie, during his time as SRSG between 2005 and 2011.[55]

(Rome Statute), art. 5.

[49] But nevertheless, not without cause for debate and diverging opinions. See for example: Knox 2012.

[50] UN Human Rights Council A/HRC/4/035, para 22.

[51] UN Human Rights Council A/HRC/4/035, para 33.

[52] United Nations Commission on Human Rights, 'UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (26 August 2003) UN Doc E/CN.4/Sub.2/2003/12/Rev.2.

[53] Knox 2012, p. 53.

[54] United Nations Commission on Human Rights, 'Report on the Sixtieth Session' (2004) UN Doc E/CN.4/2004/127, p. 333.

[55] UN Human Rights Council A/HRC/4/035, para. 44

Under his mandate,[56] Ruggie successfully steered both the *Protect, Respect and Remedy* framework and its subsequent operative document, the UNGPs, through the HRC, with the framework being "welcomed"[57] by the Council in 2008 and the UNGPs being fully endorsed in 2011. Even though the launch of the UNGPs has been deemed pivotal for the field of business and human rights, the principles nevertheless represent soft law in their legal form, although they reflect existing binding international legal obligations. The field of business and human rights has consequently expanded, and the development of an internationally binding legal instrument is currently under way.[58] In 2014, the UN Human Rights Council established an intergovernmental working group (IGWG), whose main aim is to "elaborate an internationally legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises".[59] Since then, three versions of draft treaty texts have been produced

[56] The mandate for the SRSG's first term covered, amongst other aspects, the task of identifying and clarifying "standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regards to human rights", and "to elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights", see: United Nations Commission on Human Rights, 'Human Rights Resolution 2005/69: Human Rights and Transnational Corporations and Other Business Enterprises' (20 April 2005) UN Doc E/CN.4/RES/2005/69. Similarly, the mandate for the second term covered the task of providing "views and concrete and practical recommendations on ways to strengthen the fulfilment of the duty of the State to protect all human rights from abuses by or involving transnational corporations and other business enterprises, including through international cooperation", see further: United Nations Human Rights Council, 'Mandate of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business' (1 September 2008) UN Doc A/HRC/RES/8/7.

[57] UN Human Rights Council A/HRC/RES/8/7, para 1.

[58] Deva 2020, p. 4.

[59] United Nations Human Rights Council, 'Elaboration of an internationally legally binding instrument on transnational corporations and other business enterprises with respect to human rights: resolution/adopted by the Human Rights Council' (14 July 2014), UN Doc A/HRC/RES/26/9, para 1.

by the IGWG,[60] but the adoption of the treaty text is still deemed to lie in the far future.[61]

It is meaningful, at this point, to remind the reader that this section addresses the question of corporate responsibility from an international human rights perspective. The last years have witnessed a breakthrough in national human rights legislation, often concerned with issues of mandatory human rights due diligence. However, addressing these developments lies outside the purpose of this chapter.[62]

2.2 The field of transitional justice

By way of introduction, it is important to note that although the definitions and conceptualizations of transitional justice vary,[63] most scholars and practitioners agree that the field aims to address past atrocities and human rights violations when states transition from periods of oppressive regimes and/or conflict.[64] The methods to achieve this goal incorporate both judicial mechanism and non-judicial mechanisms, the latter often reflected through truth commissions, reconciliatory efforts and memorialization processes.[65] The utilization of non-judicial mechanism stems from the recognition that traditional judicial mechanisms lack a victim-

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[60] For the different versions, see: Business & Human Rights Resource Centre, *Binding Treaty,* 2021, https://www.business-humanrights.org/en/big-issues/binding-treaty/ [accessed at 2021-12-30].

[61] Carlos Lopez, *The Third Revised Draft of a Treaty on Business and Human Rights: Modest Steps Forward, But Much of the Same,* 2021, http://opiniojuris.org/2021/09/03/the-third-revised-draft-of-a-treaty-on-business-and-human-rights-modest-steps-forward-but-much-of-the-same/ [accessed at 2021-12-30].

[62] Deva 2020, p. 5.

[63] See for example: Naomi Roht-Arriaza, "The new landscape of transitional justice", in *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice,* Naomi Roht-Arriaza & Javier Mariezcurrena (eds.), (New York: Cambridge University Press, 2006); Rudi G. Teitel, *Globalizing transitional justice: contemporary essays,* (New York: Oxford University Press, 2014); The International Centre for Transitional Justice, *What is transitional justice?,* 2021, https://www.ictj.org/about/transitional-justice [accessed at 2021-12-30].

[64] Newman 2019, pp. 14-26.

[65] Newman 2019, p. 17; The International Centre for Transitional Justice.

centered approach, and open up for processes in which the dignity and the needs of the victims can be more adequately addressed.[66]

Transitional justice is often discussed under the same thematic umbrella as peacebuilding, since they both target post-conflict scenarios. However, even though the fields at times overlap and interact, it is important to distinguish between the two. Peacebuilding is, in comparison with transitional justice, to a larger extent concerned with the building and solidification of institutions, rather than focusing on addressing past atrocities.[67]

The absence of a clear-cut definition of transitional justice can partially be explained by the difficulty to reach consensus on what 'transition' constitutes and what 'justice' constitutes. The term transition does not in itself shed light on what a state is transitioning from, nor to – and both these answers can vary according to different contextual prerequisites and effect the shaping of the transitional justice process in question.[68] Comparably, the term justice is equally vague. In an effort to conceptualize justice in post-conflict scenarios, what it should incorporate and who it should be for, scholars have argued that there is a vast array of different categories of justice. The categories include – but are not limited to – legal, rectificatory, distributive, restorative, reparative and corrective justice.[69] Different conceptualizations reflect different approaches. As Mani clarifies; legal justice targets defective rule of law-systems, rectificatory justice is characterized by a victim-centered approach, whilst distributive justice bears the objective of addressing structural and systemic injustices.[70]

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[66] Roht-Arriaza 2006, p. 4.

[67] Catherine Baker & Jelena Obradovic-Wochnik, "Mapping the nexus between transitional justice and peacebuilding", *Journal of Intervention and Statebuilding* 10:3 (2016), pp. 281-284.

[68] Roht-Arriaza 2006, p. 1; Newman 2019, p. 14.

[69] Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War,* (UK: Polity Press, 2002), pp. 6-9; Susanne Buckley-Zistel et al., "Transitional justice theories: An introduction", in *Transitional Justice Theories,* Susanne Buckley-Zistel, Teresa Koloma Beck, Christian Braun and Friederike Mieth (eds.), (New York: Routledge, 2014), p. 6.

[70] Mani 2002, pp. 6-9.

Irrespective of the conceptual difficulties that characterize the field, transitional justice frequently draws upon four pillars; truth, justice, reparation and guarantees of non-recurrence.[71] As discussed above, how these pillars take shape and how they interact, and through which mechanisms they operate, is highly dependent on contextual conditions. Consequently, there is no such thing as a 'transitional justice blueprint' that can be extrapolated and applied in every given scenario.[72] This inherent flexibility constitutes one of the major strengths of the field, but also one of its biggest challenges.[73]

One crucial issue to resolve when shaping a transitional justice process lies in which actors should be involved, and consequently, whose actions should be addressed.[74] The actions of state actors, or actors with a close connection to the state (e.g. paramilitaries), and insurgency groups, have traditionally been the main targets. Until recently, far less attention has been aimed at the question of corporate responsibility.[75] The following sub-chapter aims to examine the role of corporate responsibility in relation to the field of transitional justice.

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[71] The importance of these four pillars is also reflected in the fact that the UN has established a Special Rapporteur on the promotion of truth justice, reparation and guarantees of non-recurrence.

[72] Roht-Arriaza 2006, pp. 5, 9; Alexander González Ghavarría, "Justicia transicional y reparación a las víctimas en Colombia", *Revista Mexicana de Sociología* 72:4 (2010), p. 632.

[73] For contemporary critique, see: Newman 2019, p. 139.

[74] This has often been examined in light of the debates regarding the local versus the global, Roht-Arriaza 2006, p. 11. For further reading, see for example: Adam Kochanski, "The "Local Turn" in Transitional Justice: Burb the Enthusiasm", *International Studies Review* 22 (2020); Annika Björkdahl & Kristine Höglund, "Precarious peacebuilding: friction in global local encounters", *Peacebuilding* 1:3 (2013); Roger Mac Ginty, "Where is the Local? Critical Localism and Peacebuilding" *Third World Quarterly* 36:5 (2015).

[75] Jeffrey Atterberry, "Turning in the Widening Gyre: History, Corporate Accountability, and Transitional Justice in the Postcolony", *Chicago Journal of International Law* 19:2 (2019), p. 336; Pietropali 2017, p. 5; Joris van de Sandt & Marianne More, "Introduction", in *Peace, everyone's business! Corporate accountability in transitional justice: lessons for Colombia,* Joris van de Sandt & Marianne More (eds.), (Utrecht: PAX, 2017), p. 13; Philipp Wesche, "Business actors and land restitution in the Colombian transition from armed conflict", *The International Journal of Human Rights* 25:2 (2021), p. 297; Clara Sandoval, "Linking Transitional Justice and Corporate Accountability", in *Corporate Accountability in the Context of Transitional Justice,* Sabine Michalowski (ed.), (New York: Routledge, 2013), p. 25.

2.3 Bridging the gap: transitional justice and business and human rights

Even though corporations rarely have been the main targets of transitional justice processes, it would be unfair to argue that the field has completely shied away from and overlooked the issue of corporate accountability. However, the issue has often played a marginal role, or been addressed in a haphazardly or belated manner.[76] The *South African Truth Commission* is repeatedly used to exemplify an early non-judicial transitional justice mechanism which was tasked with examining the role of companies, and reached the notable conclusion that the apartheid regime was able to sustain partially due to the support of the business community at the end of its mandate.[77] Other countries, such as Liberia and Sierra Leone, have subsequently also aimed to address corporate responsibility within their respective transitional justice frameworks. However, Newman argues that none of these efforts have met the expected results, and that the sought-after effects of the initiatives were hampered by an absence of adequate follow-up measures.[78]

Increased understanding of the role that corporations play in contemporary conflicts has fueled ambitions to better address corporate human rights abuses in post-conflict settings. Van de Sandt and More have, in a thorough and extensive report which draws upon a broad range of case studies, illustrated that corporations operating in conflict contexts can participate or assist in human rights abuses, directly or indirectly, thus adopting the role as either primary perpetrators or beneficiaries.[79]

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[76] Newman 2019, p. 147; Leigh Payne, "Corporate complicity and transitional justice: setting the scene", in *Peace, everyone's business! Corporate accountability in transitional justice: lessons for Colombia,* Joris van de Sandt & Marianne More (eds.), (Utrecht: PAX, 2017), p. 20.

[77] TRC Final Report, Volume 4, Chapter 2, *Findings arising out of business sector hearings,* https://sabctrc.saha.org.za/reports/volume4/chapter2/subsection14.htm [accessed 2022-02-03], para 161.

[78] Newman 2019, p. 147.

[79] Van de Sandt & More 2017.

Within the scholarly debate, there have in recent years been several attempts to address the gap between the fields of business and human rights and transitional justice. Nevertheless, Michalowski's *Corporate Accountability in the Context of Transitional Justice* from 2013, still constitutes the only book which examines the relationship between the fields. The book theorizes the linkages between the two fields and analyzes challenges that can arise when they interact and overlap. As Pietropali highlights, the research field is still in its infancy and of fragmented character, mainly due to the fact that many scholars have chosen to focus exclusively on a certain conflict, mechanism or violation.[80]

However, the need for increased engagement between the fields has been emphasized by several scholars. As an example, Atterberry claims that by addressing corporate responsibility in transitional justice processes, harmful post-colonial structures can be altered. He argues that transitional justice needs to "address the various forces and actors that lie beyond and beneath the nation-state",[81] and that this is crucial for the continued relevance and legitimacy of transitional justice.[82] Along similar lines, Michalowski argues that augmented interaction between the fields can help strengthen and improve both respective fields.[83] Atterberry proposes that the transitional justice community should engage with the IGWG, in order to produce a binding legal instrument for corporate responsibility, which draws upon the learnings from transitional justice. Correspondingly, Van Ho argues that business and human rights should engage more actively with and draw upon learnings from the field transitional justice. She problematizes the fact that the formulation process of the UNGPs was primarily

[80] Pietropali 2017, pp. 19–20.

[81] Atterberry 2019, p. 345.

[82] According to Atterberry, the failure to adequately address economic actors and harmful structures in Sierra Leone, bore the consequences that some deemed the post-conflict process as deficient.

[83] Sabine Michalowski, "Introduction", in *Corporate Accountability in the Context of Transitional Justice,* Sabine Michalowski (ed.), (New York: Routledge, 2013), p. 2.

influenced by international criminal law, which consequently gave the principles an unfavorably narrow understanding of accountability.[84]

Another argument for increased engagement between the fields, that is often referred to within the discourse, is that the non-judicial mechanisms available in transitional justice processes are particularly suitable for addressing corporate responsibility. Van Ho argues that these mechanisms often engage with the whole corpus of international human rights law. As such, they are not restricted by the boundaries of criminal law and are often able to explore the underlying and structural causes to the abuses.[85] Nonetheless, these non-judicial mechanisms have historically been curtailed due to a lack of funds and capacity – which is why some scholars, like Wesche, have come to question whether the mechanisms will be able to function adequately if their scope is extended to cover issues regarding corporate responsibility as well.[86] Nevertheless, it is unquestionable that when the issue of corporate responsibility is left out of a transitional justice process, victims of corporate human rights abuses risk being deprived of the truth, justice and reparations. Additionally, impunity and absence of accountability can severely undercut guarantees of non-repetition, and consequently also the notion of sustainable peace.[87]

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[84] Tara van Ho, "Business and human rights in transitional justice: challenges for complex environments", in *Research Handbook on Human Rights and Business,* Surya Deva & David Birchall (eds.), (Cheltenham: Edward Elgar Publishing Limited, 2020), p. 398.

[85] Van Ho 2020, p. 388.

[86] Philipp Wesche, "Business Actors, Paramilitaries and Transitional Justice in Colombia", *International Journal of Transitional Justice* 13 (2019), p. 479.

[87] Payne 2017, pp. 22-23.

3 Contextual normative framework

This chapter aims to set the foundations of the normative framework in post-conflict settings, by drawing upon the UNGPs and their commentaries. By way of introduction, the initial subchapter aims to map the normative framework of conflict environments, addressing both the responsibilities of states and corporations, with the objective of enabling a more thorough understanding of the period that pre-dates the post-conflict environment. The following subchapter will, thereafter, address the normative framework for post-conflict scenarios, and will along the same lines address the issue of responsibility from both a state and corporate perspective. The subsequent subchapter aims to introduce and delve into one of the central questions of this thesis – namely the access to remedy. Finally, the last subchapter will briefly address remedy from a transitional justice perspective.

3.1 The conflict phase

First and foremost, it is important to acknowledge that there are numerous reasons as to why corporations choose to operate in conflict environments. It may be that their business requires them to be present in a specific territory, which is especially common when working with extractive resources. As an example, the cobalt industry – which the production of electric vehicles is highly dependent upon – has been source of well-known debate, as the world's largest cobalt reserve is located in the conflict-ridden Democratic Republic of Congo.[88] It may also be that a corporation is owned by or headquartered in a conflict-affected state, thus making it considerably difficult to relocate when violence erupts. These corporations, whose possibilities of relocating are severely restricted, have at times been referred

[88] See for example: Henry Sanderson, "Congo, child labour and your electric car", *Financial Times,* July 7 2019, https://www.ft.com/content/c6909812-9ce4-11e9-9c06-a4640c9feebb [accessed 2021-12-30].

to as 'captive businesses'.[89] Other companies, who are able to withdraw from the conflict zone and deem such action necessary, are encouraged through the UNGPs and the clarificatory comments of the UN Working Group on the issue of human rights and transnational corporations and other enterprises (Working Group), to practice 'responsible exits' in such scenarios.[90] This entails establishing a clear exit strategy, in which the tentative impact of the corporation's disengagement is identified, assessed and mitigated.[91] Nevertheless, there are several standards as to how businesses and states should operate in times of conflict. These are presented in the following.

The responsibilities of the state

The UNGPs repeatedly emphasize that conflict environments exacerbate the risk for corporate human rights abuses. Under the first pillar, *The State Duty to Protect Human Rights*, guidance can be found regarding how states can support business respect for human rights in conflict affected areas. States are encouraged to engage with corporations in order to help them identify, prevent and mitigate human rights related risks of their activities and relationships.[92] They are also encouraged to provide adequate assistance to corporations, to assess and address heightened risks,[93] and to additionally deny access to public support and services to corporations that are involved with human rights abuses.[94] Lastly, states are encouraged to ensure that their policies, legislation, regulations and enforcement measures are efficient for combating human rights abuses.[95] These measures are

[89] United Nations Human Rights Council, 'Issue of human rights and transnational corporations and other business enterprises: note/ by the Secretary General' (21 July 2020) UN Doc A/75/212, para 66-71.

[90] UNGP, principle 19, 23; UN Human Rights Council A/75/212, para 64-65.

[91] UN Human Rights Council A/75/212, para 65.

[92] UNGP, principle 7(a).

[93] UNGP, principle 7(b).

[94] UNGP, principle 7(c).

[95] UNGP, principle 7(d).

additional to states' obligations under international humanitarian law (IHL)[96] and international criminal law.[97]

Particularly noteworthy is that the above-mentioned measures are not solely limited to the conflict-affected state but also extend to the home states of transnational companies and to neighboring states. This broadened reach stems from the acknowledgment that conflict-affected states might be unwilling or unable to provide adequate human rights protection, and that other states in such situations can influence and help contribute to the prevention of human rights abuses.[98]

Nevertheless, the guidance that the principles offer in regard to the state's responsibility in conflict environments remains at a broad, non-operative and overarching level. In light of this, the SRSG complied a report in 2011, aimed providing "innovative, proactive and, above all, practical policies and tools"[99] that states can draw upon in conflict-affected environments. The conclusions presented in the report emanate from three different workshops that the SRSG conducted with representatives from a wide range of states: Belgium, Brazil, Canada, China, Colombia, Guatemala, Nigeria, Norway, Sierra Leone, Switzerland, the UK, and the US.[100] The report stresses that states should engage proactively with corporations who operate in conflict environments,[101] and presents different means of engagement depending on whether the corporations are perceived as cooperative or uncooperative. In regard to the first category, home states are encouraged to *inter alia* support cooperation with development agencies, foreign and trade ministries, export institutions and embassies.[102] When dealing with so-called uncooperative corporations, state agencies can be tasked with investigating the corporations and official interventions can be made, amongst other measures. In particularly severe

[96] IHL is described in further detail in *Chapter 3.1.2*.

[97] UNGP, principle 7.

[98] Ibid.

[99] UN Human Rights Council A/HRC/17/32, p. 1.

[100] UN Human Rights Council A/HRC/17/32, para 2.

[101] UN Human Rights Council A/HRC/17/32, para 9.

[102] UN Human Rights Council A/HRC/17/32, para 15. For further details, see also: para 12-16.

scenarios, states are encouraged to explore civil, administrative or criminal liability. Additionally, the imposition of sanctions can be investigated, assets can be frozen and law enforcement can be engaged.[103]

The Working Group has moreover compiled an extensive report,[104] which was presented in 2020, that aims to "clarify the practical steps that states and business enterprises should take to implement the Guiding Principles in conflict and post-conflict contexts".[105] The report underlines that the UNGPs reflect a "a concept of proportionality",[106] meaning that the required level of state action is dependent on the level of risk an environment poses. High risk environments can – apart from situations of armed conflict – also cover situations of instability,[107] weakness or absence of state structures,[108] and records of serious violations of international human rights and humanitarian law.[109] This concept of proportionality is also applicable in relation to corporations' responsibilities and will be further elaborated upon in the following subchapter.

The responsibilities of the corporation

The UNGPs are quite terse in regard to business operations in conflict environments. According to the second pillar of the UNGPs, *The Corporate Responsibility to Respect Human Rights*, all corporations are expected to respect

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[103] UN Human Rights Council A/HRC/17/32, para 18.

[104] UN Human Rights Council A/75/212.

[105] United Nations High Commissioner for Human Rights, *The business, human rights and conflict-affected regions project,* 2021, https://www.ohchr.org/EN/Issues/Business/Pages/ConflictPostConflict.aspx [accessed 2022-01-02].

[106] UN Human Rights Council A/75/212, para 13.

[107] This can e.g. be reflected through political, social, or economic volatility; abrupt or non-cyclical regime changes; insurgency movements; or armed conflict in neighboring countries. See further: UN Human Rights Council A/75/212, para 16.

[108] The Working Group exemplifies that this can be reflected in e.g. lack of efficient state mechanisms, see further: UN Human Rights Council A/75/212, para 17.

[109] See further: UN Human Rights Council A/75/212, para 18.

human rights in all situations, regardless of a state's ability or willingness to fulfill their human rights obligations.[110] Nevertheless, the principles acknowledge that conflict-affected areas "may increase the risks of enterprises being complicit in gross human rights abuses committed by other actors (security forces, for example)".[111] Such risks motivate that corporations should treat the responsibility to respect in conflict environments as a 'legal compliance issue'[112] and they're encouraged to hold external consultations with independent experts, in order to establish how to best navigate in such environments.[113]

The UNGPs establish that the human rights that corporations, at a minimum, are expected to respect are the rights set out in the *Universal Declaration of Human Rights* (UDHR) and its main instruments the ICCPR and the *International Covenant on Economic Social and Cultural Rights* (ICESCR), and the core conventions of the International Labour Organization.[114] Certain environments, such as armed conflict, can however merit heightened minimum standards. As such, corporations that operate in conflict environments are, just like states, expected to respect the standards of IHL.[115] At times referred to as the war of law, IHL is applicable during transnational and civil conflict, and military occupation, albeit to various extents.[116] It binds both state and non-state actors. The latter category can include corporations, and their staff and managers, if their activities are deemed to be closely linked to an armed conflict.[117] Which activities fall within this scope is often difficult to establish, but extending support – intended or unintended – to a conflict party is perceived to fulfil the criteria. Additionally, there is no requirement that the

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[110] UNGP, principle 11.

[111] UNGP, principle 23.

[112] Ibid.

[113] Ibid.

[114] UNGP, principle 12.

[115] UNGP, principle 12.

[116] International Committee of the Red Cross (ICRC), *Business and International Humanitarian Law: An Introduction to the Rights and Obligations of Business Enterprises under International Humanitarian Law,* 2016, https://www.icrc.org/en/doc/assets/files/other/icrc_002_0882.pdf [accessed 2022-02-01], pp. 9, 11.

[117] ICRC 2016, pp. 13-14.

activities take place during fighting or on the battlefield, and the ICRC emphasizes that it is of utmost importance that business operate with heightened care in conflict environments.[118]

Even though the UNGPs themselves do not elaborate on the matter in great detail, the Working Group has established that business operations in high-risk environments requires heightened human rights due diligence (HRDD) measures.[119] HRDD is part and parcel of the responsibility to respect, and a tool that helps identify, prevent, mitigate and account for a corporation's impact on human rights.[120] Through the HRDD process, corporations should identify and assess potential human rights impacts, integrate and act upon the findings, track responses and communicate how impacts are addressed.[121] The concept of proportionality, mentioned in the previous subchapter, is also applicable in relation to HRDD, and entails that the higher risk an environment poses, the more complex HRDD processes are required.[122] Additionally, the Working Group highlights three particular steps that can complement more traditional HRDD processes in conflict environments: identifying the root causes and tensions;[123] mapping the actors in the conflict and their drivers and capabilities;[124] and identifying and anticipating the ways in which the business operation might impact or possibly create new tensions or conflicts.[125] Worth noting is also the fact that the Working Group clarifies that corporations can never be regarded as neutral in conflict-affected environments, as

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[118] ICRC 2016, p. 14.

[119] UN Human Rights Council A/75/212, para. 13.

[120] UNGP, principle 15.

[121] UNGP, principle 17. See also: principle 18-21 for further details.

[122] UN Human Rights Council A/75/212, para 13.

[123] UN Human Rights Council A/75/212, para. 46

[124] UN Human Rights Council A/75/212, para 47. The Working Group also emphasizes that certain caution is merited in relation to armed non-state actors, whose activities and influence has become more tangible in contemporary conflicts. Interaction with such groups pose a significant risk, and has – in situations where the group is deemed as a terrorist organization – resulted in criminal liability when corporations have benefited from or assisted such groups. It is therefore crucial that corporations strive to understand these groups, develop a clear engagement strategy and strive to maintain impartiality in relation to armed non-state actors, see especially: para 55- 61.

[125] UN Human Rights Council A/75/212, para 48.

their actions in one way or the other will come to interact with the dynamics of the conflict.[126] This precarious situation is also highlighted by Van Ho, who problematizes the fact that the UNGPs are silent on whether or not there are certain environments, such as conflicts, that corporations should completely avoid or retract from, as their inherent complexity make it nearly impossible to comply with the responsibility to respect.[127]

Lastly, it is also notable that many other actors have in recent years also produced guidelines for corporations operating in conflict environments, not seldom in relation to extractive industries. Bearing in mind the limited scope of this thesis, and the multifaceted character of these guidelines, these will not be addressed in further detail.[128]

3.2 The post-conflict phase

The UNGPs do not explicitly mention post-conflict environments, but the Working Group has argued that the post-conflict phase should be viewed as an integral part of the conflict. This consequently means that the requirements concerning heightened state action and heightened due diligence measures for corporations remain in place, even though the active phase of the conflict has come to an end.[129] This is also supported by the fact that instability, weakness or absence of state structures, and previous records of violations of international human rights and IHL, often characterize post-conflict phases and have been – as noted above – mentioned

[126] UN Human Rights Council A/75/212, para 42-43.

[127] Van Ho 2020, p. 385.

[128] For further reading, see for example: OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Third Edition,* (Paris: OECD Publishing, 2016); International Alert, *Human Rights Due Diligence in Conflict-Affected Settings: Guidance for Extractives Industries* (London: International Alert, 2018).

[129] UN Human Rights Council A/75/212, para 72.

by the Working Group as contextual factors that merit heightened action from both states and corporations.[130]

The Working Group highlights that states should be particularly aware of the challenges that foreign direct investment poses in post-conflict scenarios, and should work to ensure that human rights are not overlooked or compromised as a consequence of weak regulatory frameworks and/or public sectors in disarray.[131] Furthermore, it claims that heightened human rights due diligence measures should be utilized when states enter into new treaties or contracts in the post-conflict period.[132]

In regard to corporations, the Working Group particularly emphasizes that corporations operating in post-conflict environments should closely examine and evaluate their relationships, both with individuals and other business partners. Yet again, the importance of understanding the roots and the structure of the past conflict at hand is underlined. If businesses fail to properly screen their relationships, they risk concretizing and fueling underlying structures of the conflict.[133] Furthermore, 'captive businesses' are deemed to be able to play an important role in the post-conflict phase, as they often become entrenched in the fabric of the conflict. As such, they can provide highly localized support to the post-conflict processes, through the communities in which they operate and their employees.[134]

Lastly, the issue of remediation is often noted in relation to conflict and/or post-conflict environments. As this issue is of central importance to this thesis, it will be addressed separately in the following.

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[130] UN Human Rights Council A/75/212, para 14-18. For a detailed review of other warning signs that merit cautiousness see: para 19-21.

[131] UN Human Rights Council A/75/212, para. 73.

[132] UN Human Rights Council A/75/212, para. 77.

[133] UN Human Rights Council A/75/212, para. 80.

[134] UN Human Rights Council A/75/212, para. 71.

3.3 The issue of remedy

The UNGPs approach the issue of remedy from two different but complementary perspectives. While the corporate responsibility to remediate is rooted in the second pillar, the state duty to provide effective remedy is regulated under the third pillar (even though it reflects an intricate part of the state duty to protect).

Corporate responsibility to remediate arises when a corporation has caused or contributed to an adverse human rights impact, either through an act or omission. In such scenarios, the corporation is required to actively engage in the remediation process, either by itself or in close cooperation with others. Furthermore, a responsibility to remediate can also occur when a corporation has operations, products, or services by business relationships that are directly linked to an adverse impact. In such cases, the UNGPs establish that the corporation is not required to provide remediation by itself but encourage that the corporation takes part in the process.[135] Furthermore, Ruggie has clarified that a corporation's relationship to a harm should not be seen as something static, and in cases where a corporation does not act upon a harm to which it has a direct link, the result may be that the corporation at a later stage is deemed to contribute to or cause the impact.[136]

Additionally, it important to note that even though HRDD measures can assist in demonstrating that a corporation took the appropriate steps in regard to identifying

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[135] UNGP, principle 22. The responsibility to remediate is closely intertwined with the responsibility to mitigate the harm and the UNGPs also map out different modes of engagement for corporations when such impacts are identified. If the corporation itself has caused an adverse impact, the corporation should cease the causal action. If contributing to an adverse impact, the course of action is undeniably more difficult to determine, but corporations are required to act appropriately to halt the contribution. When a corporation is directly linked to an impact, it is required to use its existing leverage to mitigate the impact. For further reading see: Rachel Davis, "The UN Guiding Principles on Business and Human Rights and conflict affected areas: state obligations and business responsibilities", *International Review of the Red Cross* 94:887 (2012), p. 974.

[136] John Ruggie, *Letter to Prof. Dr. Roel Nieuwenkamp,* 6 March 2017, https://media.business-humanrights.org/media/documents/files/documents/OECD_Workshop_Ruggie_letter_-_Mar_2017_v2.pdf [accessed at 2022-01-01], p. 2.

and assessing potential adverse impacts, it can never rid a corporation of its responsibility to remediate.[137]

Pillar III: Access to Remedy

As noted in the previous section, the state duty to protect also entails that states are responsible to ensure that those affected by business-related human rights abuses have access to effective remedy.[138] The UNGPs establish that remedy can be provided through state-based or non-state-based processes, of judicial or non-judicial character. However, state-based judicial mechanisms are understood to be at the "core of ensuring access to remedy",[139] thus establishing that there is a certain hierarchical standing between the different processes. In regard to state-based judicial mechanisms, the UNGPs stress the importance of states working actively to reduce barriers that could impede access to remedy, and that the impartiality, integrity, legitimacy and availability of such mechanisms is of utmost importance.[140] The state-based non-judicial mechanisms are, on the other hand, understood as complementary and supplementary to judicial mechanisms. They can, for example, be of administrative or legislative character and are intended to reflect that the judicial mechanisms at hand might not always be capable of addressing all types of abuses – nor are they always preferred by the claimants.[141] Non-state-based mechanisms can be driven by a broad range of actors and stakeholders, such as corporations, industry associations or multi-stakeholder groups and can operate through "adjudicative, dialogue-based or other culturally appropriate and rights-compatible processes".[142] Furthermore, regional and international human rights bodies can be involved in the non-state-based processes. In order for non-judicial mechanisms to be deemed effective, the principles

[137] UNGP, principle 17.

[138] UNGP, principle 25.

[139] UNGP, principle 26.

[140] Ibid.

[141] UNGP, principle 27.

[142] UNGP, principle 28.

establish that they should be legitimate, accessible, predictable, equitable, transparent, rights compatible and seen as a source of continuous learning.[143]

The UNGPs draw upon a broad understanding of what remedy constitutes, and exemplify that it can entail "apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions /…/ as well as the prevention of harm through /…/ injunctions or guarantees of non-repetition".[144] Additionally, the principles reflect a view that remedy should be understood as a process rather than a definitive result.[145]

Even though access to remedy is addressed under its own pillar in the UNGPs, it has been acknowledged that more effort was devoted to the two other pillars during the drafting process.[146] Similarly, the third pillar has also received noticeably less attention in comparison to the others post the launch of the principles, irrespective of the fact that access to remedy still constitutes a severe challenge in many settings.[147] In an effort to shed further light on the issue of remedy, the OCHR launched an initiative in 2013, aimed at helping states strengthen the implementation of the third pillar. As a result, the OCHR subsequently launched the *Accountability and Remedy Project* (ARP). The work of the ARP has, to date, targeted each of the three different categories of grievance mechanisms presented under the third pillar and the findings have been presented in their own, respective

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[143] UNGP, principle 31.

[144] UNGP, principle 25.

[145] Davitti 2019, p. 194.

[146] Davitti 2019, p. 196.

[147] Davitti 2019, p. 196; United Nations Human Rights Council, 'Improving accountability and access to remedy for victims of business-related human rights abuse: explanatory notes for guidance: note/ by the Secretariat' (12 May 2016) UN Doc A/HRC/32/19, para 8; Gwynne Skinner, Robert McCorquodale & Olivier De Schutter, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business,* 2016, https://www.business-humanrights.org/es/últimas-noticias/pdf-the-third-pillar-access-to-judicial-remedies-for-human-rights-violations-by-transnational-business/ [accessed 2021-12-25], p. 9; Laura Bernal-Bermúdez, *The Power of Business and the Power of the People: Understanding Remedy and Business Accountability for Human Rights Violations – Colombia 1970-2014,* PhD thesis (Oxford: University of Oxford, 2017), p. 274.

reports.[148] At the moment, the ARP is working on how to enhance, disseminate and implement the findings from these reports.

In regard to state-based judicial mechanisms, the ARP has in particular highlighted the difficulties that structural complexities of modern corporations pose and provided guidance on how states can develop legal regimes that are better equipped to deal with such challenges.[149] Furthermore, the ARP has stressed the importance of international cooperation and provided guidance on the matter, as a mean to address the certain challenges that stem from transnational cases, which are often characterized by a difficulty of establishing jurisdiction and responsibility.[150] Nevertheless, the ARP emphasizes that the guidance provided should be not be understood as exhaustive, nor as the only means by which to improve access to remedy. There are no quick-fixes, and the difficulties associated with access to remedy are often systematic of wider societal, economic or legal problems, which therefore may demand substantive and time-consuming reforms.[151]

Correspondingly, the ARP has also worked to tackle some of the challenges that often characterize state-based non-judicial mechanisms, which the group disaggregates into five different categories: complaint mechanisms; inspectorates; ombudsman services; mediation or conciliation bodies; and arbitration and specialized tribunals.[152] Even though such mechanisms are often described as adaptable and context-sensitive, they frequently suffer from a lack of adequate

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[148] For state-based judicial measures, see: UN Human Rights Council A/HRC/32/19. For state-based non-judicial mechanisms, see: United Nations High Commissioner for Human Rights, 'Improving accountability and access to remedy for victims of business-related human rights abuse through State-based non-judicial mechanisms' (14 May 2018) UN Doc A/HRC/38/20. For non-state-based grievance mechanisms, see: United Nations High Commissioner for Human Rights, 'Improving accountability and access to remedy for victims of business-related human rights abuse through non-State-based grievance mechanisms: explanatory notes' (3 June 2020) UN Doc A/HRC/44/32.

[149] UN Human Rights Council A/HRC/32/19, para 21-23, see also: Annex.

[150] UN Human Rights Council A/HRC/32/19, para 24-27, see also: Annex.

[151] UN Human Rights Council A/HRC/32/19, para 6, 15.

[152] UN High Commissioner for Human Rights A/HRC/38/20, para 10.

resources and technical limitations.[153] The recommendations provided by the ARP underline the importance of policy coherence between the different mechanisms available (both judicial and non-judicial), stressing the fact that the system of mechanisms should be organized in a way that provides victims with "realistic and readily identifiable pathways to remedial outcomes that meet international standards with respect to the components of effective remedy".[154] The guidelines also emphasize that the mechanisms should be effective and illustrate how states can pursue this goal.[155] Furthermore, the importance of effectiveness in light of transnational cases is also brought to the fore.[156]

Non-state-based grievance mechanisms have, as identified by the ARP, struggled with their own set of challenges. Victims of corporate human rights abuses have reported that it is often difficult to identify, assess and draw upon such mechanisms, and the ARP argues that remedies stemming from these mechanisms have at times been "partial at best".[157] The recommendations presented by the ARP highlight that it is important to facilitate access to effective non-state-based grievance mechanisms by strengthening domestic law and policy,[158] improve effectiveness,[159] and enhance access to effective remedy through greater cooperation and coordination by actors who operate these types of mechanisms.[160] As an example, the ARP acknowledges under the first category of recommendations, that it is profoundly important that these regimes operate in a way that right-holders can utilize these mechanisms without fear of retaliation, aimed at themselves or others.[161]

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[153] UN High Commissioner for Human Rights A/HRC/38/20, para 11.

[154] UN High Commissioner for Human Rights A/HRC/38/20, para 22, see also: Annex part I.

[155] UN High Commissioner for Human Rights R A/HRC/38/20, para 23, see also: Annex part II.

[156] UN High Commissioner for Human Rights A/HRC/38/20, para 24, see also: Annex part III.

[157] UN High Commissioner for Human Rights A/HRC/44/32, para 7.

[158] UN High Commissioner for Human Rights A/HRC/44/32, Annex part I.

[159] UN High Commissioner for Human Rights A/HRC/44/32, Annex part II.

[160] UN High Commissioner for Human Rights A/HRC/44/32, Annex part III.

[161] UN High Commissioner for Human Rights A/HRC/44/32, para 2.1 – 2.3, see also: Annex Part I.

In light of the above, it is undeniable that achieving effective access to remedy is a complex task, with a vast array of inherent challenges that need to be taken into account as the process unfolds.

3.4 A short note on remedy in transitional justice

Unfortunately, questions concerning corporate responsibility have often been excluded from transitional justice processes. Even though the right to access effective remedy is in no way dependent on the structural changes that transitional justice processes often entail, such processes often pose a unique window of opportunity for adopting a comprehensive approach for addressing past abuses and subsequently, for remediating them.

It is clear that the understanding of remedy that the UNGPs establish[162] intertwine and overlap with the four pillars of transitional justice: truth, justice, reparation and guarantees of non-recurrence. As an example, apologies presented in truth commissions reflect a type of remedial act and can contribute to anchor guarantees of non-recurrence. Indubitably, there are ample areas of possible synergies between the mechanism posed in transitional justice and the assurance of access to remedy. Furthermore, processes that shy away from addressing the acts of corporations, risk jeopardizing and severely undermining the victims' right to truth justice, reparation and guarantees of non-recurrence. Of course, one cannot ignore the fact that questions concerning corporate human rights violations have gained traction at an increasing speed in recent years, and it may be that the designers of future transitional justice processes will come to acknowledge remedial angles to a further extent. In the following chapter, one of the most contemporary transitional justice

[162] Noted in *Chapter 3.1.1* as: apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions, as well as prevention of harm through injunctions or guarantees of non-repetition.

processes – that of Colombia – will be examined, with the aim of investigating how access to remedy has been dealt with within the Colombian context.

4 The case of Colombia

This chapter turns its attention towards the case of Colombia, commencing with a background chapter on the Colombian civil conflict. This part will outline some of the main causes and drivers of the conflict, the role of corporations in the conflict and additionally shed light how the 2016 Peace Agreement came into existence. The following part will thereafter map out how access to remedy for corporate human rights abuses is addressed in the Colombian context, both in the light of the ordinary judicial system and the system established through the transitional justice process initiated by the Peace Agreement.

4.1 The Colombian civil conflict

> *"The tension between war and peace is a constant in modern Colombian history" – Díaz Pabón*[163]

When the Peace Agreement entered into force in 2016, many argued that it marked the end of the prolonged civil conflict in Colombia. For nearly six decades, the multifaceted and intricate conflict had proliferated in the country – flaring up, fading out, and sustaining in a way that swept over both socioeconomic, cultural and generational divides. The conflict has been described in great detail elsewhere,[164] but some of the main causes behind the conflict are meaningful to outline at an overarching level in order to better understand the corporate angle of the conflict.

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[163] Fabio Andrés Díaz Pabón, "Conflict and Peace in the Making", in *Truth, Justice and Reconciliation in Colombia,* Fabio Andrés Díaz Pabón (ed.), (New York: Routledge, 2018), p. 16.

[164] See for example: Fabio Andrés Díaz Pabón (ed.), *Truth, Justice and Reconciliation in Colombia,* (New York: Routledge, 2018); Angelika Rettberg (ed.), *Conflicto armado, seguridad y construcción de paz en Colombia,* (Bogotá: Ediciones Uniandes, 2010); Francisco Gutiérrez, María Emma Wills & Gonzalo Sánchez Gómez (eds.), *Nuestra guerra sin nombre,* (Bogotá: Universidad Nacional, IEPRI & Grupo Editorial Norma, 2006).

What started out as an extremely violent political contest over power in the late 1940's, a period commonly referred to as 'La Violencia', soon gave rise to several armed guerilla groups in the country, both right- and left-winged.[165] The Colombian military's ruthless efforts to eradicate the groups often paradoxically resulted in the emergence of new groups. In following decades, paramilitary groups and the turbulent drug trade entered the arena and gained ground, enmeshing themselves with the fabric of the conflict. In an effort to regain the monopoly of violence, the Colombian state begun to extend support to various armed self-defense groups, whose allegiance many a times proved to be fickle and inter-changeable.[166] During the 1990's, a period during which the conflict was especially intense, some of the most prominent non-state actors of the conflict were the leftist guerilla FARC, the umbrella organization of the right wing paramilitaries *Autodefensas Unidas de Colombia* (AUC) and the *Ejército de Liberación Nacional* (ELN).[167] The conflict has been characterized by wide-spread human rights violations, such as extra-judicial killings, torture, displacement and kidnappings, committed by both state and non-state actors.[168] Several attempts at reaching peace agreements have been made during the conflict, albeit with highly varying scopes and degrees of success.[169]

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[165] Díaz Pabón 2018, pp. 17-19.

[166] Díaz Pabón 2018, p. 19; Wesche 2019, pp. 481-482.

[167] James Rochlin, "Boom, bust and human security in the extractive sector: The case of Colombia", *The Extractive Industries and Society 2* (2015), p. 736; Díaz Pabón 2018, p. 15.

[168] For detailed information about the violations committed, see: Milton Mejía, "Armed Conflict and Human Rights in Colombia", *The Ecumenical Review* 63:1 (2011); Amnesty, *Colombia 2020,* 2020, https://www.amnesty.org/en/location/americas/south-america/colombia/report-colombia/ [accessed 2022-01-02].

[169] For more on the Peace Agreement attempts, see: Díaz Pabón 2019, pp. 15-30; Marco Alberto Velásquez Ruiz, "The emergence and consolidation of transitional justice within the realm of Colombian peacebuilding", in *Truth, Justice and Reconciliation in Colombia,* Fabio Andrés Díaz Pabón (ed.), (New York: Routledge, 2018), p. 55.

The length of the conflict and the broad range of actors involved undeniably obstruct any simple and straight-forward attempts at determining the causes of the conflict. Wealth of extractable resources, such as coca, coffee, oil and gold, have often been analyzed in light of traditional debates of 'greed vs. grievance'.[170] Similarly, studies have shown that the presence of insurgency group and outbreaks of violence have been overrepresented in resource rich areas.[171] Weak state institutions and a limited reach of state control in the remote and impenetrable areas of the Colombian territory, combined with underdeveloped infrastructure, have also been presented as possible explanations.[172] Political volatility and violence targeted towards specific parties and participants, has historically hindered political solutions between warring parties.[173] Furthermore, disputes over land and land-inequality have been omnipresent in the conflict,[174] resulting in almost 8.3 million forcibly displaced civilians reported by the end of 2020.[175] As a result, the Colombian conflict is almost always explained through the lens of multicausality, and its multifaceted character often emphasized.[176]

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[170] The greed vs. grievance debate has its roots in the work by Collier and Hoeffler from 2004 and is often used to explain and understand civil wars. It makes a distinguishment between actors in civil conflict who act with the purpose of improving their situation, and actors who act as a consequence of oppression of identity, see further: Paul Collier & Anke Hoeffler, "Greed and Grievance in Civil Wars", *Oxford Economic Papers* 56:4 (2004).

[171] Lilian Yaffe, "Conflicto armado En Colombia: análisis de las causas económicas, sociales e institucionales de la oposición violenta", *Revista CS* 8 (2011), pp. 194, 197.

[172] Jennifer S. Holmes, Sheila Amin Gutiérrez de Piñeres & Kevin M. Curtin, "Drugs, Violence and Development in Colombia", *Latin American Politics and Society* 48:3 (2006); Rochlin 2015, p. 735.

[173] One of the most prominent examples is the leftist FARC-guerillas creation of the Unión Patriótica (UP) party. Instead of achieving the intended goal of political inclusion, the UP experiment ended abruptly when 3000-4000 of its members and candidates were assassinated by paramilitary forces between the years of 1986-1992, see further: Rochlin 2015, p. 735.

[174] Van Ho 2016, pp. 60-61; Bernal-Bermúdez 2017, p. 120; Pietropali 2017, p. 187.

[175] This ranking places Colombia as the country in the world with the highest number of internally displaced persons. In comparison, Syria ranks as number 2, with 6.7 million internally displaced persons, see: UNCHR, *Global Trends: Forced Displacement in 2020,* 2020, https://www.unhcr.org/flagship-reports/globaltrends/ [accessed 2022-01-01].

[176] Yaffe 2011; Courtney Hillebrecht, Alexandra Huneeus & Sandra Borda, "The Judicialization of Peace", *Harvard International Law Journal* 59:2 (2018), p. 88.

The role of the corporation

> *"Economic actors/activities have helped armed actors wage war and armed actors have helped economic actors do business in conflict zones."*
> *– Bernal Bermúdez*[177]

The Colombian civil conflict provides ample examples of corporate human rights abuses, and the abuses committed are uniquely well-documented.[178] Much of the available evidence stems from the demobilization process of the paramilitary group AUC, in which several of the group's leaders contributed with detailed information on their association with economic actors.[179] The testimonies from the AUC and other cases which have been brought to the fore have presented clear proof that corporations have both contributed to or benefitted from human rights abuses, conducted by non-state and state actors alike. Additionally, there are also examples of situations in which the corporations have acted independently, and thus been the sole abusers.[180]

Some of the ways in which corporations have contributed to human rights abuses has been by extending support to warring factions in the conflict, be it financial, logistical or material.[181] In regard to the AUC, numerous corporations made significant financial contributions to the different sub-groups of the group during the conflict. For instance, the *Bloque Banero* received financial support from 97% of the landowners in the areas in which the group operated. Additionally, the *Bloque Norte* supposedly received financial contributions from a broad range of coal mining companies, one of which has been identified as the US-based Drummond.[182]

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[177] Bernal-Bermúdez 2016, p. 135.

[178] Wesche 2019, p. 481; Jenner Alonso Tobar Torres, "Responsabilidad corporative en procesos transicionales de paz: Entre la judicialización y la autrorregulación: Elementos de análisis desde el caso colombiano", *Estudios Constitucionales* 17:2 (2019), p. 129.

[179] For detailed information on the demobilization process, see: Wesche 2019.

[180] Bernal-Bermúdez 2016, p. 128.

[181] Payne 2017, p. 22; Wesche 2019, p. 483.

[182] Wesche 2019, p. 482.

Land disputes have often been used to illustrate how corporations have benefited from human rights abuses in the Colombian context. There are instances when corporations have purchased land titles and property rights from armed groups that attained them in an illegal fashion, often as a result of land-grabbing or forceful displacements of the communities residing in the area.[183] Nevertheless, corporations have also been accused of paying armed groups to clear land to which they want access, thus intentionally or unintentionally contributing to widespread forced displacements.[184] One of the most notable examples is the *Afro-descendant communities' case*, in which the logging company Madarién was able to sustain its illegal operations due to the fact that guerilla groups had forcefully displaced the communities living in the area.[185]

Another prominent theme of the conflict has been the repression of labor rights, which can be seen as symptomatic of the ideological tensions between the leftist guerilla groups and the right-winged groups.[186] Even though there were corporations who only benefitted from the right-winged attacks on the labor movement, some also actively participated in the events. Wesche exemplifies this by highlighting that some corporations provided lists of workers who were considered rebels or trade-unionist supporters to the paramilitaries.[187] A notable example of corporate involvement considering labor rights, is that of a Drummond contractor charged with instigating the murder of two individuals with high positions in a union for mine workers.[188]

Bernál-Bermúdez has shown that the occurrence of human rights abuses was wide-spread and not limited to a particular business sector. However, most abuses took

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[183] Van Ho 2016, pp. 60-61; Pietropali 2017, p. 188

[184] Van Ho 2016, p. 60; Pietropali 2017, p. 188.

[185] For a detailed review of the case, see: Van Ho 2016. See also: *Case of the Afro-descendant Communities displaced from the Cacarica River Basin (Operation Genesis)*, IACtHR Judgement of 20 November 2013.

[186] Bernal-Bermúdez 2016, p. 102, Rochlin 2015, p. 735.

[187] Wesche 2019, p. 483.

[188] Wesche 2019, p. 483, see also: Juzgado Once Penal del Circuito Especializado de Bogotá – Proyecto OIT, *Jaime Blanco Maya,* case no. 110013107011 2011 00026 00 (25 January 2013).

place in the extractive and agricultural sectors. Yet again land was a determining factor, as such corporations are largely dependent on the land in which they operate. Areas of what Bernál-Bermúdez calls 'strategic business importance' were often highly contested, thus creating hotbeds of collaboration between corporations and armed groups in such areas.[189]

However, it is at times argued that corporations were forced to support to parties of the conflict, either because they were extorted or because certain armed parties provided protection that was necessary for the corporations' continued operation.[190] For example, leftist guerilla groups have strategically and repeatedly targeted corporations extracting oil and gas, and as a consequence, there are several examples of corporations who have chosen to hire right-wing paramilitaries as security.[191] One significant case is that of Chiquita Brands, which in 2003 admitted before a US court that the corporation had paid the AUC a total of 1.7 million USD, in exchange for protection of its employees and operations.[192] In light of the above, it is therefore clear that the role of the corporation in the Colombian context was not always clear-cut, but rather interchangeable – moving along the scale of abuser, contributor, beneficiary, and victim.

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[189] Bernal-Bermúdez 2016, pp. 128, 195.

[190] Wesche 2019, p. 482-483; Alexandra Guáqueta, "Harnessing corporations: lessons from the voluntary principles on security and human rights in Colombia and Indonesia", *Journal of Asian Public Policy* 6:2 (2013), p. 136.

[191] Wesche 2019, p.483; Piergiuseppe Parisi & Gareth Sims, "Hindrances to access to a remedy in business-related cases in Colombia: the case of Gilberto Torres", in *When Business Harms Human Rights: Affected Communities that Are Dying to Be Heard,* Karen Erica Bravo, Jena Martin & Tara van Ho (eds.), (London: Anthem Press, 2020), p. 32.

[192] Four years later, the company pled guilty to violating US antiterrorism laws, as the AUC had been labeled as a foreign terrorist organization by the US government. Chiquita Brands was fined 25 million USD, see further: United States Department of Justice, *Chiquita Brands International Pleads Guilty to Making Payments to a Designated Terrorist Organization and Agrees to Pay USD 25 Million Fine,* 2007, https://www.justice.gov/archive/opa/pr/2007/March/07_nsd_161.html [accessed 2022-01-01].

The 2016 Peace Agreement

When president Juan Manuel Santos came into power in 2010, many believed that he would follow his predecessor's heavily militarized approach at dealing with the FARC. Even though the Colombian military in the previous years had succeeded in weakening the guerilla, both in terms of reducing their territorial control and eradicating their leadership, it was clear to Santos and his government that achieving military victory over the FARC would be an expensive and arduous endeavor.[193] As an alternative approach, Santos therefore decided to initiate negotiations with the FARC. Previous attempts had however elucidated that the guerilla seldom entered negotiations with the intention of signing agreements, but rather viewed negotiations as a way of gaining short-term benefits.[194]

It took nearly five years of intensive negotiations before the The *Final Agreement to End the Conflict and Establish a Stable and Long-lasting Peace* (Peace Agreement) was signed between the Colombian government and the FARC in Havana, Cuba.[195] In order to ensure that the Peace Agreement was perceived as legitimate amongst the Colombian population, Santos had previously announced that the agreement would be subject to a plebiscite. However, when the day came, the agreement was refused by an exceptionally thin margin, and many were taken by surprise by the outcome.[196] Renegotiations were thereafter initiated, during which a plurality of the concerns that the opposition had raised, were confronted and dealt with. After a revised version of the agreement was signed by the parties in November 2016, the government chose to ratify the agreement in Congress in

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[193] Carlo Nasi, "The peace process with the FARC-EP", in *Truth, Justice and Reconciliation in Colombia,* Fabio Andrés Díaz Pabón (ed.), (New York: Routledge, 2018), p. 36.

[194] Nasi 2018, p. 34.

[195] For a detailed interpretation of why the Santos government succeeded, see: Nazih Richani, "Fragmented Hegemony and the Dismantling of the War System in Colombia, *Studies in Conflict and Terrorism* 43:4 (2019).

[196] Camilla Gamboa Tapias & Fabio Andrés Díaz Pabón, "The Transitional Justice Framework agreed between the Colombian Government and the FARC-EP", in *Truth, Justice and Reconciliation in Colombia,* Fabio Andrés Díaz Pabón (ed.), (New York: Routledge, 2018), pp. 66-67.

early December, rather than to have the agreement be subject to a second plebiscite.[197]

The comprehensiveness and intricacy of the Peace Agreement causes it to stand out from earlier Colombian agreements.[198] It is divided into six different parts, each reflecting different areas of priority: rural reform; political participation of the FARC; ceasefire and decommission of weapons; the problem of illicit drugs; a victims' agreement; and a part concerned with the implementation, verification and public endorsement. The agreement is characterized by a clear transitional justice approach, especially prominent in relation to the so-called victims' agreement, which establishes the framework for the *Integrated System of Truth, Justice, Reparation and Non-Repetition* (Integrated System). The Integrated System establishes and governs different mechanisms, both non-judicial and judicial.[199] *The Unit for the Search of Missing Persons in the Context and as a Result of the Conflict* and *The Commission for the Clarification of Truth* (Truth Commission) reflect the former, while *The Special Jurisdiction for Peace* (SJP), *The Measures on Comprehensive Reparation for Peacebuilding* and *The Guarantee of Non-Repetition* reflect the latter. The Integrated System should be understood as holistic, and its mechanisms as complementary to one another.[200]

4.2 Access to remedy in Colombia for corporate human rights abuses

Colombia has ratified a majority of both the UN human rights treaties and the regional human rights treaties,[201] and its duty to provide effective access to remedy

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[197] Nasi 2018, p. 41.

[198] Hillebrecht et al. 2018, p. 280.

[199] Gamboa Tapias & Díaz Pabón 2018, p. 68.

[200] Gamboa Tapias & Díaz Pabón 2018, p. 68.

[201] For a list of the treaties ratified, see: Fundación Ideas Para la Paz & Danish Institute for Human Rights, *Guía de Derechos Humanos y Empresas en Colombia,* 2016, https://globalnaps.org/wp-content/uploads/2017/11/colombia.pdf [accessed 2022-01-02], pp. 14-17.

for human rights abuses and violations is thus traceable to a plurality of different sources. As an example, Colombia ratified the ICCPR in 1968, in which the duty to provide effective remedy stems from art. 2.3.[202] Furthermore, and especially relevant in the Colombian context, was the ratification of the *American Convention of Human Rights* in 1972. This treaty imposes an obligation on states to provide effective judicial remedies to victims of human rights violations through art. 25.[203] Through the jurisprudence of the Inter-American Court of Human Rights, the right to effective remedy also entails the state duty to "investigate, prosecute and punish those responsible for human rights violations even in the context of mass and systematic human rights violations",[204] which could be, for example, civil conflict.[205] Moreover, the ratification of human rights treaties allows Colombian citizens to seek remedy before the respective human rights bodies, when domestic remedies have been exhausted.[206]

The *Colombian Constitution*[207] of 1991 – which at the time of its conception was described as inclusive and innovative – highlights peace as one of its core objectives.[208] The right to judicial remedy is firmly founded in art. 229. The Constitutional Court of Colombia (Constitutional Court) has clarified that this right

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[202] See also: *Chapter 2.1.1.*

[203] American Convention on Human Rights, "Pact of San Jose, Costa Rica", (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123.

[204] Alejandro Gómez-Velásquez, "The constitutional framework for transitional justice in Colombia", *Opinión Jurídica* 14:28 (2015), p. 40.

[205] Ibid. This conclusion stems from jurisprudence which has primarily concerned issues of amnesty laws, see for example: *Case of Barrios Altos v. Peru,* IACtHR Judgement of 14 March 2001; *Case of Almonacid-Arrellano et al v. Chile,* IACtHR Judgement of 26 September 2006.

[206] Nelson Camilo Sánchez & Clara Sandoval-Villalba, "Go Big or Go Home? Lessons Learned from the Colombian Victims' Reparation System", in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity,* Carla Ferstman & Mariana Goetz (eds.), (Leiden: Koninklijke Brill NV, 2020), p. 550.

[207] Constitución Politica de la República de Colombia de 1991 (Colombian Constitution), available at: https://www.corteconstitucional.gov.co/inicio/Constitucion%20politica%20de%20Colombia%20-%202015.pdf [accessed 2022-02-01].

[208] Gómez-Velásquez 2015, p. 25.

entails that the judicial organs of the state are required to "receive and process the claims and demands presented by all citizens"[209] and that the claims must be "adequately and timely resolved".[210] Furthermore, the Constitutional Court has placed particular emphasis on the victims of the armed conflict, and explained that they constitute a particularly vulnerable group, which should be subject to favorable constitutional protection.[211]

In December 2015, simultaneously as the Peace Agreement was being finalized, Colombia became the first Latin-American country to launch a National Action Plan. The *Plan de Acción de Derechos Humanos y Empresa* (NAP), which draws upon the UNGPs with the aim of framing them adequately for the Colombian context.[212] Even though the NAP sent an important signal regarding the Colombian governments commitment towards business and human rights related issues, the process was also criticized as it omitted the undertaking of a so-called National Baseline Assessment (NBA).[213] In relation to the access to remedy, an NBA would have helped to outline and elucidate how remedy can be accessed in Colombia, and how these potential routes are considered to function in reality.[214]

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[209] Quotes reflect translation by Gómez-Velásquez 2015, p. 26, from the Spanish wording of Colombian Constitutional Court, Judgement C-543/11, 6 July 2011, available at: https://www.corteconstitucional.gov.co/RELATORIA/2011/C-543-11.htm [accessed 2021-01-01].

[210] Gómez-Velásquez 2015, p. 26.

[211] Colombian Constitutional Court, Judgement T-1094/07, 14 December 2007, available at: https://www.corteconstitucional.gov.co/relatoria/2007/T-1094-07.htm [accessed 2021-01-01].

[212] Parisi & Sims 2020, p. 31.

[213] Dejusticia, *Assesment of the Colombian National Action Plan (NAP) on Business and Human Rights,* 2016, https://www.dejusticia.org/wp-content/uploads/2017/04/fi_name_recurso_888.pdf [accessed 2021-01-02], p. 3. The importance of undertaking NBA's has also been emphasized by the Working Group, see: United Nations Human Rights Council, 'Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: note/ by the Secretary-General' (30 July 2015) UN Doc A/70/216, para 71-72; United Nations Human Rights Council, 'Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (5 August 2014) UN Doc A/69/263, para 20-24.

[214] Dejusticia 2016, pp. 12-13.

In late 2020, a second NAP called *Juntos lo Hacemos Posible Resiliencia y Solidaridad* (English translation: together we make resilience and solidarity possible) was launched. An interim report published by the Colombian government had argued, albeit vaguely, that there was a particular need to continue to strengthen the engagement with the third pillar in Colombia.[215] However, no NBA was conducted before the launch of the second NAP either.[216] Instead, the most extensive undertaking had been the publication of a report aimed at examining non-judicial remedy mechanisms and how they might be strengthened.[217] Both NAPs have stated that Colombia is to conduct a mapping of the available remedy mechanisms in the country, but as this is yet to be done, the prioritization of the matter can be questioned.[218]

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[215] Government of Colombia, *2do Informe de Seguimiento del Plan Nacional de Accion de Derechos Humanos y Empresas 2017-2018,* 2018, https://globalnaps.org/wp-content/uploads/2018/08/colombia-annual-report-on-nap-implementation-2017-18-espaol.pdf [accessed 2021-01-02], p. 64 .

[216] National Action Plans on Business and Human Rights, *Colombia,* 2021, https://globalnaps.org/country/colombia/ [accessed 2021-01-02].

[217] Centro Regional de Empresas y Emprendimientos Responsables (CREER), *Acercarse al Ciudadano: Elementos de un Sistema Integral de Remedio No-judicial en Empresas y Derechos Humanos,* 2018, https://f5355d0a-667b-4461-bfa1-e12600732440.filesusr.com/ugd/134a42_fe9b054fe5c4424a8d88ced4fdc2bc49.pdf [accessed 2021-01-02].

[218] Consejería DDHH, *Plan de Acción de Derechos Humanos y Empresas,* 2015, https://globalnaps.org/wp-content/uploads/2017/11/colombia-nap-espanol.pdf [accessed 2022-01-02], para 10.2; Consejera Presidencial para los Derechos Humanos y Asuntos Internacionales, *Plan Nacional de Acción de Empresas y Derechos Humanos 2020/2022: Juntos lo Hacemos Posible Resiliencia y Solidaridad,* 2020, http://www.derechoshumanos.gov.co/Prensa/2020/Documents/Plan-Nacional-de-Accion-de-Empresa-y-Derechos-Humanos.pdf [accessed 2022-01-02], p. 58.

Remedy through ordinary routes

Colombia has through its legislation criminalized human rights violations, in accordance with its obligations stemming from international law.[219] However, the *Colombian Criminal Code* does not hold jurisdiction over juridical persons.[220] A solution to this problem has instead been to prosecute employees, legal representatives or executives of corporations accused of human rights violations, in their individual capacity. Nevertheless, Colombian courts have in recent years also come to address and elaborate upon the responsibility of the corporation in the judgement, which alludes to the accountability of the legal entity.[221]

The approach adopted by the criminal justice system in Colombia, has resulted in several notable convictions in regard to cases involving corporate responsibility. The case against Drummond, as mentioned in part 4.1.1, is one example. Another, significant case is that of the palm oil company Urapalma, in which 15 businesspeople were convicted for their involvement in the paramilitaries forced displacement of local communities in 2014.[222] The sentences included prison and fines, but also financial reparation to the victims of forced displacement. Additionally, the court also ordered the state to oversee and monitor the land restitution process of the victims.[223]

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[219] Comisión Internacional de Juristas (CIJ), *Acceso a la Justicia: Casos de Abusos de Derechos Humanos por Parte de Empresas,* 2010, http://www.icj.org/wp-content/uploads/2012/09/Colombia-access-to-justice-corporations-thematic-report-2010-spa.pdf [accessed 2022-01-02], p. 13.

[220] Código Penal de Colombia, Ley 599 de 2000, available at: https://oig.cepal.org/sites/default/files/2000_codigopenal_colombia.pdf [accessed 2022-01-01], art. 29-30; Céspedes-Báez 2012, p. 199; CIJ 2010, p. 12.

[221] Bernal-Bermúdez 2016, p. 263, Céspedes-Báez 2012, p. 199.

[222] Nelson Camilo Sánchez et al., *Roles and Responsibilities of the Private Sector in Transitional Justice Processes in Latin America: The cases of Colombia, Guatemala and Argentina*, 2021, https://www.dplf.org/sites/default/files/roles_and_responsibilities_of_the_private_sector_in_transitional_justice_processes_in_latin_america_-_the_cases_of_colombia_guatemala_and_argentina_-_dplf_and_gijtr.pdf [accessed 2022-01-01], p. 42.

[223] For a comprehensive analysis of the Urapalma case, see: Bernal-Bermúdez 2016.

Moreover, the *Colombian Criminal Procedure Code* allows for the suspension or cancellation of juridical persons, when there are well-founded believes that it has committed or contributed to illegal activities – such as human rights abuses.[224] This is intended to act as an additional deterrent and hinder corporations from engaging in illegal activities.[225]

Additionally, the Colombian Constitution establishes the 'tutela' mechanism, which has the aim of providing "the immediate protection of protection of one's fundamental rights, when any of those are violated or threatened by public authority".[226] In accordance with this aim, the formal requirements of tutelas have a uniquely low threshold, beneficiary to the complainant. Moreover, the victims are entitled to receive a response within 10 days.[227] Consequently, tutelas have become a vastly popular mechanism for accessing remedy for human rights violations in Colombia.[228] Tutelas can also be filed against private actors, when they "are in charge of supplying public services, exercise public functions, when they threaten certain rights, or when the applicants are in a situation of helplessness or subordination in relation to them".[229] As a result, individuals have been able access remedy for corporate human rights abuses through the tutela mechanism. Noteworthy is that the Colombian Constitutional Court has referred to the UNGPs in several tutela judgements.[230] However, tutelas can only be utilized if there is no

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[224] Código de Procedimiento Penal de Colombia, Ley 906 de 2004, available at: https://leyes.co/codigo_de_procedimiento_penal.htm [accessed 2022-01-03], art. 91.

[225] Céspedes-Báez 2012, p. 199.

[226] Quote reflects English translation of art. 48 of the Colombian Constitution by Patrick Delaney, "Legislating for Equality in Colombia: Constitutional Jurisprudence, Tutelas, and Social Reform", *Equal Rights Review* 1 (2008), p. 54. Further note that "fundamental rights" only covers the rights explicitly established in articles 11-41 of the Colombian Constitution.

[227] Bernal-Bermúdez 2016, p. 114.

[228] Delaney 2008, p. 50.

[229] English translation by Nicolás Carrillo-Santarelli & Carlos Arévalo-Narváez, "The Discursive Use and Development of the Guiding Principles on Business and Human Rights in Latin America", *International Law Revista Colombiana de Derecho Internacional* 15:30 (2017), p. 99.

[230] See for example: Colombian Constitutional Court, Judgement T-732/16, 19 December 2016, available at: https://www.corteconstitucional.gov.co/relatoria/2016/t-732-16.htm [accessed 2022-

other judicial path available for the victims, or "if it's necessary to avoid an irremediable harm".[231]

Furthermore, Colombian civil law enables victims who have incurred injuries to obtain reparations from the liable actors, which encompasses both natural and juridical persons.[232] However, Céspedes-Báez has highlighted that civil law remains an unpopular route for addressing corporate liability in Colombia. The civil law regime has been described as rigid, complex and costly. Additionally, Céspedes-Báez has argued that there is a lack of Colombian lawyers who are willing to take on clients with a lack of resources, which often poses a significant hurdle for victims who have been subject to corporate human rights abuses.[233]

Colombia's National Human Rights Institution, *Defensoría del Pueblo de Colombia* (in English Office of the Ombudsman of Colombia), has the responsibility of promoting effectiveness of and overseeing human rights in Colombia. In relation to access to remedy for corporate human rights abuses, the Office can also assist, guide and advise people in the exercise of their rights. Furthermore, they can help file and provide assistance in tutela cases, and also insist on the review of a specific case before the Constitutional Court.[234]

01-02]; Colombian Constitutional Court, Judgement T-657/13, 23 September 2013, available at: https://www.corteconstitucional.gov.co/relatoria/2013/T-657-13.htm [accessed 2022-01-02].

[231] Bernal-Bermúdez 2016, p. 114.

[232] The Colombian Civil Code allows for both "direct and indirect extra-contractual civil liability action" (English translation by Camilo Sánchez & Sandoval-Villalba 2020, p. 550), see : Código Civil de Colombia, available at: http://www.secretariasenado.gov.co/senado/basedoc/codigo_civil.html [accessed 2021-12-25], art. 2341 and 2347.

[233] Céspedes-Báez 2012, pp. 195-197.

[234] La Defensoría del Pueblo, *Grupo de trabajo sobre la cuestión de los derechos humanos y las empresas transnacionales y otras empresas,* 2019, https://www.ohchr.org/Documents/Issues/Business/Remedy/INDH_Colombia_DH_Empresas.pdf [accessed 2022-01-02].

Remedy through transitional justice frameworks

As noted above, the Integrated System does not constitute Colombia's sole attempt at transitional justice. Before examining how the Integrated System addresses corporate responsibility for human rights abuses, the following sub-chapter will outline two of the most notable earlier attempts.[235]

4.2.1.1 Earlier transitional justice mechanisms

Ley de Justicia y Paz[236]

In 2005, Colombia adopted the *Justice and Peace Law* (JPL), as the governing framework for the upcoming demobilization process with the paramilitary organization AUC. The law was highly influenced by a transitional justice rationale and created an alternative criminal process for the paramilitaries who demobilized, which took place in four different so-called Justice and Peace chambers.[237] Those who discontinued their illegal activities, and contributed to establishing a truth and reparation of victims, were in exchange offered more lenient sanctions than they would have been subject to in the ordinary criminal system.[238] This procedure included full confessions of the crimes the applicants either participated in or knew off, and the disclosure of the AUC's organization and structure.[239]

Even though the JPL incorporated a victim-sensitive approach, emphasizing the victims' right to justice, truth, reparation and non-repetition, the law was criticized

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[235] For more on earlier legislative attempts with transitional justice influences, see: Velásquez Ruiz 2018, p. 36.

[236] Ley de 975 de 2005, available at: https://www.funcionpublica.gov.co/eva/gestornormativo/norma_pdf.php?i=17161 [accessed 2022-02-01].

[237] Gustavo Emilio Cote Barco, "Complicidad, responsabilidad penal de directivos empresariales y violaciones de Derechos Humanos cometidas por grupos armados illecales: lecciones del Derecho Penal Internacional para Colombia", *Vniversitas* 68:138 (2019), p. 3; Velásquez Ruiz 2018, p. 56; Wesche 2019, p. 485.

[238] Cote Barco 2019, p. 3; Gómez-Velásquez 2015, p. 34; Wesche 2019, p. 485.

[239] Wesche 2019, p. 485.

from various sources for being perceived as too lenient, bordering on granting the perpetrators of human rights violations and abuses impunity and amnesty.[240] As an example, the Inter-American Commission on Human Rights (IACHR) expressed that the law did not adequately address and provide redressal mechanisms for victims.[241] The lenient sentencing regime was argued to be incompatible and with the victims' rights[242] (thus elucidating the common friction between justice and peace often inherent in transitional justice processes), and the issue was escalated all the way up to the Constitutional Court. Through its judgement, the Constitutional Court attempted to interpret the JPL in a way which would safeguard the rights and the participation of the victims. However, the court lacked capacity to fundamentally alter the core of the law, which by Congress had been established to center around the demobilization process of the paramilitaries, and the changes were thus had marginal effect.[243]

The JPL-system was unfortunately designed in a way that made victims access to it complex, time-consuming and hard to navigate.[244] The testimonies of the paramilitaries were dealt with at a primary stage, and the victims were only able to provide their account of what had happened once this primary stage was finalized. The reparations provided to the victims came from a reparation fund consisting of assets seized from the AUC or from voluntary donors but was often lacking sufficient funds to provide financial reparations that had been granted.[245]

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[240] Velásquez Ruiz 2018, p. 56; Gómez-Velásquez 2015, p. 34.

[241] Inter-American Commission on Human Rights, *Press Release No. 26/05: IACHR Issues Statement Regarding the Adoption of the "Law of Justice and Peace" in Colombia*, July 15 2005, http://www.oas.org/documents/spa/colombia.asp [accessed 2022-01-02].

242 Velásquez Ruiz 2018, p. 57; Gómez-Velásquez 2015, p. 34

[243] Colombian Constitutional Court, Judgement C-370/06, 18 May 2006, available at: https://www.corteconstitucional.gov.co/relatoria/2006/C-370-06.htm [accessed 2022-01-03]. For English interpretations of the judgement, see: Céspedes-Báez 2012, p. 179; Gómez-Velásquez 2015, pp. 34-35.

[244] Camilo Sánchez & Sandoval-Villalba 2020, p. 551.

[245] Camilo Sánchez & Sandoval-Villalba 2020, p. 551; Maria José Guembe & Helena Olea, "No justice, no peace: Discussion of a legal framework regarding the demobilization of non-state armed groups in Colombia", in *Transitional Justice in the Twenty-First Century: Beyond Truth versus*

The clear focus on the paramilitaries was also reflected in the fact that the JPL did not grant its governing institutions jurisdiction over non-combatants, neither natural nor juridical persons.[246] Despite the fact that economic actors were thereby excluded from the JPL process, the extensive testimonies provided by the paramilitaries (in Spanish 'versiones libres'), contributed to elucidate how business actors had engaged with and supported the AUC.[247] Corporations were acknowledged to have participated in or contributed to human rights abuses that the paramilitaries had undertaken, as noted above in *Chapter 4.1.1*.[248] The extent to which the testimonies covered business actors increased as a result of an amendment of the JPL,[249] which was aimed at improving the performance of the Justice and Peace chambers, but also included a provision which encouraged the judges and prosecutors to put stress on investigating how the AUC was financed.[250]

The evidence collected in the Justice and Peace chambers concerning the illegal involvement of economic actors was sent from the transitional justice system, through so-called 'compulsas de copias', to the ordinary criminal system.[251] However, the compulsa system was in no way flawless: the quality of the compulsas was often suboptimal, there was no co-ordination regarding the destination of the compulsas, which led to the fact that they were disseminated all over the justice system. Furthermore, the procedure for processing them was incredibly slow, due to the overburdened system.[252]

Justice, Naomi Roht-Arriaza & Javier Mariezcurrena (eds.), (New York: Cambridge University Press, 2006), p. 134.

[246] Wesche 2019, p. 486.

[247] Cote Barco 2019, p. 3; Camilo Sánchez et al 2021, p. 34; Wesche 2019, p. 486.

[248] Bernal-Bermúdez 2016, p. 146.

[249] Wesche 2019, p. 485.

[250] Wesche 2019, pp. 485-486.

[251] Wesche 2019, p. 486.

[252] Wesche 2019, pp. 486, 491- 492.

Ley de Victimas y Restitución de Tierras[253]

The *Victims and Land Restitution Law* (Victims' Law) was, at its adoption in 2011, perceived as a groundbreaking transitional justice effort.[254] In a more articulated way than the JPL, the Victims' Law seeks to recognize the victims' right to truth, justice, reparation and non-repetition.[255] The conception of the law has been argued to stem from the recognition of this evident need, but also from both the newly appointed Santos governments wish to distance itself from the right-wing policies of the previous administration. The Constitutional Court's ask for a comprehensive land restitution program for the victims that had been displaced during the civil conflict was also deemed to influence the shaping of the law.[256]

The overarching purpose of the Victims' Law was to establish a mechanism aimed at the restitution of the vast amounts of land that had been wrongfully or illegally transferred or seized during the conflict, to the previous owners.[257] By creating a special process called the Action for Land Restitution, which consists of both administrative and judicial measures, the law reflects a clear ambition to provide an uncomplicated remedial path for the victims of forced displacement.[258] In particular, the rules regarding the burden of proof and evidence, were designed in a way to be especially beneficial for the victims.[259]

Moreover, the scope of the law also covers victims of other, non-land-related human rights abuses committed in the context of the armed conflict. The law creates an intricate framework, aimed at securing a holistic approach concerning victims right

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[253] Ley 1448 de 2011, available at: https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=43043 [accessed 2022-01-01].

[254] Céspedes-Báez 2012, p. 186; Mijke de Waardt & Sanne Weber, "Beyond Victims' Mere Presence: An Empirical Analysis of Victim Participation in Transitional Justice in Colombia", *Journal of Human Rights Practice* 11:1 (2019), p. 215.

[255] Amnesty 2020, p. 8; Velásquez Ruiz 2018, p. 60; Pietropali 2017, p. 189.

[256] Van Ho 2016, p. 62; Céspedes-Báez 2012, p. 183.

[257] Van Ho 2016, pp. 60-61, Amnesty 2020, p. 5; Pietropali 2017, p. 189.

[258] Van Ho 2016, p. 69; Céspedes-Báez 2012, p. 194.

[259] Céspedes-Báez 2012, p. 181; Van Ho 2016, p. 70; Pietropali 2017, p. 189.

to reparation, often referred to by its Spanish acronym SNARIV (*Sistema Nacional de Atención y Reparación Integral a las Víctimas*, or National System for Integral Attention and Reparation of Victims in English).[260] Organizations such as the *Victims Unit*, *Land Restitution Unit*, *National Centre for Historic Memory*, and *National Registry of Victims*, are organized within the SNARIV framework.

The type of reparations the victim can become eligible for through the system established by the Victims' Law depends to a large extent on when the crime occurred. The reparations can incorporate financial compensation, rehabilitation, symbolic reparation or land restitution.[261]

Despite the fact that the Victims' Law bears the ambition of approaching the conflict in a comprehensive manner, the role of corporations is not tangibly present. On the one hand, the law does have the mandate to force corporations to return land to its previous owner, under certain circumstances.[262] This possibility has been frequently utilized, and in 2020, more than 70 corporations were ordered to return land to the original owners.[263] One factor deemed to have contributed to this realization, is that the victims are not required to prove that the corporations in control of the land were responsible for or in any other way took part in the violence of the conflict.[264] On the other hand, the Victims' Law does not, similarly to the JPL, have the mandate to establish corporate liability for human rights abuses. In instances where the evidence collected within the Victims' Law system finds evidence that points to the involvement of corporations in human rights abuses, the prosecutor is obliged to refer the case to a general prosecutor within the ordinary criminal system.[265] However, the law also establishes that the tentative criminal

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[260] Velásquez Ruiz 2018, pp. 60-61.

[261] Ley 1448 de 2011, chapters VIII – IX. See also: Amnesty 2020, p. 7; Camilo Sánchez & Sandoval-Villalba 2020, pp. 555-562.

[262] Pietropali 2017, p. 191.

[263] Bluradio, *Más de 70 empresas, condenadas a restituir tierras a campesinos en el país,* 2020, https://www.bluradio.com/judicial/mas-de-70-empresas-condenadas-a-restituir-tierras-a-campesinos-en-el-pais [accessed 2022-01-01].

[264] Camilo Sánchez et al. 2021, p. 47.

[265] Ley 1448 de 2011, art. 46.

liability must be assignable to a legal representative or an individual, thus eradicating the possibility of holding legal persons accountable.[266] Céspedes-Báez argues that this creates a significant threshold for the possibility of remediating corporate human rights abuses, as the "conduct of other agents within the corporation will not be taken into account",[267] which in turn will "heighten the burden of proof for the victims" and imply an "almost unsurpassable obstacle to achieve redress"[268].

What is interesting about the Victims' Law is that there were certain actors whom during the drafting process seemed to have the ambition to more comprehensively address the business and human rights angle of the conflict. Nonetheless, as Céspedes-Báez intricately outlines, these objectives were met with resistance and never discussed with serious intentions. As an example, she underlines that Congressman Ivan Cepeda proposed that the Victims' Law should establish a truth commission in order to "unveil the links between corporations and illegal armed groups",[269] but this intention never materialized.

4.2.1.2 The Integrated System

Previous transitional justice mechanisms had elucidated that the recognition of victims' rights was a difficult and fickle task, and the issue was therefore identified as one of the most important factors in order to ensure the success of the Peace Agreement.[270] However, the final Peace Agreement also came to reflect an understanding that it was important to extend the scope of the agreement in such a way that it was able to deal with actors whom did not fall in the traditional categories of victim/ perpetrator.[271] This understanding is particularly well-

[266] Ley 1448 de 2011, art. 46.

[267] Céspedes-Báez 2012, p. 207.

[268] Ibid.

[269] Céspedes-Báez 2012, p. 192.

[270] Gamboa Tapias & Díaz Pabón 2018, p. 75.

[271] Peace Agreement, chapter 5.1.

articulated in the Truth Commission and the SJP, and due to the limited scope of this thesis, these mechanisms will be the focus of the following segment.

The Truth Commission and business actors

The work of the Truth Commission is governed by three broad aims: to clarify the events of the armed conflict; to promote co-existence between responsible parties and victims; and to encourage and facilitate voluntary confessions regarding individual and collective responsibilities by *everyone* who participated in the conflict, either indirectly or directly.[272] Especially remarkable is that the Peace Agreement binds the Colombian government "foster third party participation in the Commission, so as to contribute towards elucidating and the acknowledgement of responsibilities, as part of the necessary guarantees of non-recurrence".[273]

Important to note is, however, that the Truth Commission has been characterized as an 'extra-judicial mechanism', which means that it cannot initiate criminal charges on those actors who speak before it. Additionally, the information compiled by the Commission cannot be used or requested by judicial authorities in the purpose of criminal attributing liability.[274] The process for selecting the members of the commission was public and resulted in a composition of members from a broad variety of backgrounds. However, no commissioner has a background from the private sector, which can be explained by the fact that no businessperson applied to be part of the commission.[275]

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[272] Peace Agreement, chapter 5.1.

[273] Peace Agreement, chapter 5.1.1.1.8.

[274] Peace Agreement, chapter 5.1.1.1.1.

[275] The Truth Commission consists of an Afro-community leader, an indigenous lawyer, a retired Army major, a human rights lawyer, an investigative journalist, a former museum director, an investigator a feminist, a public health expert, and a psychologist whose work has focused on victims, head of commission Jesuit priest well renowned for his local peacebuilding efforts, see further: La Silla Vacia, *La comisión de la verdad y los empresarios aún no logran vencer la desconfianza,* 2020, https://www.lasillavacia.com/historias/silla-nacional/la-comision-de-la-verdad-y-los-empresarios-aun-no-logran-vencer-la-desconfianza/ [accessed 2022-01-01].

The Truth Commission has clarified that it perceives the role of corporations in the conflict as dual, clarifying they have both been victims of and participants in the human rights violations committed within the context of the conflict.[276] Drawing upon the experiences of the JPL, the Truth Commission is especially encouraged to investigate and clarify how different actors cooperated with the paramilitaries, which includes highlighting aspects of funding.[277]

How economic actors could, and should, engage with the Truth Commission has been source of debate.[278] For example, Sánchez Leon and Marín López elaborate that:

> *"As participants in the violence, local, national, and international corporate actors could assist the TC effectively in at least six ways, by: firstly, helping to clarify the violent actions carried out in the regions of the country; secondly, acknowledging their collective responsibility for their participation in the conflict (as a company, an economic sector, a group of companies, professional association, and so forth); thirdly, clarifying the historical context, the origins and causes of the conflict in which they were sponsors or their rights were violated; fourthly, identifying the factors and conditions that facilitated or contributed to the continuation of the conflict, particularly economic conditions such as voluntary financing of armed groups; fifthly, explaining the different forms of illegal cooperation with paramilitaries or other armed groups; sixthly, clarifying the phenomenon of land grabbing in which the main*

[276] Nelson Camilo Sánchez Leon & Daniel Marín López, "Corporate accountability in transitional justice in Colombia", in *Peace, everyone's business! Corporate accountability in transitional justice: lessons for Colombia,* Joris van de Sandt & Marianne More (eds.), (Utrecht: PAX, 2017), p. 127.

[277] Peace Agreement, chapter 5.1.1.1.2.

[278] See also: Nelson Camilo Sánchez León et al., *Cuentas Claras: El papel de la Comisión de la Verdad en la develación de la responsibilidad de empresas en el conflict armado colombiano,* (Bogotá: Dejusticia, 2018).

beneficiaries were corporate actors, as shown in various legal cases."[279]

The Truth Commission was granted a three-year mandate, and the findings of the commission are to be presented in an extensive report at the end of this period.[280] The report, which was to be finalized in November 2021, is yet to be published.

The SJP and business actors

The SJP is, in comparison to the Truth Commission, a solely judicial mechanism.[281] It establishes an inventive, but legislatively complex, sentencing regime. Those who accept responsibility and contribute to establishing the truth and the reparations of victims, are in exchange eligible for more lenient sanctions than those which would have been provided in the ordinary judicial system.[282] The jurisdiction of the court covers those who participated in, directly or indirectly, the armed conflict, thus extending its reach beyond the parties of the agreement.[283]

The unusually wide scope of the SJP, which in light of the above also covers third parties such as civilians or business actors, caused quite a stir once revealed.

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[279] Sánchez Leon & Marín López 2017, pp. 129-130.

[280] Sánchez Leon & Marín López 2017, p. 129.

[281] Wesche 2019, p. 496.

[282] What sanctions are applicable depends on the severity of the crime in question. On the one hand, amnesties, pardons, and special treatment can be granted for so called political crimes, while individuals who have committed crimes amounting to gross human rights violations and grave breaches of IHL only are subject to "effective restriction of their liberties and rights" for a period between 5-8 years. Individuals who do not accept liability and contribute to the establishment of truth and the reparations of victims, are excluded from the special sentencing regime. Much has been written on the SJP's sentencing regime, particularly in light of its compatibility with Colombia's international obligations stemming from the Rome Statute, see example for example: Jacopo Roberti di Sarsina, *Transitional Justice and a State's Response to Mass Atrocity,* (The Hague: Springer-Verlag Berlin Heidelberg, 2019); René Urueña, "Prosecutorial Politics: The ICC-s Influence in Colombian Peace Processes, 2003-2017", *American Journal of International Law* 111:1 (2017); Line Engbo Gissel, *The International Criminal Court and Peace Processes in Africa: Judicialising Peace,* (New York: Routledge, 2018), pp. 169-187.

[283] Peace Agreement, chapter 5.1.

However, the SJP was never intended to cover juridical persons, and the definition of third parties was from the beginning limited to natural persons.[284] By some actors, the inclusion of third parties was hailed as a welcome step towards securing the involvement of business actors in the peace process and addressing issues regarding their potential responsibility.[285] By others, it was argued that the extended scope could risk destabilizing the productive sector of the country and have disastrous consequences for individuals who had chosen to invest in Colombia.[286] These vastly differing opinions on the mandate of the SJP were also prominent in Congress, and contributed to stall and severely complicate the political implementation process. What eventually came to defuse the tension was a decision by the Constitutional Court, which clarified that the SJP would not have the mandate to summon third parties, and the contribution of such actors would thus be dependent on their voluntary participation.[287] The motivation behind this consequential conclusion was that the JEP's ability to summon third parties was incompatible with these actors' right to a fair and impartial trial.[288]

The decision of the Constitutional Court undoubtedly came to restrict the possibility of addressing the acts of business actors committed during the civil conflict. However, it has not completely eradicated the incentive for partaking in the JEP process. Actors who voluntarily present themselves to the court and comply with its requirements, will be applicable for the more beneficial sentencing regime that the JEP establishes. Actors who don't, risk being subject to criminal proceedings within the ordinary justice system. However, from a victims-centered perspective, this restriction might have implications for their perceived redressal. According to the Peace Agreement, victims of acts committed during or because of the conflict, have the ability of submitting information regarding these events to the SJP.[289] As

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[284] Michalowski 2020, p. 27.

[285] Sánchez Leon & Marín López 2017, p. 124.

[286] Wesche 2019, p. 498.

[287] Colombian Constitutional Court, Judgement C-674/17, 14 November 2007, available at: https://www.corteconstitucional.gov.co/relatoria/2007/T-1094-07.htm [accessed 2021-01-01].

[288] Ibid.

[289] Peace Agreement, chapter 5.1.2, para 48 (c).

a consequence, if allegations concern a business actor, the SJP is thus solely dependent on the voluntary participation of the actor in their quest of establishing responsibility, truth and reparation for the victims.

Nevertheless, the victims of the Colombian conflict are not reliant the SJP for reparations. The fifth part of Peace Agreement, namely the *Comprehensive reparation measures for peacebuilding*, recognizes a vast array of reparations that can be provided to the victims. These reparations are in general of collective character, but reparations concerning psychosocial rehabilitation and land restitution constitute the exceptions.[290] However, the Peace Agreement does not contain a new mechanism or create new legislation in order to deal with the issue of reparation, but rather endorses the reparations system created under the Victims' Law.[291] This choice gave cause for concern as the Victims' Law was only intended to be in force until 2021, but in January 2021, the Colombian government announced that the validity of the law would be extended until 2031.[292]

[290] Peace Agreement, chapter 5.1.3.

[291] Camilo Sánchez & Sandoval-Villalba 2020, p. 554.

[292] Coneo Rincón, *Con la Ley 2078 del 8 de enero de 2021 el presidente Duque prorroga la vigencia de la Ley 1448 de 2011 hasta el 10 de junio de 2031,* 2021, https://www.asuntoslegales.com.co/actualidad/ley-de-victimas-tendra-vigencia-por-10-anos-mas-luego-de-sancion-de-prorroga-de-duque-3109742 [accessed 2022-01-02].

5 Taking stock: possibilities and pitfalls in the Colombian experience

Five years have passed since the signing of the Peace Agreement between FARC and the Colombian government. Since then, the peace process has progressed, but it has undoubtedly been plagued by a wide array of challenges. In 2018, Colombia elected a new right-wing government and president, Iván Duque, whose campaign to a large extent was built on the premise that he would revise and alter the already agreed upon Peace Agreement. Duque had, like many others in opposition of the Santos government, extensively proclaimed that the agreed sentencing regime was far too lenient to be perceived as acceptable. Congruently, he had also aimed sharp critique against and raised doubts over the legitimacy of the accord and the mechanisms it established.[293]

The process has also been tested by the fact that many former combatants have chosen to take up arms once again, thus contributing to reignite and fuel the spread of violence in the country. The phenomenon of 'spoilers' is well known in peace processes[294] and can have devastating effects on the prospects of establishing a durable and sustainable peace. Colombia is no exception. One of the most well-known examples is that of the FARC top-commander Luciano Marín Arango, commonly known by the alias 'Iván Márquez', who in 2019 announced that he would take up arms again, despite the fact that he was heavily involved in the

[293] Andrés Morales, *The rocky road to peace: current challenges at the Special Jurisdiction for Peace in Colombia,* 2021, https://www.ejiltalk.org/the-rocky-road-to-peace-current-challenges-at-the-special-jurisdiction-for-peace-in-colombia/ [accessed 2022-01-02].

[294] See for example: Edward Newman & Oliver Richmond (eds.), *Challenges to peacebuilding: Managing spoilers during conflict resolution,* (New York: United Nations University Press, 2006).

negotiation process.[295] According to Human Rights Watch, there were in 2020 at least 25 active dissident FARC groups operating in the country.[296]

Albeit a bit bruised and battered, the Peace Agreement is still alive. In the following we will examine how the access to remedy for corporate human rights abuses was addressed (or perhaps more correctly – overlooked) in the transitional justice process.

5.1 The transitional justice framework

The Peace Agreement of 2016 initially posed a unique opportunity to address corporate human rights abuses. The Colombian government had, when the negotiations started in 2012, ample experience of formulating and constructing transitional justice mechanisms. Additionally, previous transitional justice mechanisms, especially the JPL, had contributed to elucidate that corporations had been involved in the conflict, in one way or another – thus tying into the UN Working Group's statement that no corporation is neutral in a conflict. The negotiations were initiated at a time when the UNGPs had just seen light of day, and the adoption of the Colombian NAP in 2015 evidently reflected an awareness of the field of business and human rights amongst Colombian actors. In light of this, discussions regarding the responsibility of corporations were remarkably absent from the transitional justice discourse.

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[295] Dylan Baddour & Anthony Faiola, "As Colombia peace accord unravels, ex-FARC leaders take up arms, announce return to conflict", *Washington Post* August 29 2019, https://www.washingtonpost.com/world/the_americas/as-colombia-peace-accord-unravels-ex-farc-leaders-take-up-arms-to-resume-struggle/2019/08/29/e2a50bd6-ca5d-11e9-9615-8f1a32962e04_story.html [accessed 2022-01-02].

[296] Juan Pappier & Kyle Johnson, *Does the FARC still exist? Challenges in Assessing Colombia's 'Post Conflict' under International Humanitarian Law,* 2020, https://www.hrw.org/news/2020/10/22/does-farc-still-exist-challenges-assessing-colombias-post-conflict-under [accessed 2022-01-02].

There was a wide understanding that it was crucial for the peace process to incorporate a victim's sensitive approach, in order to create conducive settings to foster a sustainable peace. I argue that such an approach would have required that the issue of corporate human rights abuses was also addressed, in order to promote a multifaceted understanding of the conflict and to remediate *all* victims of the conflict. The original wide reach and wide mandate of the SJP, considering its jurisdiction over third parties, constituted a promising advance. However, when the SJP was stripped of its ability to summon third parties, the power of the court was undeniably diluted. As a consequence, the court has thus been dependent on the goodwill of such actors and the appeal that the alternative sanctioning system holds. On the one hand, approaching the SJP on a voluntary basis could constitute a way for corporations to comply with their responsibility to remediate in those cases where they've caused, contributed or has had business relationships that have been directly linked to an adverse human rights impact, in accordance with the UNGPs. On the other hand – considering the duties of the Colombian state – the way the jurisdiction of the SJP was constructed can be deemed as problematic bearing in mind the state's responsibility to work actively to reduce barriers that can impede access to remedy, as established through principle 26 of the UNGPs.

Nevertheless, a wide scope does not constitute a panacea. Even though the scope of the SJP is considered narrow in relation to business actors, it has a uniquely wide jurisdiction in comparison to previous international tribunals, particularly bearing in mind the temporal scope.[297] This wide scope has proved challenging and resulted in overburdening the court, which is currently struggling to combat a significant backlog.[298] Furthermore, the scope also poses challenges in regard to evidence collection, especially with respect to the older cases of which some date back almost

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[297] Shoshana Levy, *Can Colombia's Special Jurisdiction for Peace be considered slow? A preliminary comparative study of trials for international crimes,* 2021, https://justiceinconflict.org/2021/03/03/can-colombias-special-jurisdiction-for-peace-be-considered-slow-a-preliminary-comparative-study-of-trials-for-international-crimes/ [accessed 2022-01-02].

[298] Morales, *The rocky road to peace: current challenges at the Special Jurisdiction for Peace in Colombia*.

fifty years.[299] As such, there is an evident discrepancy between the capacity of the court and its jurisdiction, which in its turn jeopardizes the victims right to access effective remedy.

Another angle that was overlooked was the possibility of giving the SJP jurisdiction over juridical persons. This would have allowed for a more all-encompassing manner of investigating the role of corporations in the Colombian armed conflict. As the Colombian criminal law does not hold the ability of prosecuting juridical persons for human rights abuses, it would unquestionably have been beneficial to extend the SJP's reach in order to strengthen the victims' access to effective remedy. Such an action could have been reflected an effort from Colombia's side to comply with the requirement of heightened state action that the UNGPs establish, given that country was not only aspiring to enter a post-conflict phase but also has a lengthy previous record of violations of human rights and IHL – in other words constituting a high-risk environment.

The governing framework for the SJP set a deadline for the participant of third parties. Before this date, third parties who wanted to voluntarily engage with the court needed to make themselves known. A total of 657 civilians presented themselves, out of which 55 were linked to economic activities.[300] Bernal-Bermúdez has highlighted that a majority of the 55 only came forward once it became clear that investigations against them within the ordinary system were advancing.[301] Even though it is incontestably positive that some of these cases

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[299] Wesche 2019, pp. 500-501.

[300] Jurisdicción Especial Para la Paz, *675 terceros civiles han solicitado su sometimiento a la JEP*, 2019, https://www.jep.gov.co/Sala-de-Prensa/SiteAssets/Paginas/Comunicado-127-de-2019---657-terceros-civiles-han-solicitado-su-sometimiento-a-la-JEP/127.%20Comunicado%20127%20de%202019%20-%20657%20terceros%20civiles%20han%20solicitado%20su%20sometimiento%20a%20la%20JEP.pdf [accessed 2022-01-03].

[301] ABColombia, *Why Truth and Justice Matter in Colombia*?, 2021, https://www.abcolombia.org.uk/event-discussion-why-truth-and-justice-matter-in-colombia/ [accessed 2022-01-03].

concerning economic activities are caught – either by the transitional justice system or the ordinary justice system – there is nevertheless a high risk that this set-up threatens to create accountability gaps in relation to cases where the investigations in the ordinary system are irresolute or faltering. Strictly speaking, it is very difficult to argue that the SJP constitutes an effective remedy mechanism for victims, as victims of corporate human rights abuses are entirely dependent upon the voluntary acknowledgment and participation of the business actors.

The Truth Commission has, from the beginning, struggled to engage with the private sector. According to a report by the independent newspaper *La Silla Vacía*, there has been a tangible lack of trust between the private sector and the Truth Commission, which has primarily been influenced by three different aspects. Firstly, there has been a perception that the Truth Commission, due to its composition, has a clear bias against the private sector since it lacks commissioners with a thorough understanding of the business sphere. Secondly, critique against the Truth Commission has often reflected and tied into the narrative that corporations and business actors were solely victims in the conflict, be it victims of extortion, kidnappings, or looting of property. In the same spirit, some business actors have underlined the difficulty of operating in areas characterized by a tangible lack of state presence. Lastly, there has been a noticeable worry amongst business actors that cooperating with the Truth Commission might lead to legal repercussions in the future, even though this would be in stark contrast to the purpose of the Commission. In the private meetings that have been held between the commissioners and the private sector, there has been a heavy presence of lawyers, which has contributed to suffocate meaningful exchanges of knowledge-sharing.[302]

The reasons as to why it is important that Colombian business actors and corporations engage with the Truth Commission are many. From a corporate perspective, it could give the corporations a possibility of contributing to the peace and reconciliation process, and to tell their side of the story. Furthermore, it

[302] La Silla Vacía, *La comisión de la verdad y los empresarios aún no logran vencer la desconfianza*.

constitutes an opportunity to acknowledge responsibility, elucidate wrongdoings and to foster guarantees of non-repetition. From a victim's perspective, if the private sector does not participate, it hinders the victims' right to truth, and endangers the Commission's possibility of producing a holistic, comprehensive final report.

In order to promote the engagement of the private sector, the NGO *Fundación ideas para la Paz* (FIP), published an analysis of 56 reports that had been submitted to the Truth Commission from various civil society organizations. In total, 81 businesses are identified in the reports. FIP argued that this finding should incite and motivate businesses to participate in the work of the Commission, as a multi-sourced truth telling process was argued to be crucial for the future co-existence of Colombian society. Similarly, the private sectors participation was also framed as an opportunity for them to provide information on how they have conducted and worked with human rights due diligence measures.[303]

As noted in the previous chapters, truth-telling can be a way of providing a type of non-judicial remedy, materializing through apologies and clarifying the past, which contribute to anchor guarantees of non-repetition. If the private sector chooses to abstain from contributing to the work of the commission, this can risk denting the perceived remedial process for victims of corporate human rights abuses.

A severe problem that both the SJP and the Truth Commission have struggled with is lack of funding. The Duque administration early on in its tenure declared that they would cut funding of the SJP, in an effort to undermine its legitimacy and capability. In 2019, Duque announced that he would cut the funding of the court by 30% for 2020. However, this move was heavily criticized, and the government ended up granting the court the funds it had initially requested.[304] The Truth

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[303] Fundación Ideas Para la Paz (FIP), *Los Empresarios y la Verdad,* https://www.ideaspaz.org/especiales/empresas-paz/ [accessed 2022-01-02].

[304] Washington Office on Latin America, *Policy Recommendations: The Peace Accord – Justice for victims of the conflict,* 2021, https://reliefweb.int/report/colombia/policy-recommendations-peace-accord-justice-victims-conflict [accessed 2022-01-02].

Commission, in comparison, saw its funds cut by 40% in 2019.[305] However, according to a UN report from, funds for the implementation of all the transitional justice mechanisms have marginally increased by a yearly basis since 2017. Nevertheless, the report does not elaborate upon the exact allocation of the funding.[306]

As noted above, the temporal scope of the Victims' Law has been extended until 2031. By October 2021, more than 9.2 million people had registered as victims,[307] which is more than double the amount that was predicted when the law was adopted in 2011.[308] The implementation of the reparation measures have been excruciatingly slow, and an overwhelming majority of the victims are still waiting for their claims to be addressed.[309] This also applies to the land restitution process.[310] The lack of publicly available disaggregated data in relation land restitution make it difficult to draw any conclusions regarding the extent to which corporations have been obligated to return land. However, Wesche has drawn upon studies from CSO's in order to argue that the corporate land restitution only has constituted a small part of the total restitution.[311] The reason behind this, according to Wesche, is reflected in the combination of the fact that business-related cases are often highly complex and that the victims of land dispossession are at a disadvantage from the outset given their vulnerable socio-economic position.[312] As such, there are serious concerns about the effectiveness of the remedy provided through the Victims' Law.

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[305] Washington Office on Latin America, *Policy Recommendations: The Peace Accord – Justice for victims of the conflict.*

[306] United Nations Security Council, 'United Nations Verification Mission in Colombia – Report of the Secretary-General' (24 September 2021) UN Doc S/2021/824.

[307] Unidad para la atención y reparación integra a las victimas, *Incio,* 2021, https://www.unidadvictimas.gov.co/es [accessed 2022-01-03].

[308] Camilo Sánchez & Sandoval-Villalba 2020, p. 556;

[309] Julia Zulver, *Feasible justice: Has Colombia over-promised and under-delivered reparations for its 8.6 million victims?,* 2018, https://www.justiceinfo.net/en/37686-feasible-justice-has-colombia-over-promised-and-under-delivered-reparations-for-its-8-6-million-vic.html [accessed 2022-01-02].

[310] Wesche 2021, p. 305.

[311] Wesche 2021, p. 306.

[312] Wesche 2021, p. 307.

5.2 Overarching challenges

Before concluding this chapter, I find it essential to elaborate upon some other issues that have affected victims' access to remedy for corporate human rights abuses in Colombia, which are not necessarily rooted in the Peace Agreement of 2016.

At the outset, one prominent challenge is the nature of the Colombian civil conflict. As a result of the many actors involved, it is almost more correct to talk of several parallel civil conflicts that intertwine and overlap, rather than one single conflict. The Peace Agreement had the aim of ending the conflict between the Colombian state and the FARC, but it was not equipped or meant to end all on-going violent engagements. This fragmented approach to transitional justice has been visible earlier in Colombia's history, as illustrated not the least by the JPL. One can argue that a fragmented approach at best can achieve a fragmented peace. Furthermore, such an approach unquestionably contributes to create a patchwork of different transitional justice mechanisms, whose limited scopes can be difficult to maneuver and can risk creating accountability gaps. Besides, the positive effects of these types of transitional justice processes risk being severely restricted and limited by continuing violence.

One worrisome aspect that has been omnipresent in the Colombian context is the vulnerability of victims. Because of the irregular state present in the country, many victims are highly dependent on the corporations that operate in their societies, especially in the underdeveloped countryside. This in turn might risk creating an unhealthy and skewed power balance between employer and employee, and can heighten the threshold for reporting corporate human rights abuses. As an example, Wesche has highlighted that there have been several occurrences of corporations that have filed complaints against victims, accusing them of defamation or the submission of false testimonies.[313] Such events indubitably risk intimidating

[313] Wesche 2019, p. 489. This fear is also problematized by the CIJ in their report of 2010, part 2.4.3.

victims and can hinder evidence collecting, and in the long run – hinder victims from speaking up and seeking remedy.

However, it is not only corporations who pose challenges for victims trying to access remedy. The *Comisión Internacional de Juristas* has in a report exemplified that the judicial routes available in Colombia are hard to navigate and difficult to understand without expert knowledge or guidance.[314] There is also a widespread lack of knowledge concerning one's rights, which also adds a layer of complexity.[315] Moreover, they emphasize that the Colombian remedial paths are paved with social obstacles as well, illustrating that victims often face economic barriers when aiming to access remedy.[316] Some of these arguments have also been brought to the fore by the Office of the Ombudsman, which along the same lines has argued that the limited knowledge of one's rights in relation to corporate human rights abuses, poses a severe obstacle for accessing remedy. Similarly, the Office has stressed that there is a lack of awareness of the available routes for accessing remedy amongst the victims of corporate human rights abuses.[317]

Another challenge in the Colombian context is that the ordinary judicial system, as noted in the previous chapters, has struggled to timely process complaints regarding corporate human rights abuses. This has been fueled by a wide range of factors, such as difficulties concerning evidence collecting and inefficient investigations. The tutela system constitutes an exception, but is as earlier discussed only available in relation to the fundamental rights established in the constitution and if no other judicial remedial paths are available.

Moreover, it is also important to acknowledge the effect the power of the corporation can have in regard to remedy. Colombia has, historically, been relatively susceptible to state capture by economic actors. Drawing upon the

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[314] CIJ 2010, part. 2.1.1; 2.4.2.

[315] CIJ 2010, part 2.4.2.

[316] CIJ 2010, part. 2.4.1.

[317] La Defensoría del Pueblo, *Grupo de trabajo sobre la cuestión de los derechos humanos y las empresas transnacionales y otras empresas.*

Colombian context, Espejo Fandino has demonstrated that state capture has contributed to obstruct victim's access to remedy for corporate human rights abuses in several cases.[318] Similarly, Bernal-Bermúdez has concluded that corporations which have been deemed important for the well-being of the Colombian economy have been more likely to avoid judicialization, compared to corporations with less economic leverage.[319] However, Bernal-Bermúdez also argues that there are certain factors which have proven to be helpful when seeking remedy. As an example, she has argued that victims who have engaged with NGO's or CSO's, which have been able to provide support and knowledge, have been more successful in their pursuit of remedy. Furthermore, the involvement of global actors – such as the Inter-American Court on Human Rights (IACtHR) – has also increased the prospects of the victims.[320]

Lastly, one immense challenge in the Colombian context is the blatant lack of adequate protection of human rights defenders. According to Human Rights Watch, more than 450 human rights defenders were killed between 2016 and April 2021, making Colombia the most dangerous country for human rights defenders in Latin America.[321] Additionally, 2 829 threats against human rights defenders were recorded between January 2016 and June 2020.[322] The mechanisms established in Colombia for the purpose of protecting of human rights defenders have continuously been constrained by an absence of adequate funding and incoherent

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[318] Fabian Espejo Fandino, *Friends or foes of peace? Multinational Corporations and state capture in Colombia,* PhD thesis (Belfast: Queen's University Belfast, 2020).

[319] Bernal-Bermúdez 2016, p. 279.

[320] Bernal-Bermúdez 2016, p. 280; Leigh A. Payne, Gabriel Pereira & Laura Bernal-Bermúdez, *Justicia Transicional y Rendición de Cuentas de Actores Económicos, Desde Abajo: Desplegando la Palanca de Arquímedes,* (Bogotá: Editorial Dejusticia, 2021), p. 156.

[321] Human Rights Watch, *Amicus brief on killings of human rights defenders in Colombia,* 2021, https://www.hrw.org/news/2021/04/20/amicus-brief-killings-human-rights-defenders-colombia [accessed 2022-01-03].

[322] Human Rights Watch, *Left Undefended: Killings of Rights Defenders in Colombia's Remote Communities,* 2021, https://www.hrw.org/report/2021/02/10/left-undefended/killings-rights-defenders-colombias-remote-communities [accessed 2022-01-03].

regulatory frameworks.[323] This undeniably contributes to create a climate of fear and apprehension for those trying to address and seek remedy for human rights abuses.

[323] Human Rights Watch, *Left Undefended: Killings of Rights Defenders in Colombia's Remote Communities*.

6 Lessons learned: extrapolating insights from Colombia

The Colombian experience has exposed several difficulties associated with addressing corporate responsibility and providing access to effective remedy for corporate human rights abuses within the context of transitional justice processes. In this chapter, I will elaborate upon some of the lessons from the Colombian context that can be extrapolated to future transitional justice processes.

First and foremost, it is apparent that there is a substantial need for increased engagement between the fields of transitional justice and business and human rights. The Colombian transitional justice process has elucidated that this engagement seldom comes effortlessly, but needs to be intentionally, continuously and purposefully pursued. In order to address accountability for corporate human rights abuses and ensure victims' access to effective remedy, dedicated efforts are needed from the governments and stakeholders who are responsible for shaping transitional justice processes. Expertise from local actors, such as NGO's and CSO's who work with issues concerning business and human rights and have a thorough understanding of local conditions and challenges, should be drawn upon in the process. Furthermore, international actors can contribute to promote engagement, and help provide guidance, as highlighted by the ARP. Involvement from human rights bodies, such as the IACtHR, can also help steer transitional justice projects in a direction which is more conscious of corporate human rights abuses.

Furthermore, there were many factors in the Colombian context that could have motivated and fueled a business and human rights perspective in the transitional justice process, such as the wide-spread knowledge of corporate human rights abuses in the context of the armed conflict and the parallel drafting process of the country's first NAP. However, the Colombian transitional justice process did not embrace this opportunity, and a business and human rights perspective never

materialized in the Peace Agreement. Instead, the drafting of the NAP and the Peace Agreement took place separately, resulting in a tangible disconnect between the two. This elucidates that engagement between the two fields is a difficult task even for a country that is aware of and claiming to be actively pursuing a business and human rights agenda. In order to ensure access to remedy for corporate human rights abuses in future transitional justice processes, it must be deemed necessary to take country-specific insights from NAPs into account and to draw upon the UNGPs and the detailed work of the Working Group.

Likewise, it is essential that NAPs relate to and address challenges that are linked to on-going or previous armed conflicts. As an example, in the Colombian context, it would undeniably have been meaningful to outline the available remedy mechanisms in the country when drafting the NAP. This would not only have helped victims of corporate human rights abuses, but could also have helped shape the transitional justice mechanisms in a way that was adequate for addressing tentative gaps between the existing remedy mechanisms.

The Colombian experience has also revealed the need for ensuring stability, cohesion and function of transitional justice mechanisms. The turmoil that has surrounded the jurisdiction over third parties has spread uncertainty and unclarity regarding how and if corporate responsibility is to be addressed in the transitional justice process. The restriction of the SJP's ability to summon third parties is a clear example of this. Additionally, the stability of the transitional justice process has been severely impacted by the volatile political landscape in Colombia, with the power shifting between political actors with widely differing opinions on the peace process and the legitimacy of it. Political differences are undeniably healthy from a democratic perspective but pose inherent and complex challenges for the permanency and the effectiveness of established transitional justice mechanisms. This has become especially prominent in Colombia in regard to the funding of the transitional justice mechanisms.

In the same essence, it has also proven to be important to ensure policy coherence between transitional justice mechanisms and ordinary remedial mechanisms. A disconnect between them can result in confusion, and risks creating unnecessary

and avoidable accountability gaps. Regardless of what ways a transitional justice processes choses to deal with issues of corporate responsibility, it is crucial that the jurisdictional mandates of the transitional justice mechanisms and ordinary judicial mechanisms are clear-cut and well-defined. As an example, the earlier Colombian transitional justice mechanisms were able to collect evidence regarding corporate human rights abuses but were then obligated to pass them on to the ordinary judicial system. This dissemination process proved to be deficient and ineffective, clearly lacking a systematic approach. Not only was the evidence scattered across different courts in the country, but it also was stripped from the instance with the most knowledge and understanding of the conflict milieu. As such, there are undoubtedly certain advantages of processing corporate human rights abuses that have taken place in the context of a conflict within the mechanisms established through transitional justice processes. Firstly, such an approach could ensure that corporate actions are recognized and acknowledged as factors that influence and affect conflicts. Secondly, it could guarantee that the corporate human rights abuses are processed and dealt with by actors whose competence encompasses a holistic understanding of the different segments and dynamics of the conflict.

Furthermore, the Colombian experience has also shed light on some of the pitfalls regarding the perception of the role of corporations in transitional justice processes. As discussed above, corporations who have operated in conflict scenarios can be victims, beneficiaries, contributors and perpetrators – and more importantly, can shoulder multiple of these roles simultaneously. Many corporations and politicians have in the Colombian context clung onto the narrative that corporations and business actors solely were victims. It is therefore important to acknowledge that being a victim does not rid a corporation of its responsibility to remediate. Such narratives thus need to be addressed and countered, in order to promote responsibility and remedy. Additionally, by altering these types of narratives, one might be able to promote the engagement of the private sector in the transitional justice process. If this narrative would have been addressed in the Colombian context, it might have increased the incentive for corporations to voluntarily engage with both the SJP and the Truth Commission, as a mean of clarifying their role and involvement in the conflict. Moreover, increased engagement of the private sector can contribute to establishing a more inclusive transitional justice process, that

comprises all the different societal actors. If a sector as large and influential as the private sector is excluded, one risks creating a fragmented peace and a lingering sense of impunity.

Similarly, it is also essential to acknowledge *all* victims of armed conflicts in transitional justice processes. As illustrated through the Colombian experience, corporations and business actors play active roles in conflicts. It is therefore crucial to recognize the victims of corporate human rights abuses as well, in order to foster a durable and comprehensive peace. Additionally, these victims should be able to access remedy and share their experiences, without fear of retaliation – be it from their employers, corporations who operate in the area where they reside, or state actors. This safeguarding should clearly not be limited to victims, but should embrace human rights defenders as well. Transitional justice processes should be shaped bearing this in mind. Additionally, the Colombian experience has also elucidated that victims are often unaware of their rights. As such, acknowledging the rights of victims of corporate human rights abuses in transitional justice processes by establishing easily accessible and comprehendible paths for remedy can facilitate the spread of awareness regarding the topic.

7 Concluding remarks

The previous chapters of this thesis have elucidated that there is still a tangible gap between the field of business and human rights and the field of transitional justice in practice. The Colombian experience has shown that interaction between the two fields does not come about on its own accord but needs to be persistently pursued. The lacking engagement between the two fields can of course, at this stage, be explained by the fact that the field of business and human rights is still in its early days and continuously evolving. However, this thesis has illustrated that both fields would undeniably benefit from increased engagement, not the least seeing the issue from a victim's centered approach.

Furthermore, this thesis has demonstrated that the Colombian transitional justice model leaves much to be desired in regard to ensuring access to remedy for corporate human rights abuses. The issue of corporate responsibility was not incorporated into the structure of the transitional justice mechanisms, hence pushing the matter outside the realm of the peace process. As argued above, addressing corporate human rights abuses in transitional justice processes will require and promote the engagement of all segments and actors of society, and thus constitute an important step in ensuring a solid and comprehensive transition. By addressing corporate human rights abuses in transitional justice processes, one also acknowledges the fact that the operations of corporations are neither detached nor disengaged from the conflict environment. As the purpose of transitional justice is to address past atrocities, I thereby argue that it makes sense to also address past corporate human rights abuses within the same process. This can also promote and remediate victims' access to remedy, holding the possibility of providing a context-sensitive remedial path.

The drafting process of a binding legal framework on business and rights can pose an ample opportunity for further engagement between the fields. Such a framework could, in a more comprehensive way than the UNGPs, acknowledge and focus on the challenges associated with post-conflict scenarios. The drafting process could

also be informed by the alternative mechanisms and the lessons learnt from previous transitional justice processes, in order to comprehensively and coherently ensure access to remedy for corporate human rights abuses – be it in times of peace, conflict or transition.

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