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**INCORPORATING CORPORATE CRIMINAL LIABILITY IN
TRANSITIONAL JUSTICE PROCESSES: PAST AND PRESENT EXAMPLES**

Dissertation to obtain a Master's
degree in Litigation and Arbitration

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“The winding path to peace is always a worthy one, regardless of how many turns it takes.”

Times are changing.

Anti-plagiarism statement

I hereby declare that the work I present is my own work and that all my citations are correctly acknowledged. I am aware that the use of unacknowledged extraneous materials and sources constitutes a serious ethical and disciplinary offense.

Quoting

The citation style utilized throughout this written piece was Chicago 17th Edition (full note).

Acknowledgments

To every soul around the world whose lives have been put at risk and forever changed by war and economic conflicts beyond their control: while we can't go back in time to prevent this, let us work towards building a better future for them.

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List of Abbreviations

ATS – Alien Tort Statute

BHR – Business and Human Rights

CESCR – Committee on Economic, Social and Cultural Rights

CONADEP – National Commission on the Disappearance of Persons (Comissão Nacional sobre o Desaparecimento de Pessoas)

CSDDD - Corporate Sustainability Due Diligence Directive

CSR – Corporate Social Responsibility

DRC – Democratic Republic of Congo

ECCHR – European Center for Constitutional and Human Rights

ESCR – Economic, Social and Cultural Rights

EU – European Union

ICC – International Criminal Court

ICL – International Criminal Law

ILC – International Law Commission

ILO - International Labour Organization

MNE – Multinational Enterprises

NGO – Non-governmental Organization

OECD – The Organization for Economic Co-operation and Development

SRSG – Special Representative of the Secretary-General

TNC – Transnational Corporation

Incorporating corporate criminal liability in transitional justice processes: past and present examples

TRC – Truth and Reconciliation Commission

UN – United Nations

UNGPs – UN Guiding Principles on Business and Human Rights

General Notes

The body of the dissertation, including spaces and notes, occupies a total of 131 493 characters.

Abstract

Transitional justice faces significant challenges in holding corporations accountable for their involvement in international crimes, particularly when they are not the masterminds behind the atrocities but profit financially from the situation. This complex dilemma demonstrates how some corporations profit from conflict zones, human rights violations, and weak governance structures while not directly committing the crimes. In these volatile environments, corporations may be directly or indirectly complicit, negligent, or even promote human rights violations. This topic raises fundamental questions about transitional justice systems and international law's approach to corporate criminal liability. Rather than letting multinational corporations off the hook, understanding and addressing these dynamics is critical to achieving truth, justice and reconciliation. This dissertation examines previous efforts to hold corporations accountable in transitional justice contexts, highlighting both successes and areas for improvement. It emphasises the importance of strong legal frameworks, effective enforcement methods, and collaboration between states, civil society, and international organisations to ensure that corporations are held accountable for their conduct. To accomplish this, it looks not only at the current legal frameworks and practices, but also at two particular situations in which corporate criminal liability was (or was not) tackled: the Ford case in Argentina and the Lafarge case in France/Syria. Its ultimate goal is to contribute to building an increasingly fair, responsible and accountable society.

Keywords: Transitional Justice, Corporate Criminal Liability, International Law, Human Rights, Argentina, Lafarge.

Resumo

A justiça de transição enfrenta alguns desafios significativos na responsabilização das empresas pelo seu envolvimento em crimes internacionais, especialmente quando estas não são principais autores das violações, mas beneficiam da situação. Este complexo dilema evidencia como algumas empresas beneficiam por operarem em zonas de conflito, das violações dos direitos humanos e das frágeis estruturas de governo, mesmo sem cometerem diretamente os crimes em questão. Em ambientes tão vulneráveis e voláteis, as empresas podem ser direta ou indiretamente cúmplices, negligentes ou até impulsionadoras das violações de direitos humanos. Esta

questão fundamental levanta dúvidas sobre a eficácia dos sistemas de justiça de transição e a abordagem do direito internacional à responsabilidade criminal das empresas. Para abolir a regra que tem sido a impunidade no que toca à atuação das multinacionais, é essencial compreender e abordar estas dinâmicas para atingir a verdade, a justiça e a reconciliação. Esta dissertação pretende explorar os esforços realizados até ao momento para responsabilizar as empresas em contextos de justiça de transição, destacando tanto os casos de sucesso como as áreas que necessitam de ser melhoradas. Enfatiza a importância de sistemas legais robustos, métodos eficazes de aplicação da lei e a colaboração entre Estados, sociedade civil e organizações internacionais para garantir que, efetivamente, haja responsabilização das empresas pelas suas condutas. Para isso, será analisado não apenas os sistemas jurídicos e as práticas atuais, mas também duas situações concretas em que a responsabilidade penal das empresas foi (ou não) abordada: o caso Ford na Argentina e o caso Lafarge na França/Síria. O seu objetivo final é contribuir para a construção de uma sociedade cada vez mais justa, responsável e comprometida com a responsabilização.

Palavras-chave: Justiça de Transição, Responsabilidade Criminal das Empresas, Direito International, Direitos Humanos, Argentina, Lafarge.

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Introduction

States bear the primary obligation to respect, protect, fulfil, and promote human rights, safeguarding against abuses by third parties, including corporations.¹ This obligation is more comprehensible in peacetime contexts where democratic mechanisms, though potentially flawed, are operational. However, in regions experiencing conflict or post-conflict conditions, verifying these obligations becomes considerably more challenging. This difficulty is exacerbated by the unfortunate reality that states themselves, meant to serve as the foremost guarantors of human rights protection, often perpetrate violations.

Presently, existing mechanisms for Business and Human Rights (BHR) reveal a significant regulatory gap in addressing such circumstances. The legal framework predominantly consists of soft law instruments, with minimal or absent provisions pertaining to the protection and reparation of human rights within transitional justice contexts. In an increasingly globalized world, where corporations wield significant economic power and operate across diverse geographical and cultural landscapes, their actions exert a profound influence on the individuals and communities in which they operate. This influence extends beyond economic considerations to encompass social, environmental, and human rights dimensions. Consequently, corporations have the capacity to impact the lives of workers, local populations, and broader society, either by contributing to the promotion of human rights respect or by perpetrating violations thereof. Decisions concerning supply chain participation and endorsement of projects and policies can harbour significant and wide-ranging implications for human rights.²

Often, when discussing conflict situations, wars, and genocides, the focus tends to be on apparent state-versus-state confrontations or struggles between a state and resistance groups within its own territory. However, the underlying dynamics that drive these conflicts are far more complex and multifaceted, often eluding straightforward understanding. No conflict can persist without substantial financial backing, logistical support, and various other

¹ United Nations Human Rights Council, Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, March 21, 2011.

² Sabine Michalowski, "Introduction", in *Corporate Accountability in the Context of Transitional Justice*, ed. Sabine Michalowski (Routledge, 2013), 1-2.

forms of assistance. It is in this intricate web of support that the role of corporations, particularly multinational enterprises operating in conflict-affected regions, becomes critical. These companies can inadvertently or deliberately contribute to the perpetuation of conflicts through their involvement in providing the necessary resources and infrastructure.³

Both the Ford case in Argentina and the Lafarge case in France/Syria exemplify how corporations can be implicated in conflicts and human rights abuses. Understanding their influence is essential for comprehensively addressing and resolving the root causes of such conflicts. Corporations hold immense power and influence, capable of either making or breaking communities. When corporations prioritize profit above all else, they risk exacerbating inequalities, exploiting vulnerable populations, and degrading the environment. Conversely, when corporations embrace ethical business practices and prioritize social responsibility, they can become powerful agents of positive change, fostering sustainable development, promoting human rights, and uplifting marginalized communities.

In our modern era, we are fortunate to live without the constant worry of survival. Yet, this privilege can sometimes lead to complacency, blinding us to the harsh reality that millions around the globe face each day—a struggle for their very existence. In a world seemingly overrun by apathy and indifference, where profit often trumps compassion and empathy, this thesis aims to serve as a call to action, urging us to confront our interconnected world and to recognize the profound impact of corporate choices on the lives of others. It emphasizes the importance of holding corporations accountable for their actions, demanding transparency, integrity, and a commitment to human rights. By harnessing the potential of responsible corporate conduct, we can build a more compassionate and fairer world, where the pursuit of profit never comes at the expense of human dignity and well-being.

As recognized by the former UN Special Representative on Business and Human Rights in 2011, conflict situations are one of the most difficult circumstances for human rights and the most egregious business-related human rights abuses take place in conflict-affected areas and other situations of widespread violence.⁴

³ Laura García Martín, “Unfinished Business: Corporate accountability and ESCRs in transitional justice processes” (PhD diss., Universidad de Sevilla, 2018), 111.

⁴ United Nations Human Rights Council, Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises,

Thus, to understand the role corporations play in transitional justice processes, this research focuses on following research questions: *Have corporations been held accountable for the commission of international crimes and serious human rights violations? How can we ensure more accountability in the future? What mechanisms should be used? Are they enough?*

To achieve this, the thesis follows a desk-based research based on a literature review and legal analysis of key international instruments on International Human Rights Law, International Criminal Law, and Transitional Justice, as well as other relevant UN reports on this matter. In particular the thesis first analyses the existing legal framework addressing business and human rights second, it examines how international criminal law deals with corporate involvement in crimes and serious human rights abuses; and third, the research explores the pillars of transitional justice and how they can influence corporate conduct in addressing human rights violations in these contexts, with a particular focus on the role of Truth Commissions and their contribution to reparation programmes. Then, in the second part of the thesis, two cases that dealt with corporate involvement and criminal liability in human rights abuses through transitional justice processes are presented: the Ford case in Argentina, as an example of a past experience and the Lafarge case in France/Syria, a current case dealing with violations committed in an armed conflict scenario. Finally, the thesis ends with some concluding remarks and lessons learned about the potential criminal liability of corporations in these contexts.

This comprehensive approach aims to shed light on the critical role corporations play in transitional justice processes and propose effective strategies for enhancing corporate accountability in the future.

John Ruggie, *Business and Human Rights in Conflict-affected Regions: Challenges and Options Towards State Responses*, May 27, 2011, 3.

1. Corporate Accountability for Human Rights and IHL Violations

1.1 Main instruments to tackle Business and Human Rights – legal framework

This first chapter addresses the legal instruments that aim to tackle business and human rights abuses, such as the UN Guiding Principles on Business and Human Rights (UNGPs), the OCDE Guidelines for Multinational Enterprises, the ILO Conventions and the draft Binding Treaty on Business and Human Rights, as well as other regional and domestic legislation that establish mandatory Human Rights Due Diligence obligations.

These instruments provide fundamental guidelines for corporate responsibility and government regulation. Given the inevitability of corporate engagement in society, it becomes imperative to closely monitor their activities to ensure alignment with human rights principles. It is essential to scrutinize corporate practices to ascertain their positive contribution to societal well-being and sustainable development, as opposed to fostering exploitation, discrimination, or human rights violations, as they can be a double edged sword. A holistic approach involving all of them, both at international and national level, is required, especially considering that they are mainly soft law.

i. The UN Guiding Principles on Business and Human Rights (UNGPs)⁵

First of all, the most important authoritative standards when it comes to Business and Human Rights issues are the UN Guiding Principles on Business and Human Rights (UNGPs), adopted in 2011. Nevertheless, the attempt to regulate multinational enterprises is not a new agenda for the UN.

In the 1970s, the UN Economic and Social Council entrusted a group to advise in matters of transnational corporations (TNCs) and their impact on the international community. Later, established a Centre on TNCs, that took on the task of negotiating a “Code of Conduct” on Transnational Corporations that comprehended duties of respect

⁵ Available at https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

fundamental human rights and objectives of consumer and environmental protection. Although the discussion started back then and comes down to the present date, the Code was unsuccessful and never officially adopted.⁶

Later, there was a new attempt to regulate this field with a binding document, with the so called “The norms” (Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights). The UN sub-commission on the Promotion of Human Rights established a Working Group with the task of elaborating it, after carrying out a series of consultations of diverse representatives from enterprises, governments, organizations, and other interested parties. After presenting it in 2003, the Sub-Commission unanimously adopted the Norms, but a year later the UN Commission on Human Rights rejected them, as a lot of member states and businesses opposed to it - most of them on the basis of believing it displaced the responsibility from states to businesses and its standards vague and counterproductive.⁷ Although they were not adopted, this led to the appointment of a Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises (SRSG), that since then has been trying to approach the field and its actors differently and based on the lessons learned from this situation.⁸

In 2005, following this failed attempts of binding instruments, Professor John Ruggie was assigned as the Special Representative to the Secretary General on Business and Human Rights, with the role of outlining the landscape of corporations’ obligations under international human rights law. During his mandate, John Ruggie consulted extensively with business, governments and civil society, including through 14 multi-stakeholder consultations on five continents and two interim reports.⁹ His work led him to one conclusion – in his own words, “the urgent need for a common framework of understanding

⁶ Dorothée Baumann-Pauly and Justine Nolan, *Business and human rights: From Principles to Practice* (Routledge, 2016), 39.

⁷ *Ibid.*, 41-42.

⁸ *Ibid.*

⁹ E/CN.4/2006/97 to the Commission on Human Rights in 2006 and A/HRC/4/035 to the new Human Rights Council in 2007.

in the business and human rights real.”¹⁰ Based on this, he presented a *framework for BHR* to the UN that ultimately culminated in the creation of the UNGPs.¹¹

The UNGPs were unanimously endorsed by the UN Human Rights Council in 2011 and are based on three pillars: (i) the state duty to *protect* the citizens against HR abuses, including from third parties such as corporations; (ii) the corporate responsibility to *respect* human rights; and (iii) access to *remedy* for victims of violations as an obligation to provide more effective remedies. The UNGPs apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure and aim to be used as a dynamic system of preventive and remedial measures.¹²

Although these principles are non-binding and constitute a soft-law instrument, they have a significant and growing influence over the formation of regulation and case law worldwide. This effect originates from their position as the most respected global framework for responsible business practices and the redress for human rights violations. The fact that they were unanimously adopted is outstanding, since the former attempts to regulate this area were not very successful.

Within its second pillar, corporations need to perform due diligence processes meaning they need to “*identify, prevent, mitigate and account for how they address their impacts on human rights*”.¹³ Therefore, recognizing the companies’ independent duty to respect human rights, regardless of the States primary obligation to protect them.

They were also incorporated into other Guidelines regarding business conduct. For instance, the OECD Guidelines on Multinational Enterprises and the OECD Due Diligence Guidance for Responsible Business Conduct.

Moreover, states are encouraged to incorporate the standards established in the UNGPs at the domestic level through the adoption of National Action Plans (NAPs).

¹⁰ John Ruggie, “UN Guiding Principles”, Harvard University, <https://scholar.harvard.edu/john-ruggie/un-guiding-principles>.

¹¹ *Ibid.*

¹² General principles of the UNGPs.

¹³ Principle 15/b of the UNGPs.

A National Action Plan (NAP) on Business and Human Rights is a document developed by a state that identifies priorities and actions to be taken to support the implementation of obligations and commitments at the international, regional, and national levels - in this case, in the field of business and human rights.¹⁴ Therefore, is an “*evolving policy strategy developed by a State to protect against adverse human rights impacts by business enterprises in conformity with the UNGPs.*”¹⁵ A strong NAP is well-built on the principles outlined in the UNGPs, adjusted to the specific circumstances of the country in question, and marked by inclusivity and transparency throughout its formulation process. Moreover, to be effective, they must be revised and updated on a regular basis to accommodate the ever-changing settings of the social dynamics they apply to.¹⁶

NAPs provide an opportunity for governments to review their legal frameworks regarding business and human rights and identify gaps, as well as foster stakeholder contributions and a supportive and progressist environment in order to achieve a better legal framework and broader goals – identifying national policies that are a priority, more transparency, an on-going dialogue between stakeholders - enlisting both "sides" participation, with the ultimate goal of protecting human rights. As of the present date, a total of 26 countries have formulated a national action plan and another twenty-one countries are currently engaged in the process of developing their own plans.¹⁷

ii. OECD Guidelines for Multinational Enterprises¹⁸

The OECD Guidelines for Multinational Enterprises offer comprehensive recommendations from governments to multinational companies operating within or from member countries. These guidelines set standards for responsible business conduct across a

¹⁴ Claire Methven O'Brien, *Business and human rights - A handbook for legal practitioners* (Council of Europe, 2019), 60.

¹⁵ UN Working Group on Business and Human Rights, *Guidance on National Action Plans on Business and Human Rights* (2016), https://www.ohchr.org/sites/default/files/Documents/Issues/Business/UNWG_NAPGuidance.pdf.

¹⁶ *Ibid.*

¹⁷ OHCHR, “National action plans on business and human rights”, OHCHR, last accessed May 30, 2024, <https://www.ohchr.org/en/special-procedures/wg-business/national-action-plans-business-and-human-rights>.

¹⁸ Available at <https://www.oecd.org/daf/inv/mne/48004323.pdf>.

variety of domains, including human rights, environmental protection, and other critical areas. Additionally, they provide sector-specific guidance to address the unique challenges and responsibilities of different industries.¹⁹

The first time they were adopted, back in 1976, there was only a brief mention of human rights, but with the updated version of 2011, they included a chapter on human rights and the UNGPs standards and this led to the National Contact Point (NCP) set up by each state to promote their application.²⁰ NCPs offices can act as an instrument of accountability as they provide a grievance mechanism to deal with cases related to the non-compliance of the Guidelines. In their latest update, from 2023, the process of human rights due diligence is even more detailed and enlightens the importance situations of armed conflict play as increased risk of gross human rights violations.²¹

Aligned with the UN Guiding Principles on Business and Human Rights (UNGPs), the OECD Guidelines reinforce and expand upon the principles of good practice, due diligence, and human rights protection. This alignment is particularly crucial for multinational enterprises (MNEs) due to their extensive operations across multiple countries and complex supply chains.²²

They overall provide a comprehensive framework for responsible business conduct, reinforcing the principles of the UNGPs and guiding MNEs to operate ethically and sustainably on a global scale.

¹⁹ELSA Portugal Legal Research Group on Business and Human Rights, Recommendations for the Upcoming Portuguese National Action Plan on Business and Human Rights, 9, <https://novabhre.novalaw.unl.pt/wp-content/uploads/2023/03/Recommendations-for-the-Upcoming-Portuguese-NAP-on-Business-and-Human-Rights.pdf>.

²⁰Baumann-Pauly and Nolan, *Business and human rights: From Principles to Practice*, 39.

²¹Leonard Feld, “A (Slight) Raise of the Bar: Due Diligence in the 2023 Update of the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct”, *Nova Centre on Business, Human Rights and the Environment Blog*, November 2023, <https://novabhre.novalaw.unl.pt/a-slight-raise-of-the-bar-due-diligence-in-the-2023-update-of-the-oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct/>.

²²“Responsible Business Conduct, the new normal for a sustainable future”, OECD Guideline for Multinational Enterprises, last accessed May 28 2024, <https://mneguidelines.oecd.org/>.

iii. International Labour Organization (ILO) Conventions – the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration)²³

The guidelines provided by the ILO MNE Declaration offer comprehensive recommendations to multinational enterprises, governments, and workers' organizations in areas such as employment, training, working conditions, and industrial relations. In addition, they present tools to facilitate and assist in the implementation of the principles²⁴. These guidelines are based on principles from International Labour Conventions and Recommendations, particularly the ILO Declaration on Fundamental Principles and Rights at Work.²⁵

With multinational enterprises playing a substantial role in globalisation, applying these concepts is critical for managing foreign direct investment, commerce, and global supply chains. The guidelines intend to improve the positive social and labour benefits of MNE activities, so contributing to the goal of decent employment for all, as outlined in the 2030 Agenda for Sustainable Development. The principles should be implemented to establish partnerships to address obstacles that governments and businesses cannot manage alone, hence encouraging international cooperation. Adherence to the MNE Declaration helps to create an environment that promotes decent jobs, inclusive economic growth, and sustainable development.²⁶

iv. The Draft Binding Treaty on Business and Human Rights

Although the UNGPs have become the primary normative framework on business and human rights and the application of NAPs has been increasing, access to remedy, specially at the international level continues to be insufficient, alongside with other governance gaps, since the UN Guiding Principles have not been providing the desired

²³Available at

https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@ed_emp/@emp_ent/@multi/documents/publication/wcms_094386.pdf.

²⁴ Annex II of the MNE Declaration.

²⁵ Introduction of the MNE Declarations.

²⁶ *Ibid.*

results and there is an apparent apathy of some governments towards the topic. Some companies continue operating with impunity and their victims are lacking access to an effective remedy.

This situation led the UN Human Rights Council to establish an intergovernmental working group with the task of elaborating an international legally binding instrument to regulate the activities of transnational corporations and other business enterprises, as well as states responsibility in it.²⁷ Nonetheless, the treaty and the already-existing *tools* should be used together and complement each other.

The treaty is still currently being drafted and its most recent draft dates from July 2023.²⁸ It focuses on the rights of victims to access remedy and the obligation of the states to ensure that companies respect human rights and regularly carry out human rights impact assessments.

The first version of the draft treaty (Zero Draft) was presented in 2018, new updated versions were then published, namely from 2019, 2020 and 2021. The most recent draft dates from July 2023 and it focuses on victims' rights to obtain remedies and requires governments to guarantee that corporations respect human rights, as well as conduct regular assessments on it. Although China and Russia have been supporting this process, the European Union and the United States only start being involved in it more recently.²⁹

The effectiveness or otherwise of the threat will be determined by how states and businesses implement its provisions into their national laws.³⁰

²⁷ United Nations Human Rights Council, Resolution, *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, July 14, 2014.

²⁸ Available at <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg-transcorp/session9/igwg-9th-updated-draft-lbi-clean.pdf>.

²⁹ Paloma Muñoz Quick, “Levelling the Global Playing Field: A Binding Treaty on Business and Human Rights”, *BSR*, January 2024, <https://www.bsr.org/en/blog/leveling-the-global-playing-field-a-binding-treaty-on-business-and-human-rights>.

³⁰ *Ibid.*

v. Other instruments

There are other important instruments on Business and Human Rights at the regional level, namely the recently approved Corporate Sustainability Due Diligence Directive CSDDD, that intends to put into practice corporations' commitment to respect human rights, as outlined in the UNGPs through establishing an obligation for them to do risk-based human rights and environmental due diligence.³¹

Human Rights Due Diligence policies are a vital factor in preventing human rights violations from even occurring. Thus, national legislations also play a big role in this field. France has been committed to foster responsible business practices and implementing human rights due diligence throughout its various sectors, namely its National Action Plan, International and European frameworks. Inspired by its developments, Germany also kickstarted the implementation of such rules in its legal framework, ensuring that companies that operate within the country respect and protect such rights in their activity. Similar to these two countries, the Netherlands also has been a pioneer when it comes to human rights due diligence processes.³²

1.2 Criminal Liability and Corporations

The concept of corporate accountability should be interpreted as including all economic actors' accountability, public or private, regardless of their size, if they operate national or transnationally, even if some of the challenges demonstrated do not appear to be significant in the smallest enterprises, but, for conceptual purposes, the role of all of them should be considered and addressed.

After having briefly analysed the relevant legal and normative instruments on business and human rights this section now dives into the different legal mechanisms that can be used to prosecute corporations at the criminal level for the commission of serious abuses.

³¹ Article 4 of CSDDD.

³² See Juliana Dias Apolinário, “National Action Plans as Policy Instruments for promoting Human Rights Due Diligence: a comparative analysis of France, Germany, and The Netherlands”, (LLM diss., Universidade Nova de Lisboa, 2023).

It is important to emphasise that while states hold the primary responsibility for ensuring the protection of human rights, there is an increasing recognition of the responsibility that companies also bear in this regard. The Preamble of the Universal Declaration of Human Rights refers to "every individual and every organ of society," which includes corporations. UN human rights bodies such as the Committee on Economic, Social and Cultural Rights (CESCR) and the Special Rapporteur on truth, justice and reparation guarantees of non-recurrence have also consistently emphasized corporate responsibilities in their general comments and reports, respectively.

In General Comment No. 24 (2017),³³ the CESCR outlines state obligations concerning business activities, underscoring the significant role businesses play in realizing economic, social, and cultural rights (ESCRs) through employment, development, and investment. States are obligated to ensure that businesses comply with and respect international human rights standards, such as the UNGPs. The General Comment also emphasizes states' extraterritorial obligations, acknowledging the increasing prevalence of transnational corporate activities. State obligations extend beyond their borders, requiring them to take necessary steps to prevent human rights violations internationally, while respecting the sovereignty of other states.³⁴

Moreover, the Special Rapporteur on Truth, Justice and Reparation and Guarantees of non-recurrence, Fabián Salvioli, also presented a comprehensive report on the role and responsibilities of non-state actors in transitional justice processes, with a particular focus on corporations and the private sector.³⁵ In addition, during his mandate he also produced several reports examining the pillars of transitional justice and their implementation, providing guidelines for improved application and a more robust framework for justice in relation to business involvement in human rights abuses, that will be explored along this research.

³³Available at

<https://documents.un.org/doc/undoc/gen/g17/237/17/pdf/g1723717.pdf?token=LCeiVDANNUUagX2qdN&fe=true>.

³⁴ Comment no 24 (2017), para 25 – 26.

³⁵ United Nations Human Rights Council, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Fabián Salvioli, *Role and responsibilities of non-State actors in transitional justice processes*, July 12, 2022.

i. How does International Criminal Law tackle corporate accountability?

International Criminal Law (ICL) is designed to proscribe international crimes and mandate that States prosecute and punish those who commit them.³⁶ As the main permanent international criminal court, the International Criminal Court (ICC) has jurisdiction over *individuals* who commit genocide, crimes against humanity, war crimes, and aggression - the most serious crimes of concern to the international community³⁷. However, according to Article 25 of the Rome Statute, the ICC's jurisdiction is limited to "natural persons," thus excluding corporations.

It is important to note that during the Rome Statute's negotiations, the French delegation proposed expanding the ICC's jurisdiction to include legal entities, specifically private corporations, to enable victims to seek compensation more efficiently. However, this proposal was rejected due to concerns about the difficulty of gathering evidence against corporations and the lack of a standardized framework for corporate criminal liability. In addition, some national legal systems also do not recognize corporate criminal liability, further complicating the issue.³⁸

ICL covers several forms of criminal liability, such as individual responsibility, command responsibility, instigating, ordering, planning, conspiring to commit a crime, and most importantly for the corporate context, "aiding and abetting." This form of complicity was included in the ICL vocabulary after the Nuremberg trials. "Aiding" refers to providing assistance to commit a crime, while "abetting" involves facilitating the commission of an act by being sympathetic to it.³⁹ It is particularly relevant for corporations, which can be complicit in human rights violations by providing logistical support, benefiting from abuses, or maintaining business relations with regimes implicated in atrocities.

In fact, the International Law Commission (ILC) states that these forms of participation can constitute corporate complicity in human rights violations.⁴⁰ However, the

³⁶ Antonio Cassese, *International Criminal Law* (Oxford University Press, 2003), 15.

³⁷ Rome Statute of the International Criminal Court, article 5 – 8.

³⁸ Irene Pietropaoli, *Business and human rights and transitional justice*, (Routledge, 2020), 32.

³⁹ ICTR, Prosecutor v Akayesu (Case No. ICTR-96-4-T) Judgment, September 2, 1998, para.423; William Schabas, *War Crimes and Human Rights: Essays on the Death Penalty, Justice and Accountability*, (Cameron May, 2008) 498-500.

⁴⁰ United Nations, International Law Commission, *Yearbook of the International Law Commission* II, part two, (1996): 18-20.

ICC's jurisdictional limit to natural persons prevents claims involving corporations from being brought before the court, only their directors as individuals could potentially be prosecuted for their involvement in international crimes.

At the domestic level, states only have authority over their jurisdiction, as well as the right to regulate and prosecute the people who act within their territory and jurisdiction. Thus, one country cannot exercise its jurisdiction on the territory of another without its consent. However, there is a distinctive measure states may turn to – the universal jurisdiction for serious crimes against international law, on the basis of these being so detrimental to the global community as a whole that they allow them the ability to file legal action against the perpetrator or victim, regardless of their location or nationality, in order to fight against impunity.⁴¹ If these crimes know no borders, the fight for their prosecution shouldn't either. This principle of extraterritoriality is recognized in the Geneva Conventions and other international instruments, such as Convention against Torture, and in a growing number of domestic legislations. The efficient use of this tool requires States not only have the legal framework but also the resources to do so, and many of them don't have them.

As mentioned above, given the fact that corporations are not primary subjects of international law or international criminal law, their involvement in violations is often categorized as complicity.⁴² The ICC can only adjudicate corporate involvement in international crimes when the focus is on the individual who acted on behalf of a corporation while assessing their responsibility. Meaning, the role that corporations play in abuses is frequently recognised, mostly on TRCs' reports, as will be discussed more thoroughly later, but there is no way (yet) for the ICC to hold them accountable, due to their lack of jurisdiction, letting these task to each state's national jurisdiction under their domestic system.

Thus, the notion of complicity is central to discussions of corporate legal accountability in international law, focusing on when companies can be held accountable for contributing to human rights violations, particularly when they are not the primary perpetrators, as initially anticipated by international law, which either failed to recognize their

⁴¹Martín, "Unfinished Business: Corporate accountability and ESCRs in transitional justice processes", 129 – 130.

⁴² Martín, "Unfinished Business: Corporate accountability and ESCRs in transitional justice processes", 114.

involvement or overlooked the broader context. Accusations of complicity typically arise when companies aid or abet the abuses committed by governments, rebel forces or others that detain the control of a given region. Complicity can manifest in various forms, including providing logistical support, benefiting from violations without direct involvement in their execution, financing repression, maintaining business relations with regimes implicated in atrocities or even direct complicity (forced labour for example), thus implicitly endorsing, and enabling their actions.⁴³

Although the notion of complicity is not yet legally defined at international level or even uniformised within the national legal orders, some scholars, as for example Clapham and Jerbi, divide corporate complicity into three categories: direct, indirect and silent complicity even though most of the literature trying to dodge defining it.⁴⁴

According to them, direct corporate complicity requires corporation's direct and casual contribution to the specific abuse. It is not required that they have the desire to share the result, but only that they know the probability of their assistance leading to that specific result. An example of this is when companies allow their facilities to be used as places of interrogation and torture by the governmental agents or members of armed as well as subjecting their workers to forced labour.

They label indirect complicity (or "beneficial" complicity as sometimes it is referred to as) a situation when companies knowingly benefit from the human rights abuses. They do not necessarily cause the hurtful behaviours but consequentially take advantages of the benefits of operating in an area of conflict. An illustration of this is when a company maintains relationships with a government that is being repressive, ending up financing its repressive activities for example.

Lastly, silent complicity refers to the mere presence or participation in the economic activity of a conflict-affected country. It is based on the idea that doing nothing is not an option and staying silent is not neutral. Operating and not taking action against the violations can be a tacit approval for the actions the authoritarian governments or armed groups in the region perpetuate.

⁴³ Pietropaoli, *Business and human rights and transitional justice*, 11-13.

⁴⁴ Andrew Clapham and Scott Jerbi, "Categories of corporate complicity in human rights abuses", *Hastings International & Comparative Law Review* 24, no. 3, 2001.

Corporations are unable to act on their own and must be embodied by humans. This is not to say that the "corporate culture" that underpins those actions should not be scrutinised - whether to explain the actions and their alignment with it or to exonerate the corporation from the conduct of individuals who act on its behalf. Zerk presents two approaches to this issue: identification method and organisational approaches. The first one takes into account the acts and intentions of the officers and managers of a given corporation with the company itself, and the second one has to do with the mentioned-above "corporate culture". Consequently, if criminal liability is to be linked to the corporation, there needs to be a culture behind it that encouraged or led-to that wrongful behaviour, in opposition with a culture that nourished compliance with the legal framework and adequate conduct.⁴⁵

The problem with only prosecuting individuals and not the corporations they worked *for*, is that although the individuals are probably removed from their positions, corporations keep existing and their behaviour, as a corporation and their "corporate culture" goes unpunished.⁴⁶ One should not answer for the actions of the other, and both should be addressed, with the ultimate purpose of appropriately addressing the infractions and providing greater compensation to victims. The kind of restitution and acknowledgement that a business can provide is completely different from that offered by an individual, regardless of their social or economic status.

Although there are differences in the national legal frameworks, the need for casualty (a causal linkage between the action and the crime itself) is transversal – even though their standards may vary. The two main components needed are the *actus reus* – the conduct itself and the given participation in it- and the *mens rea* (the state of mind and positive intention to commit or participate in it).

Once again, the amount to which these elements are satisfied varies depending on the applicable legislation; some are stronger, requiring that individuals who participate not only act intentionally, but also *intend* to commit the crime. Other jurisdictions have broader qualifications since they do not require the same purpose as the primary wrongdoer, but it is

⁴⁵ Jennifer Zerk, report prepared for the Office of the UN High Commissioner for Human Rights, *Corporate liability for gross human rights abuses. Towards a fairer and more effective system of domestic law remedies*, 2013, 33.

⁴⁶ Anita Ramasastry, "Corporate Complicity: From Nuremberg to Rangoon - An examination of forced labor cases and their impact on the liability of Multinational Corporations", *Berkeley Journal of International Law* 20, no 1(2004): 98-99.

sufficient to know that the conclusion would *most likely* result in the realisation of the fact, or to some even just simply being able to conceive that it *probably* would.⁴⁷ For example, in Argentina it is required to have a shared intent, but in the Netherlands it is enough to have knowledge or foreseeability of harm to establish liability.⁴⁸

With this in mind, it is now very easy to comprehend why it is so difficult to prove corporate involvement in crimes. The number of criteria that links to a subjective approach is not very likely to facilitate its translation to corporate behaviour, even with the “corporate culture” concept in hand. The existing legal framework urge for new solid criteria that is easily applicable to corporate situations and that extends some kind of bridge between what is expected from a natural person and what is expected from the “collective mind” of a company, that translates into their “corporate identity” far beyond what they present themselves, but what characterizes their conduct and values, their way of interacting with the complex social issues and supply chains.

There are some examples of individual businesspeople have been prosecuted over allegations for complicit in crimes under international criminal law related to their companies.⁴⁹ One of them is the case of Frans van Anraat, a Dutch businessman accused of complicity in war crimes and genocide for selling chemicals used in the fabrication of the mustard gas used by the Iraqi government under Saddam Hussein’s rule, knowing what it would be used for – the massacres of the Kurdish minorities.⁵⁰ The District Court of The Hague found him guilty in 2005 of aiding and abetting war crimes, as they considered he “consciously and solely acting in pursuit of gain, has made an essential contribution to the chemical warfare program of Iraq (...) which enabled, or at least facilitated, a great number of attacks with mustard gas on defenceless civilians”.⁵¹

However, individual liability does not preclude corporate criminal liability, even when it is connected with the role they have inside a company.⁵² Given the limitations of

⁴⁷ Zerk, *Corporate liability for gross human rights abuses. Towards a fairer and more effective system of domestic law remedies*, 38.

⁴⁸ Martín, “Unfinished Business: Corporate accountability and ESCRs in transitional justice processes”, 128.

⁴⁹ Pietropaoli, *Business and human rights and transitional justice*, 80.

⁵⁰ District Court of The Hague, December 23, 2005, Case no. AX6406 (*Van Anraat case*).

⁵¹ *Ibid*, para 17.

⁵² Jonathan Clough and Carmel Mulhern, *The prosecution of corporations* (Oxford University Press, 2002), 8.

international mechanisms regarding corporate accountability, national courts can be a solution for prosecuting corporations for human rights violations, as they can include legal persons as prosecutable subjects, not only the national regulations but also the international ones that are incorporated into domestic law.⁵³ While domestic jurisdictions vary in their recognition and standards for corporate criminal liability,⁵⁴ they currently offer the most feasible option for direct prosecution and providing reparations to victims,⁵⁵ even though no case against a *corporation* for human rights violations has yet been determined on the merits.⁵⁶

The idea of creating a special tribunal for international corporate liability has been suggested and supported from scholar and civil society, but it is more likely that the Rome Statute will be amended to include them in its jurisdiction, as it is already well-established and provides geographical and financial coverage for a more satisfactory outcome of the processes to be reached.⁵⁷

ii. A brief comparison with civil liability

When it comes to civil claims, their main purpose is to provide remedy for those who have suffered damages on an interested protected by law. In this topic, most of the interest at stake are linked to life, liberty, dignity, physical and mental integrity as well as property and are recognized in all jurisdictions.⁵⁸

As expected, there are different terminologies among the different countries but the main are the same: one actor can be civil liable for their *intentional conduct* or *negligence*, as long as it causes harm to someone else's protected interests.⁵⁹ This means to voluntarily undertook a course of conduct known to most likely lead to a harmful behaviour. The legal jurisdictions

⁵³ Martín, "Unfinished Business: Corporate accountability and ESCRs in transitional justice processes", 125.

⁵⁴ Zerk, *Corporate liability for gross human rights abuses. Towards a fairer and more effective system of domestic law remedies*, 32.

⁵⁵ Pietropaoli, *Business and human rights and transitional justice*, 66.

⁵⁶ *Ibid*, 142.

⁵⁷ Pietropaoli, *Business and human rights and transitional justice*, 32-33.

⁵⁸ International Commission of Jurists, *Report of the ICJ Expert Panel on Corporate Complicity in International Crimes, Corporate Complicity & Legal Accountability* 3, 2008, 11.

⁵⁹ Martín, "Unfinished Business: Corporate accountability and ESCRs in transitional justice processes", 131.

that additionally require malicious intention to do harm are rare.⁶⁰ However, as in criminal law, there must be a causal link between the conduct and the harm caused. This implies that the harm would not have occurred without the conduct.⁶¹ This is where the different legislations start to separate from each other, the “reasonable foreseeability” criteria vary when determining how a prudent person would have acted in the same circumstances, to enable the determination of the standard for both negligence and causation.⁶²

Since the standards of proof are different in civil law from the ones observed in criminal law, some claims succeed in civil litigation even when they do not in criminal proceedings.

Adding to this, since both human rights violations and business structures are complex, we are led to several problems regarding the attribution of responsibility, the causality of damages and the subjective standard of intent or negligence. Meaning, the newly obstacle to corporate accountability, after all of these, is the act of “piercing the corporate veil”. The corporate veil is a conceptual figure that separates the actions of the corporation from the actions of its stakeholders and, therefore, the act of piercing/lifting it, means to lose the veil and hold the officers accountable for the actions of the corporation. This is an important matter because corporations are distinguished by their impenetrable structures, in addition to the fact that their arrangements are often confidential and it’s extremely difficult to establish connections.⁶³

In a post-conflict context, during a period of transition, civil liability has proven to be a crucial mechanism for victims to access justice. Civil liability actions against companies can be brought in the civil courts of the states of origin without facing the challenges typically encountered in criminal law.⁶⁴

⁶⁰ International Commission of Jurists, *Report of the ICJ Expert Panel on Corporate Complicity in International Crimes, Corporate Complicity & Legal Accountability*, p.13.

⁶¹ Leonard Hoffman, “Causation”, *Law Quarterly Review* 121 (2005): 592.

⁶² International Commission of Jurists, *Report of the ICJ Expert Panel on Corporate Complicity in International Crimes, Corporate Complicity & Legal Accountability*, 24-25.

⁶³ Martín, “Unfinished Business: Corporate accountability and ESCRs in transitional justice processes”, 137.

⁶⁴ Joanna Kyriakakis, “Corporations before International Criminal Courts: Implications for the International Criminal Justice Project”, *Leiden Journal of International Law* 30, no. 1, (December 2016): 233.

2. Transnational Justice and Corporations

2.1 The importance of corporate conduct and the insufficient legal framework

First of all, it is important to address the role that corporations play in conflict-affected areas and in authoritative or repressive regimes. Corporations often keep developing their activities areas affected by conflicts, driven by incentives such as weak regulation and low-cost labour. These conditions enable corporations to maximize profits but often lead to human rights violations, fuelling the existing disputes and as already mentioned, the most outrageous human rights violations associated with business occur in these areas of widespread violence. As former UN Secretary-General Kofi Annan noted, the economic dimension of armed conflict should never be underestimated.⁶⁵ Corporate activities in such regions can exacerbate disputes, leading to severe human rights abuses,⁶⁶ as the evidence brought to the surface by the work of TRCs indicating their involvement and emphasising the need for broader accountability systems.⁶⁷

The lack of effective enforcement mechanisms for corporate accountability, due to either their absence or significant loopholes, is further complicated by varying jurisdictions and criteria. This challenge is particularly acute for multinational enterprises operating across multiple regions, raising questions about which legal framework applies and to whom.

This situation becomes even more fragile, when the already complex corporate criminal liability overlaps with transitional justice processes.

As mentioned, International (Human Rights) Law focuses mostly on States as primary subjects, as does transitional justice programmes, leaving corporations out, although they are frequently involved in the abuses. At the same time, as the distinction

⁶⁵ UN Security Council Press Release, *Security Council Discusses the Role of Business in Conflict Prevention, Peacekeeping, Post-Conflict Peacebuilding*, 2004, <https://press.un.org/en/2004/sc8058.doc.htm>.

⁶⁶ Benedita Sequeira, “The Lafarge case: tackling corporate impunity in the battlefield”, *Revista Eletrónica de Direito* 26, no. 3, (October, 2021), https://cij.up.pt/client/files/0000000001/6-benedita-sequeira_1794.pdf.

⁶⁷ Clara Sandoval, Leonardo Filippini and Roberto Vidal, “Linking Transitional Justice and Corporate Accountability”, in *Corporate Accountability in the Context of Transitional Justice*, ed. Sabine Michalowski (Routledge, 2013), 25.

between state and non-state actors gets diluted in international law discussions, transitional justice is being pushed to accommodate and face those challenges too.⁶⁸

While the UNGPs provide a framework for corporate responsibility, they have been criticized for their lack of ambition in addressing broader issues. The UNGPs do not explicitly incorporate transitional justice principles. Principle 7⁶⁹ briefly references businesses operating in conflict-affected areas and the document lacks specific guidance on how corporations should navigate the complex legal, political, and social dynamics inherent in Transitional Justice processes. Their general and superficial approach can lead to misinterpretations of essential international law principles that are key for transitional justice. For example, the absence of explicit language on "violations of human rights" and instead referring to "human rights abuses" can obscure the accountability of both states and corporations as perpetrators of the crimes.⁷⁰

Additionally, the suggestion that states are neither obliged to regulate nor prohibited from regulating extraterritorial corporate activities contradicts established legal obligations, particularly in this context where the rule of law is precarious.

The proposed legally binding treaty on business and human rights represents a significant step forward. However, similar to the UNGPs, it lacks specific references to transitional justice contexts. The draft treaty's Article 16.3⁷¹ focuses on business activities in conflict-affected areas, emphasizing the need to identify, prevent, and mitigate human rights risks, with special attention to gender-based and sexual violence, child soldiers, and hazardous child labour. This specificity is crucial, but the broader framework still falls short of addressing the complexities of transitional justice, as well as is not been giving enough attention to the relevant implication of corporate involvement during this times of conflict

⁶⁸ Michalowski, *Corporate Accountability in the Context of Transitional Justice*, 1.

⁶⁹ Which reads "Because the risk of gross human rights abuses is heightened in conflict-affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses."

⁷⁰ Pietropaoli, *Business and human rights and transitional justice*, 6-9.

⁷¹ Which reads "Special attention shall be undertaken in the cases of business activities in conflict affected areas including taking action to identify, prevent and mitigate the human rights related risks of these activities and business relationships and to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence, the use of child soldiers and the worst forms of child labour, including forced and hazardous child labour."

and weakened rule of law. Some countries still present themselves reluctant when it comes to adopting hard law mechanisms.

To address these shortcomings, a more precise delineation of states' legal obligations concerning corporate governance is necessary within the framework of the UNGPs. This requires careful consideration of the intricate dynamics of Transitional Justice processes, BHR standards and the unique challenges they present in holding corporations accountable for their actions. A holistic approach that integrates international and national mechanisms, clearer legal obligations, and robust enforcement strategies is crucial.

2.2 What is Transnational Justice and its main mechanisms?

As stated by Ruti Teitel, transnational justice refers to the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.⁷²

Originally, the concept of Transitional Justice (TJ) originally developed in 1995⁷³, addressing initiatives regarding human rights violations by repressive regimes, primarily at the national level, despite the United Nations participating in some of them. Then, it evolved to being used for dealing with war crimes and gross human rights violations perpetrated during armed conflicts.⁷⁴ Its origins goes back to the trials for crimes against humanity after the holocaust but as time passes, it takes on a broader meaning as it expands its importance too, alongside the creation of new institutions at an international level, as well as ad hoc tribunals⁷⁵, and the development of new policies.

At this date, Transitional Justice covers the processes and mechanisms aimed towards bringing about political and social changes that will allow the rule of law, respect for human rights, and democracy to prosper in a society's attempt to confront a legacy of

⁷² Ruti G. Teitel, "Transitional justice genealogy", *Harvard human rights journal*, vol 16 (2003): 69

⁷³ With the pioneering publication of the study edited by Neil Kritz in 1995, "Transitional Justice: How emerging Democracies Reckon with Former Regimes".

⁷⁴ For instance, Martha Minow, *Between Vengeance and Forgiveness. Facing History after Genocide and Mass Violence* (Beacon Press, 1998).

⁷⁵ Such as International Criminal Tribunal for the former Yugoslavia, Special Court for Sierra Leone and International Criminal Tribunal for the former Yugoslavia.

large-scale past human rights and humanitarian law violations, in order to ensure accountability and achieve reconciliation⁷⁶. It encompasses a range of processes, including judicial and non-judicial mechanisms like prosecutions, truth-seeking, reparations programs, and institutional reforms, all aligned with international legal standards⁷⁷.

A key aspect of transitional justice is that it requires a holistic approach to succeed, as it needs to be adapted to the society that is in the process of transformation after the gross violations and abuses, with an (ideally) symbiotic relationship between international and local jurisdictions.

For this to happen and to prevent impunity to take place, the roles that each actor played in the situation must be considered - not only the ones that caused it, but also those that facilitated the gross violations by oppressive regimes – this includes a variety of individuals, namely groups, states and corporations. If the core causes of the problem are not addressed properly and the new-born legal institutions are not solid, the outbreak of another conflict situation could be just around the corner.⁷⁸

Four fundamental pillars underpin Transitional Justice: truth, justice, reparation, and guarantees of non-recurrence. Each one of them constitutes a distinct process, that will be analysed further in-depth. However, they all stem from the foundational belief that perpetrators of crimes must be held accountable for their actions and the obligations States have to respect and guarantee human rights. In turn, this is supported by three key aspects: the international law obligation imposed on states to investigate, prosecute, and punish such crimes; adequate reparations include holding perpetrators accountable; and accountability for past crimes is crucial to prevent them from happening again in the future.⁷⁹

⁷⁶ In a broader interpretation, it can also be applied to situations where a conflict is still on-going or in emergencies.

⁷⁷ United Nations, *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice* (2010), https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/TJ_Guidance_Note_March_2010FINAL.pdf; Naomi Roht-Arriaza and Javier Mariezcurrena (ed.), *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (Cambridge University Press, 2006), 2.

⁷⁸ Sadoval, Filippini and Vidal (ed.), *Corporate Accountability in the Context of Transitional Justice*, 9.

⁷⁹ *Ibid*, 13.

i. Truth

Firstly, when a country or region finds itself in the aftermath of gross human rights violations and other crimes, it is left with doubts about what happened. There is an urgent need to answer questions about who committed the crimes, how they were committed, why they were committed, who assisted them, for what purpose, what facilitated their perpetration and other relevant questions that clarify the situation and bring the truth to light, ensuring that atrocities do not occur again or, at the very least, insight about what led to them and closure and public acknowledgment to the victims and their families for the suffering caused. Moreover, answering these questions presents itself as an opportunity to facilitate the making of the transition from a period of violence to one of peace and to create new institutions and policies with loopholes already proven to fail. For this purpose, the first pillar of transitional justice emerges – Truth-seeking.

States have an obligation to investigate gross human rights violations and serious violations of international humanitarian law, leading to the victims and their families' rights to the truth and effective remedy for those violations. There are several international⁸⁰ and regional⁸¹ instruments that ensure these obligations.

These processes involve mechanisms such as truth commissions and investigative panels, which aim to uncover and document the facts and causes of past atrocities. These efforts serve to raise public awareness, provide historical context, and acknowledge the suffering of victims. Truth-commissions do not have a single definition as they vary accordingly to the circumstances - some are state-sponsored, others are organized by civil society; some investigate recent crimes, some investigate crimes that happened more than a century ago.⁸²

⁸⁰ For example, article 8 of Universal Declaration of Human Rights and e Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

⁸¹ See article 1,8 and 25 of the American Convention on Human Rights; article 3 and 13 of the African Charter on Human and People's Rights; article 3, 13 and 23 of the Arab Charter on Human Rights.

⁸² Elazar Barkan, "Introduction: Historians and Historical Reconciliation" *The American Historical Review* 114, no. 4 (October 2009): 899.

ii. Justice

Then there's justice, which is the pursuit of holding perpetrators accountable through legal processes, as well as civil litigation. Justice may be pursued through sentencing in national or international courts, or through a combination of both. In addition, administrative actions aimed at prohibiting perpetrators from public positions, alongside social exposure and shaming, serve as non-judicial mechanisms for achieving justice for the victims and the society itself.⁸³ It comes from the idea that the reconciliation and sustainable peace only is reached if the perpetrators are held accountable and punished.

If States fail at bringing justice to the table, the international community will take action as it has in the past – for example, UN security council created ad hoc tribunals in Rwanda and Yugoslavia to deal with the crimes committed.

Once again, victims have the right to expect states to conduct thorough investigations and, if necessary, pursue and punish criminals. Prosecutions can also serve as guarantees of non-recurrence, producing a record of wrongdoings and establishing social standards for acceptable behaviour.⁸⁴

iii. Reparations

Severe harm should have adequate redress, according to a core principle of transitional justice. Indeed, this is connected to the state's duty to provide reparations, which is not complete until the unlawful conduct is penalised. If the States do not provide the victims with compensation, this is an omission and, therefore, a violation of international law, as it would be by action.⁸⁵ In this sense, the reparations pillar arises.

Reparations should be adequate, effective and prompt. They do not necessarily mean financial compensation, even though it being the most common restitution that results from

⁸³ Martín, “Unfinished Business: Corporate accountability and ESCRs in transitional justice processes”, 53.

⁸⁴ United Nations Human Rights Council, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, *Implementing the third pillar: lessons from transitional justice guidance by the Working Group*, para 18.

⁸⁵ Martín, “Unfinished Business: Corporate accountability and ESCRs in transitional justice processes”, 57.

the civil actions. They can also come in the form of restitution, rehabilitation, satisfaction and guarantees of non-repetition.⁸⁶

Restitution means to restore the original situation of the victim before the violations were committed. Compensation requires an economic assessment of (all the types of) the damaged caused to determine an adequate value. Rehabilitation takes into consideration the trauma caused by experiencing a certain traumatic situation, providing services and measures to rehabilitate the victims psychologically and socially. Satisfaction includes symbolic actions such as truth-seeking, public apologies, commemorations and other activities aimed at helping the victims and society to process the events experienced. Domestic reparation programmes at a national level are fundamental because they include the various forms of reparation and should focus on specific measures to help the unique needs of the victims when needed and other factors such as be gender sensitive and consider minorities, since these and woman are often discriminated. Moreover, it is crucial to recognize and involve all victims in the reparations process to ensure it reaches the widest audience possible.⁸⁷

States frequently take part in restitution processes even when there is no accountability for the human rights breaches committed. Nevertheless, they want to recover and foster progress in their society. Likewise, other nations often contribute to it voluntarily.⁸⁸

iv. Guarantees of non-recurrence

In order to prevent the violations from reoccurring, it is important to have solid structures that act as guarantees of non-recurrence, this comes in the form of an institutional reform process to break the structural systemic problems that allow violations to happen. As it happens with the reparations, this should happen with adequate representation of woman and minorities to ensure effectiveness and in harmony with the international law.⁸⁹ It includes

⁸⁶ United Nations General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Resolution 60/147, December 15, 2005.

⁸⁷ United Nations Human Rights Council, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Fabián Salvioli, *International legal standards underpinning the pillars of transitional justice*, July 10, 2023, 14.

⁸⁸ Martín, “Unfinished Business: Corporate accountability and ESCRs in transitional justice processes”, 57.

⁸⁹ UN Human Rights Council, *International legal standards underpinning the pillars of transitional justice*, 19

strengthening the rule of law, promoting human rights protections, improving accountability mechanisms, and cultivating a culture of respect for human dignity.

As articulated by the UN Working Group on Business and Human Rights, such measures may manifest through the reform of corporate governance regulations and policies, implementation of human rights education initiatives tailored to businesses, examination of the nexus between corruption and human rights violations, introduction of corporate criminal liability in jurisdictions where absent, or even the dissolution, divestiture, or exclusion of businesses from public procurement procedures.⁹⁰

In addition to these pillars, the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence and some other authors also considers that memory processes constitute the fifth pillar of transitional justice, both as a stand-alone and a cross-cutting pillar.⁹¹

Overall, transitional justice represents a step forward within the international legal framework for addressing human rights violations, promoting accountability, and advancing toward a more peaceful and equitable global community. While it may be commonly perceived that transitional justice exclusively applies to states, its scope extends beyond such limitations. As previously stated, companies' roles in (dis)respecting human rights must be carefully analysed and monitored particularly in situations of armed conflict or authoritarian regimes. This is no different in transitional justice contexts, plus it is exacerbated, as discussed in the chapters that follow.

2.3 Truth and Reconciliation Commissions and Corporations

Peaceful times demand more than the mere absence of violence; they require the creation of enduring relationships and robust social structures. This includes restoring damaged or lost relationships from the past and developing systems that meet the

⁹⁰UN Human Rights Council. *Implementing the third pillar: lessons from transitional justice guidance by the Working Group*, paras. 43–45, and annex, paras. 45–48.

⁹¹ UN Human Right Council, *International legal standards underpinning the pillars of transitional justice*.

population's needs while being properly equipped to manage future conflicts effectively.⁹² For this to happen, the causes that lead to the conflict in the first place need to be addressed.

Truth and reconciliation commissions (TRCs) are described as “official, temporary, non-judicial fact-finding bodies that investigate a pattern of abuses of human rights or humanitarian law committed over a number of years”.⁹³ Even though they are perceived as non-judicial bodies, they are official bodies because they are established by legislation that confers them gives them compelling powers. Their role revolves around collecting statements from the victims and witnesses, thematic research, conducting public hearings and publishing a final report with what they found and recommendations.⁹⁴ Each truth commission is unique and its formation varies accordingly to what the State that forms them prefers – sometimes they are complementary to criminal trials, other times they are an alternative to it, because of the lack of probability of it happening due to a number of challenges such as incapable justice bodies, political amnesties, a high number of subjects involved, etc.⁹⁵

As the time passes by and truth commissions start to play an important more defined role in transitional processes, they have been playing a crucial role in highlighting the significant involvement of corporations in sustaining oppressive regimes. An increasing number of them has been recognizing businesses accountability in their final reports, as it will be explained below. However, they lack the legal authority to enact these recommendations and bring compensation to the victims or even assign blame to the ones they found responsible after the investigations are concluded. The policymakers decide to implement it or not in their (expected) newly made policies, but, unfortunately, most of the time they are hesitant to enact them because of the potential political repercussions it might involve.⁹⁶

⁹² *Ibid*, 14.

⁹² Martín, “Unfinished Business: Corporate accountability and ESCRs in transitional justice processes”, 153.

⁹³ United Nations Security Council, Report of the UN Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies*, August 23, 2004, 17.

⁹⁴ Mark Freeman, *Truth Commissions and Procedural Fairness* (Cambridge University Press, 2006), 188.

⁹⁵ William Schabas and Shane Darcy (eds), *Truth commissions and courts: the tension between criminal justice and the search for truth* (Kluwer, 2005).

⁹⁶ Omar Encarnación, “Transitional Justice at 40: A Critical Appraisal”, *Current History* 123, no. 849, January 1, 2024, <https://doi.org/10.1525/curh.2024.123.849.3>.

Despite this, it is undeniable the role they play in shedding light on the substantial involvement of corporations in sustaining oppressive regimes, contributing to a more comprehensive understanding of violations by incorporating narratives of corporate complicity, thus offering insights crucial for preventing similar transgressions in the future.⁹⁷

The first to include their finding regarding business and their involvement in the violations committed as well as recommending reparations for them in their report was the South Africa TRC.⁹⁸ It concluded that “businesses benefited substantially during the apartheid era (...) and has, at very least, a moral obligation to assist (...) through active reparative measures”.⁹⁹ For instance, multinational companies like IBM and Ford provided vital support to the apartheid regime, underscoring their complicity in its survival and this conclusion was only possible to reach because of the hard work of the South Africa TRC¹⁰⁰.

Although the report mentioned specific suggestions for how the reparations payments could be extracted from the companies, the government provided only monetary compensation for the victims, way under the value suggested¹⁰¹ and corporations did not provide any reparation. Instead, there was created a Business Trust to which companies could contribute voluntary to – and not as a response to the harm caused and suffered – that was then used as an investment in the future of the country and not as redress for the victims.¹⁰²

On one side, all the situation involving the South Africa TRC and the choosing of the government to place businesses by their side as newly partners in showing their wanting transformation and contribution to the development of the country, mainly because the government was highly dependent on their investment and preferred to build new and solid relationships with them than achieving accountability and reparations.

On the other side, it serves as an eye-opening situation because it documented that the corporations not only had a clear role in the perpetration of the abuses, but they also had

⁹⁷ United Nations Human Rights Council, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Fabián Salvioli, *Role and responsibilities of non-State actors in transitional justice processes*, July 12, 2022.

⁹⁸ Geeta Koska, “Corporate accountability in times of transition: the role of restorative justice in the South African Truth and Reconciliation Commission”, *Restorative Justice*, vol 4, no 1 (2016): 41-67.

⁹⁹ *Truth and Reconciliation Commission of South Africa Report*, vol 5, (1998) 318-19 and vol 6, 155, <https://www.justice.gov.za/trc/report/>.

¹⁰⁰ *Ibid*, vol. 4, chapter 2.

¹⁰¹ 70 million dollars, instead of 360 million.

¹⁰² Pietropaoli, *Business and human rights and transitional justice*, 158.

the capacity to contribute to reparation funds – even though the use they later gave to that money should have been better picked.¹⁰³

Despite this, the truth commission's work in South Africa was crucial because its findings about the mining companies' collaboration with the government that exacerbated apartheid within the mining industry ultimately led to the adoption of a Black Economic Empower Act, that promoted the inclusion of black people in key sectors of the economy transforming and empowering them after the abuses suffered.

Another truth-seeking initiative that had a similar approach is the Liberian TRC. The Liberian TRC dedicated a chapter to examining the impact of economic activities in exacerbating and prolonging the civil war, underscoring the connection between economic interests and conflict dynamics.¹⁰⁴ For instance, the UN-mandated investigations in the Democratic Republic of Congo (DRC) established the role natural resources played in the maintenance of the regime and how it facilitated the persistence of armed conflicts.¹⁰⁵

Furthermore, the government of Argentina has taken proactive steps to address economic complicity in dictatorship-era atrocities by enacting legislation to establish a new truth commission mandate specifically tasked with investigating economic crimes and collaborations, as it will be analysed in detail further ahead in chapter 3.

While not sufficient on their own and clearly undervalued, truth commissions can and should be integrated into a broader political initiative aimed at initiating a gradual yet robust reconstruction of society and its political structures. They serve as temporary measures to facilitate the transitional process, but their significance lies in their contribution to the establishment of a revitalized societal framework. Regardless of their recommendations might not always be implemented, their work can serve as essential evidence in future legal processes, to advocate for reparations, raising awareness among the population, and prompt new democratic reforms.¹⁰⁶

¹⁰³ Pietropaoli, *Business and human rights and transitional justice*, 157-159.

¹⁰⁴ Final Report of the Liberia Truth and Reconciliation Commission, Economics Crimes and the Conflict, Exploitation and Abuse, vol 3, (2009).

¹⁰⁵ Emily Harwell and Philippe Le billon, "Natural Connections: Linking Transitional Justice and Development Through a Focus on Natural Resources", in *Transitional Justice and Development: Making Connections*, eds. Pablo de Greiff and Roger Dutchie, (Social Science Research Council, 2009), 283.

¹⁰⁶ Jeremy Sarkin (ed.), *The Global impact and legacy of truth commissions* (Cambridge: Intersentia, 2019), 97.

Thus, to effectively address the complex dynamics that lead to and sustain human rights violations, a comprehensive approach is essential. Truth and Reconciliation Commissions, while often lacking judicial powers and limited to making recommendations, play a crucial role in uncovering the truth and fostering accountability. Unfortunately, governments rarely implement TRC recommendations, particularly those related to reparations. Nonetheless, TRC findings can sometimes prompt subsequent judicial proceedings. Recognizing the link between corporate behaviours and human rights violations is vital, as it can deter future corporate complicity in authoritarian regimes and prevent violations. If states fail to acknowledge and address the economic contributions to human rights abuses despite TRC findings, it raises significant ethical and legal concerns.¹⁰⁷

Conversely, addressing these contributions can provide additional funding for reparations to victims and their families, thereby enhancing justice and reconciliation efforts. However, TRC investigations often face substantial challenges from interest groups and political agendas, which can restrict their scope and effectiveness. Financial constraints and inadequate infrastructure further impede the ability of TRCs to be properly equipped and staffed, ultimately limiting their capacity to deliver comprehensive and actionable findings.¹⁰⁸

Although corporate accountability is often insufficiently addressed in the work of truth commissions, these commissions nonetheless facilitate positive changes and contribute to institutional reforms, indirectly preventing the recurrence of corporate abuses. This outcome is typically a secondary effect, as truth commissions rarely focus directly on the business sector despite the potential benefits of doing so. Governments tend to avoid targeting businesses to maintain economic stability and avoid potential conflicts with powerful corporate interests. The inclusion and detailed explanation of the corporate sector's involvement during periods of conflict or under authoritarian regimes is crucial for in the TRCs' work. This way, a more comprehensive approach is taken and ensures that the reality of such periods is accurately portrayed, encompassing all actors involved, whether directly or complicitly in human rights violations. It is essential that corporate behaviour is not only analysed in the investigations, but also document in their final reports. This allows for the formulation of appropriate recommendations, acknowledges wrongdoings, and ideally exerts

¹⁰⁷ Pietropaoli, *Business and human rights and transitional justice*, 183-185.

¹⁰⁸ *Ibid.*

a persuasive effect for future accountability and ethical conduct, either for the targeted companies and others.

The University of Oxford in collaboration with several global partners, including Dejusticia in Colombia and CELS and ANDHES in Argentina created a “Corporate Accountability in Transitional Justice database”, which is a comprehensive resource that documents violations carried out by economic actors during periods of authoritarian rule and conflict. This database aims to make visible the direct and indirect human rights abuses perpetrated by businesses and economic entities. It includes a research manual, examples of successful accountability strategies, and in-country workshops designed to address victims' rights. It serves as a crucial tool for advancing justice by highlighting the role of corporations in human rights violations and promoting accountability measures in transitional justice processes.¹⁰⁹

A review of 39 truth commissions' work found that 59% of them addressed corporate responsibility in cases of serious human rights violations, with 223 commissions identifying over 329 companies, most of them well known and successful until this date, even though most of the cases regarding them not leading to judicial actions.¹¹⁰

2.4 Reparations and corporations

As it has been presented, impunity is a recurrent problem in transitional processes, often manifesting as a "pact of silence" orchestrated by authorities and society to deny or suppress accountability for the atrocities committed. Ineffective investigations, inadequate sentencing relative to the severity of crimes, or the granting of amnesty to perpetrators further exacerbate this issue in some instances.¹¹¹

¹⁰⁹ “Corporate Accountability in Transitional Justice – About CATJ”, *University of Oxford*, <https://ahra.web.ox.ac.uk/catj>.

¹¹⁰ Leigh Payne, Gabriel Pereira and Laura Bernal-Bermúdez, *Transitional Justice and Corporate Accountability from Below: Deploying Archimedes' Lever* (Cambridge University Press, 2020).

¹¹¹ United Nations Human Rights Council, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Fabián Salvioli, *Accountability: Prosecuting and punishing gross violations of human rights and serious violations of international humanitarian law in the context of transitional justice processes*, July 9, 2021, paras. 28–55.

Reparations are intended to alleviate the suffering caused to the victims and somehow heal the wounds caused by the past. The right to an *adequate* and *effective* remedy is not just a human right by itself but a key aspect that concerns other rights too.¹¹² As it is expected, after a violation of a certain right, the obligation to repair it arises, as the injured parties are entitled to it after the breach occurrence. Usually, international law places the primary obligation of providing remedies on States, but the UNGPs are clear to enunciate that businesses should provide and participate in appropriate remedies when they cause harm or if they contribute to it,¹¹³ which is determined by the actions or omissions¹¹⁴. Evaluating a company's position on the accountability continuum entails taking into account its power and independence, the severity and predictability of the harm, and the steps taken by the company to reduce the impact, such as perform human rights due diligence.¹¹⁵

Similarly, the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law also refers to “legal persons” as capable of being liable for reparation to victims for these violations.¹¹⁶

Reparations should cover all injuries and be proportionate to the gravity of the violations and the harm suffered.¹¹⁷ However, given the violence the breaches of international human rights law bring to its victims, it is almost impossible to match the damages caused. It is impossible to restore taken lives, years lost, communities destroyed, and traumas caused to the population.

Reparations mechanisms frequently incorporate a variety of grievance redress options, including administrative reparations programmes, legislative changes that allow

¹¹² UNDHR article 8.

¹¹³ Principle 22 UNGPs.

¹¹⁴ OHCHR, *OHCHR Response to Request from Bank Track for Advice Regarding the Application of the UN Guiding Principles on Business and Human Rights in the Context of the Banking Sector*, June 12, 2017, <https://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf>.

¹¹⁵ Tara Van Ho, “Defining the Relationships: “Cause, Contribute, and Directly Linked To” in the UN Guiding Principles on Business and Human Rights”, *Human Rights Quarterly* 43, no 4, (November, 2021): 647-654.

¹¹⁶ Article 15, section IX of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation>.

¹¹⁷ Basic Principles and Guidelines, para. 15.

practical and preferential access to courts, and financing for community reparations projects. No society has accomplished adequate compensation using only one approach. Instead, the most successful programmes integrate numerous instruments to increase effectiveness, assure broader victim access, and solve institutional flaws.¹¹⁸

The UN Working Group on BHR¹¹⁹ presented some guidelines for legal standards and good practises for state actors to design reparation processes that involve business actors as part of the right to an effective remedy. Some of the key aspect highlighted in it are the following.

The reparations need to be victim-centred, gender-sensitive and culturally appropriate. Also, reparations cannot be seen as being on the same level as corporate social responsibility, as they intent to redress harm caused to victims and not just to improve their situation. It unrolls from harm caused in a specific situation to a determined population and as a counterpart to that, in order to answer to the obligation that arises from it.¹²⁰

The UN Working Group also stated that “Where corporate criminal liability does not exist, its introduction should be considered as a guarantee of non-recurrence, as the circumstances of crimes committed by businesses cannot easily be addressed through individual liability, for example, where such crimes are the result of an entire structure that benefits from or enables the commission of international crimes and not merely the decisions or omissions of a handful of individuals.”¹²¹

Despite recognising the need for reconstruction polices that foster economic development, the rule of law and conflict prevention initiatives, makes it clear that businesses should not portray their voluntary involvement in reconstruction and development policies as fulfilling their reparations obligations or participating in transitional justice processes. Additionally, states must avoid encouraging businesses, through economic or legal incentives, to engage in reconstruction policies that aim to bypass, restrict, or postpone their

¹¹⁸ UN Human Rights Council, *Implementing the third pillar: lessons from transitional justice guidance by the Working Group*, para.49.

¹¹⁹ *Ibid*, annex.

¹²⁰ *Ibid*, annex, para 6.

¹²¹ *Ibid*, annex, para 48.

reparations responsibilities. – this demonstrates the path that must be taken from now on, in contrast to what has happened so far.¹²²

Some procedural problems get in the way as most cases are dismissed on procedural grounds and it is really difficult to hold corporations accountable because of these challenges.¹²³

The Special Rapporteur on the promotion of Truth, Justice, Reparation and Guarantees of non-recurrence, Fabián Salvioli, presented a report on the role and responsibilities of non-State actors in transitional justice processes, specifying the peculiar situation of the corporations and the private sector organizations.¹²⁴

First, it is difficult to incentivize corporations to participate in transitional justice processes. Often, they do not even respond to commissions' invitations or outright refuse, as seen with Shell and British Petroleum regarding their involvement in apartheid in South Africa, where they were significant investors.¹²⁵

Even when truth commissions specify means and instruments which corporations can contribute to a reparations fund, they are not implemented and fail to ensure reparations for the victims, mostly driven from the lack of compelling powers.

For instance, the South Africa Truth and Reconciliation Committee suggested the implementation of a wealth tax a one-off levy on corporate and private income, a one-off donation of 1 per cent of market capitalisation by companies listed in the Johannesburg Stock Exchange¹²⁶ a retrospective surcharge on corporate profits backdated to an agreed time, and responsibility for the payment of the previous government's debt.¹²⁷

¹²² *Ibid*, annex, para 54-55.

¹²³ Pietropaoli, *Business and human rights and transitional justice*, 238.

¹²⁴ UN Human Rights Council, *Role and responsibilities of non-State actors in transitional justice processes*,

¹²⁵ Truth and Reconciliation Commission of South Africa Report, vol. 4, chap. 2, 18–19.

¹²⁶ The Johannesburg Stock Exchange (JSE) is the largest stock exchange in Africa.

¹²⁷ South African TRC report, vol. 5, chap. 8, 318; Martín, “Unfinished Business: Corporate accountability and ESCRs in transitional justice processes”, 170.

Similarly, in Liberia, it was recommended that they create a trust fund to compensate the victims of economic crimes and it would be funded by the due taxes from the economic actors and asset freezing and recovery.¹²⁸

Secondly, in a lot of situations, businesses include immunity from criminal or civil litigation as conditions to participate in the reparations processes – imposing an obstacle to acknowledging their responsibility and wrongdoings.¹²⁹ A clear distinction must be made between reparations, which stems from the obligation to redress harm caused to victims of corporate activities, and other forms of remedy, such as voluntary contributions under the guise of corporate social responsibility (CSR). Reparations necessitate an acknowledgment of wrongdoing, whereas CSR initiatives are driven by social conscience and a desire to contribute to societal improvement.¹³⁰ When corporations use CSR as a substitute for reparations, it distracts from their responsibility and serves as a form of community "mental washing". This approach not only allows corporations to evade accountability but also affords them a disguise of ethical contribution, often motivated by guilt and fear of exposure rather than genuine altruism.

2.4. Justice and accountability of corporations under Transitional Justice processes

There are three potential venues at the domestic level where to prosecute companies or their executives for commission or being complicit in human rights violations or international crimes: where the crimes were committed (the "host" state), where the corporation is legally domiciled or the executive lives or in any state, exercising universal jurisdiction over the crimes to apply the last two options.¹³¹

Two legal problems can be noted when it comes to the criminal prosecution of corporations: the existence of *mens rea*¹³² in the commission of the crime, which is difficult to conceptualize the moral culpability of companies and the use of this form of liability as a form of "collective punishment" – which is incompatible with criminal law and could lead

¹²⁸ UN Human Rights Council, *Implementing the third pillar: lessons from transitional justice guidance by the Working Group*, paras. 38–39.

¹²⁹ *Ibid*, para. 73 and annex, paras. 6–8, 15.

¹³⁰ *Ibid*.

¹³¹ Pietropaoli, *Business and human rights and transitional justice*, 67–68.

¹³² "guilty mind".

to unfair sanctions on the shareholders and employees, ending up paying for the corporation's past actions.¹³³

As of the present date, criminal liability is predominantly recognized in common law countries and an increasing number of civil law systems too¹³⁴. This recognition comes from the understanding that corporations are entities capable of exercising autonomous will and committing crimes independently of the individual intentions of their executives and representatives. Consequently, this allows for the prosecution of the aforementioned "corporate culture" on criminal grounds as well.¹³⁵

When we transpose this to transitional justice contexts, an increasing number of states have incorporated ICL into their domestic criminal legislation, recognizing that national implementation of it can serve as a means of holding corporations accountable for violations of ICL. Unlike the jurisdiction of the ICC, which is limited *ratione personae* to individuals who are nationals of a state party to the Rome Statute or who have committed criminal acts on the territory of a state party, domestic legislations do not impose such restrictions¹³⁶. This broader scope allows for the prosecution of individuals and entities of any nationality, including those who have committed violations abroad, thereby providing national courts with a wider jurisdictional reach than the ICC.¹³⁷

The *Amesys* case serves as a notable example of successful criminal prosecution, where the French subsidiary of the Bull Group faced a formal complaint for its involvement in providing surveillance technology to the Gaddafi regime in Libya. This technology was used to identify opponents of Gaddafi, who were subsequently detained and tortured. The complaint was filed in France using extraterritorial jurisdiction, for its allegedly complicity in acts of torture and ultimately the Paris Court of Appeal confirmed the indictment of *Amesys* and its executives.¹³⁸

¹³³ *Ibid*, 68.

¹³⁴ *Ibid*, 69.

¹³⁵ *Ibid*.

¹³⁶ Regis Bismuth, "Mapping a Responsibility of Corporations for Violations of International Humanitarian Law Sailing between International and Domestic Legal Orders", *Denver Journal of International Law & Policy* 38, no. 2, (January 2010): 219-22.

¹³⁷ Pietropaoli, *Business and human rights and transitional justice*, 69-70.

¹³⁸ "The *Amesys* case: the victims anxious to see tangible progress", Business & Human Rights Resource Centre, accessed on May 20, 2024, <https://www.business-humanrights.org/en/latest-news/the-amesys-case-the-victims-anxious-to-see-tangible-progress/>.

Transitional justice encounters persistent challenges in holding corporations criminally liable for their involvement in international crimes and human rights violations. These challenges are multifaceted, encompassing normative, practical, and political dimensions.

Firstly, host states often exhibit an inability or unwillingness to prosecute corporations, particularly in post-conflict settings where state structures may be fragile or complicit in the abuses. Establishing jurisdiction in the home state of the corporation also presents significant difficulties, often due to complex legal and procedural challenges. Practical problems, such as the investigation of corporate crimes and language barriers, further complicates the process. Additionally, procedural difficulties frequently result in cases being dismissed or settled out of court, rather than achieving a substantive determination of corporate liability.¹³⁹

States emerging from conflict or oppressive regimes face an urgent need to attract investment for economic growth and development, making them reluctant to pursue claims against corporations, especially foreign ones. This need for economic revitalization creates a substantial barrier to the investigation and prosecution of corporations that violate human rights, as these corporations are perceived as essential to national economic development. Consequently, the pursuit of justice and redress for victims is often deprioritized in favour of fostering economic activity. As mentioned, no case against a corporation for human rights violations has yet been determined on the merits, with most cases being dismissed on procedural grounds due to the intricate jurisdictional and procedural challenges involved.¹⁴⁰

The most common result is out-of-court settlements and, despite achieving some compensation for the victims or contributing to some reparations programmes, they often fall short of meeting the standards of justice desired. The compensation obtained is frequently inadequate and fails to align proportionally with the damages sought and rightfully deserved. Additionally, corporations typically prefer confidential settlements, hindering the acknowledgment of their wrongful behaviour¹⁴¹. Moreover, not all victims typically partake in these proceedings, leaving certain individuals without any avenue for redress. An example

¹³⁹ Pietropaoli, *Business and human rights and transitional justice*, 137-142.

¹⁴⁰ *Ibid.*

¹⁴¹ UN Human Rights Council, *Implementing the third pillar: lessons from transitional justice guidance by the Working Group*, para 44.

of this was the highly criticized between Volkswagen Brazil and the victims because it did not acknowledge any of the wrongdoings, measures of satisfaction or memorialization activities.¹⁴²

Although the ICC only has jurisdiction over “natural persons”¹⁴³, two of its former prosecutors have stated a willingness to undertake prosecutions for environmental destruction, illegal exploitation of natural resources and land confiscation where corporations could have been involved. When it comes to the universal jurisdiction use, there have been criminal trials against corporations’ executives held both in France, the Netherlands and Sweden for complicity in war crimes.¹⁴⁴ In fact, most of the cases regarding corporations’ responsibility for human rights violations have been litigated in a different country from the one where they occurred, invoking the extraterritorial jurisdiction.¹⁴⁵ This is encouraged by international bodies such as the Committee on Economic, Social and Cultural Rights, that several times highlighted the idea that states should take the necessary measures to prevent human rights violations abroad by corporations under their jurisdiction or those domiciled in their territory.¹⁴⁶ French authorities for example have filled complains on the basis of extraterritorial jurisdiction involving French companies accused of complicity regarding Sudan’s genocide, torture in Libya and Syria.

According to the Amnesty International and the International Corporate Accountability Roundtable, several situations in which there were enough evidence of multinationals’ illegal conducts linked to the human rights violations, impunity still ruled and the authorities did not prosecute them.¹⁴⁷ For example, the role Anvil Mining played in facilitating the Kilwa massacre on DRC in 2004, for providing substantial logistical support

¹⁴² *Ibid.*

¹⁴³ Article 25 of the Rome Statute.

¹⁴⁴ UN Human Rights Council, *Implementing the third pillar: lessons from transitional justice guidance by the Working Group*, para 40.

¹⁴⁵ Pietropaoli, *Business and human rights and transitional justice*, 71.

¹⁴⁶ United Nations Committee on Economic, Social and Cultural Rights, *Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights*, May 20, 2011, 5-6; General comment no. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, June 23, 2017, 14.

¹⁴⁷ “Corporate Human Rights Principles”, Amnesty International and International Corporate Accountability Roundtable, 2016, <https://www.commercecrimehumanrights.org/>.

to the military, was never properly investigated and prosecuted by the national government, although publicly criticized by the African Commission.¹⁴⁸

As discussed, the civil proceedings held against executives and companies themselves is another round that can be taken to reach accountability, when criminal prosecution is not possible.

The Alien Tort Statute (ATS) in the United States allows courts to address tort-based claims involving international law violations, regardless of whether the citizens are from the United States or not.¹⁴⁹ The groundbreaking decision that served as precedent and led several victims to start filing cases before these courts under the ATS regarding human rights violations was the one concerning *Filartiga v Pena-Irala* decision, even though there was still a debate about whether the statute allowed these claims or not.¹⁵⁰ Although tort law is not exactly a mechanism for transitional justice, the ATS has been one of the main venues for corporate human rights litigation, fostering the discussion and progress around the topic.

Unfortunately, the decision of the US Supreme Court on the *Kiobel v Shell* case reduced the extraterritorial application of the ATS to cases that “touch and concern the territory of the United States”,¹⁵¹ closing the door for the ATS to become an international venue for corporate accountability with extraterritorial effects. This led to the dismissal of well-known ongoing trials such as the ones against *Chiquita* and *Drummond*, both of them in the grounds of no longer having jurisdiction because the relevant conducts didn’t occur in the United States.¹⁵²

Thus, achieving justice in transitional justice processes is inherently challenging, underscoring the critical importance of the final reports and recommendations issued by TRCs. These reports should not only provide recommendations for state actors and document their involvement but also address and incorporate corporate actions. Recognizing the role of corporations in these contexts is essential to ensure the maximum accountability and justice achievable.

¹⁴⁸ Pietropaoli, *Business and human rights and transitional justice*, 81.

¹⁴⁹ Alien Tort Claims Act, 28 U.S.C. (2000), para 1350.

¹⁵⁰ Pietropaoli, *Business and human rights and transitional justice*, 91-92.

¹⁵¹ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

¹⁵² Pietropaoli, *Business and human rights and transitional justice*, 100.

3. Past and present examples

This chapter examines two significant examples of past and present transitional justice processes, drawing lessons on how to hold corporate actors accountable for their participation and involvement in human rights violations. The first case focuses on Argentina and Ford, a historical example that legal and societal efforts can culminate in the successful prosecution of corporate entities and their executives for their complicity in human rights abuses. Even though transitional justice's origins go back to the French Revolution, the creation of Argentina's truth commission in 1983 led to the development of the field as we know it today. The second case addresses the ongoing situation in Syria involving the cement company Lafarge, which has made substantial contributions to the discourse on corporate responsibility in conflict-affected areas.

3.1 The Ford case in Argentina

From 1976 to 1983, Argentina experienced a period of military dictatorship known as the "Dirty War." This era was characterized by state-sponsored terrorism, repression, and massive human rights violations, such as abduction, torture and murder.

The dictatorship began with a military coup on March 24, 1976, which ended the government of María Estela Perón and installed General Jorge Rafael Videla as president, marking the start of the *Proceso de Reorganización Nacional* (National Reorganization Process). The Military Junta controlled the executive, legislative, and judicial powers, effectively eliminating the division of powers.¹⁵³

Around 30,000 individuals were victims to the regime, that targeted not only suspected political opponents but also students, journalists, families, and anyone perceived as dissenters. Alongside the repression, new economic policies were implemented to restructure the economy and discipline society. The regime's internal power struggles and conflicts over leadership and political ideas further complicated the situation. During this

¹⁵³ *Ibid*, 177.

period, the regime received loans and credits from international commercial banks and states, sustaining its repressive policies.¹⁵⁴

Following Argentina's defeat in the Falklands War¹⁵⁵ and the ensuing economic and social crises, democratic elections were held in 1983. Raúl Alfonsín, who prioritized human rights, was elected president, marking the return to democracy.¹⁵⁶ Alfonsín's government initiated accountability measures by establishing the National Commission on the Disappearance of Persons (CONADEP).¹⁵⁷

CONADEP's final report, "Nunca Más"¹⁵⁸ (Never Again), called for judicial processes, redress, and social assistance for victims' families, asserting that the disappearances were crimes against humanity.¹⁵⁹ Some human rights organisations considered that more accountability beyond just truth-telling was needed and, therefore, created Technical Commission for Data Collection.¹⁶⁰ The Commission's primary focus was on the investigation of the disappearances, as they were the main method of repression, but it was also assigned to gather denunciations and evidence to facilitate the judicial trials, locate the missing children, report attempts to hide or destroy evidence and submit a final report—to which they had a mere 180 days to do so.¹⁶¹ This led to a gathering of 7 000 testimonies and 8 961 documented cases of enforced disappearances, in addition to evidence proving the existence of 340 clandestine detention centres.¹⁶² It also asserted that the disappearances should be considered crimes against humanity and that judicial processes were needed, as well as emphasized the need for redress and social assistance for the victims' families.

Despite CONADEP's findings leading to the successful prosecution of the nine top leaders of the military juntas in 1985, and the government partially following its

¹⁵⁴ *Ibid.*

¹⁵⁵ Against the United Kingdom in 1982.

¹⁵⁶ Martín, "Unfinished Business: Corporate accountability and ESCRs in transitional justice processes", 207.

¹⁵⁷ Comisión Nacional sobre la Desaparición de Personas.

¹⁵⁸ Available at

http://www.desaparecidos.org/nuncamas/web/english/library/nevagain/nevagain_001.htm

¹⁵⁹ Prologue and Chapter VI of the Recommendations.

¹⁶⁰ Priscilla Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, (Routledge, 2011) 64-65.

¹⁶¹ *Ibid.*, 56.

¹⁶² Emilio Crenzel, "Políticas de la memoria. La historia del informe Nunca Más", *Papeles del CEIC*, no. 61 (2010): 15.

recommendations to restore the withdrawn rights as well as pecuniary compensation and medical benefits to the victims' relatives,¹⁶³ Alfonsín faced significant military opposition, resulting in the end of investigations and prosecutions and the granting of self-amnesties. This attempt to overlook the crimes unsettled human rights activists and ultimately led to the Supreme Court of Argentina ruling that crimes against humanity could not be limited by self-amnesty laws, declaring them unconstitutional.¹⁶⁴

Since 2015, under President Mauricio Macri, there has been renewed a discussion on establishing a commission to investigate corporate complicity in the dictatorship.¹⁶⁵

UN experts expressed their support for it, stating that the creation of this Commission represents a crucial opportunity to uncover the truth and ensure accountability for past human rights violations involving the business sector, often overlooked in transitional justice processes. While emphasizing the importance of addressing the economic dimensions of these violations, they also called for high standards, impartiality, and stakeholder involvement to prevent politicization. The Commission can gather information and make recommendations, but judicial authorities must lead investigations and prosecutions of those responsible, including economic actors.¹⁶⁶

President Néstor Kirchner, elected in 2003, had already reinvigorated efforts to prosecute human rights violations. Trials were reopened, and key military and police officials were prosecuted for crimes against humanity. Kirchner's administration annulled previous laws granting impunity, leading to ongoing prosecutions. His successor, Cristina Fernández de Kirchner, continued these policies, implementing new accountability measures.¹⁶⁷

¹⁶³ Maria Jose Guembe, "Economic Reparations for grave human rights violations: the Argentinian experience", in *The Handbook of Reparations*, ed. Pablo De Greiff (Oxford University Press, 2006), 22-27.

¹⁶⁴ Alejandro Garro and Enrique Dahl, "Legal Accountability for Human Rights Violations in Argentina: One Step Forward and Two Steps Backward", *Human Rights Law Journal* 8 (1987): 305.

¹⁶⁵ Pietropaoli, *Business and human rights and transitional justice*, 174.

¹⁶⁶ "Argentina dictatorship: UN experts back creation of commission on role business people played", *OHCHR*, November 10, 2015, <https://www.ohchr.org/en/press-releases/2015/11/argentina-dictatorship-un-experts-back-creation-commission-role-business>.

¹⁶⁷ Francesca Lessa, "Nunca Más. The Politics of Transitional Justice in Argentina and Uruguay, 1983 – 2010" (2011), 30.

During the Dirty War, the regime has been described as a civil-military dictatorship or a corporate-military dictatorship due to the involvement of some sectors of the corporate world in *the process*.¹⁶⁸

The relationship between the regime and corporations was characterized by a strategic interchange of positions between public administration and corporate sectors.¹⁶⁹ Businessmen often transitioned into legislative roles and vice versa, through public-private exchanges, assuming strategic roles that benefited a select few companies and economic groups. This intermingling effectively linked the repressive government with corporations that acted as its right-hand supporters. Companies that did not align with the Junta were often appropriated or liquidated.¹⁷⁰

Argentina received substantial financial support in the form of loans and credits from major commercial banks and foreign states. This international support was crucial in sustaining the regime's repressive policies.¹⁷¹ Many companies did not merely benefit economically from supporting the regime. They actively contributed to its perpetuation by using oppressive authority against their workers, with some businesses going as far as denouncing employees they deemed subversive or problematic, thus solving their internal issues while significantly increasing the number of victims of the regime.¹⁷² Abductions frequently occurred in the workplace, as documented in CONADEP's final report.

Despite the already reprehensible nature of these actions, businesses gained economically by supporting the regime. They provided information on individuals and groups, mainly their workers, to be targeted, presenting them as subversive elements.¹⁷³ The testimonies gathered by CONADEP revealed that companies were involved in

¹⁶⁸ In this regard, Bruno Nápoli, M. Celeste Perosino and Walter Bosisio, *La dictadura Del capital financiero. El golpe militar corporativo y la trama bursátil*, (Ediciones Continente, 2014), 42.

¹⁶⁹ A phenomenon referred to as “swing doors”.

¹⁷⁰ Alejandra Dandan, “The National Securities Commission and the Assault on “Economic Subversion””, in *The Economic Accomplices to the Argentine Dictatorship. Outstanding debts*, ed. Horacio Verbitsky and Juan Pablo Bohoslavsky (Cambridge University Press, 2015), 290.

¹⁷¹ Juan Pablo Bohoslavsky, ‘Complicity of the Lenders’, in *The Economic Accomplices to the Argentine Dictatorship. Outstanding debts*, op. cit., 105-116.

¹⁷² Marcos Novar and Vicente Palermo, *La dictadura militar 1976/1983: del golpe de estado a la restauración democrática*, (Paidós, 2014), 115.

¹⁷³ Martín, “Unfinished Business: Corporate accountability and ESCRs in transitional justice processes”, 28.

disappearances and other human rights violations, with some clandestine detention centres even located within company facilities.¹⁷⁴

In recent years, particularly following the presidency of Cristina Kirchner, substantial academic work has emerged regarding the role that the private sector played during the dictatorship period.¹⁷⁵

The criminal justice processes in Argentina have primarily targeted individual corporate managers and officers rather than the corporations themselves. Their participation is generally perceived as complicity, as discussed in chapter 1, with the government and military identified as the principal perpetrators of the violations.¹⁷⁶ The Argentine Criminal Code interprets the concept of criminal complicity as anyone who assists or supports those who commit a crime, regardless of whether that help was essential or not.¹⁷⁷ Likewise, it also punishes those who encourage others to commit crimes, benefit from the crime's consequences, join a group formed to commit crimes, or are directly involved in planning or committing crimes. Shared intent with the main perpetrator is necessary for these punishments. However, these rules do not apply to corporations, only to individuals.¹⁷⁸

Although the concept of corporate criminal responsibility is recognized, it is limited to specific sections where it is explicitly mentioned, which does not include including the notion of complicity. The adoption of the "Corporate Liability Bill" in 2017 introduced a framework where legal entities could face sanctions for crimes committed either by themselves or in their name, interest, or benefit. Unfortunately, the actions must be initiated within six years, and if the acts are not in profit for the company, just exclusively for who committed it, the company cannot be prosecuted. This led to some lawsuits against businessmen and company managers involved in the violations. Most of these cases,

¹⁷⁴ *Ibid*, 248.

¹⁷⁵ See Martín, "Unfinished Business: Corporate accountability and ESCRs in transitional justice processes", 249.

¹⁷⁶ *Ibid*, 250.

¹⁷⁷ In its sections number 45 to 49, 210 and 277.

¹⁷⁸ *Ibid*.

however, were dismissed or lacked sufficient evidence.¹⁷⁹ The implicated corporations were not only national businesses but also transnational corporations.¹⁸⁰

One of the most paradigmatic cases of corporate complicity during the Dirty War is the Ford lawsuit. In October 2002, a federal prosecutor in Argentina accused executives of Ford Motor Argentina of collaborating with the military dictatorship. The allegations included aiding the regime in the repression, abduction, and mistreatment of workers and union organizers, reportedly on the company's premises. It was also claimed that the military operated a detention centre within Ford's factory facilities, with the assistance of company officials, to kidnap 25 employees and a trade union leader, who were subsequently tortured. Ford denied these allegations, asserting that they only requested protection from guerrillas and denying the establishment of the detention centre.¹⁸¹

In January 2004, workers and union organizers from Argentina filed another lawsuit against Ford Motor and Ford Motor Argentina, alleging that their managers conspired with the military regime and operated a detention centre in Ford's Buenos Aires factory, causing physical and emotional injuries to the victims. Initially stalled by amnesty laws, the case was reopened in 2005 after these laws were repealed, reigniting discussions on corporate accountability for human rights violations during the military regime. This led to additional lawsuits being filed by workers against Ford Argentina, citing similar claims of violence and efforts to eliminate trade union activists.¹⁸²

In 2013, a claim was filed against three former executives of Ford Motor Argentina for crimes against humanity, including providing information about their workers, maintaining a clandestine detention centre within the factory, and participating in the kidnapping and torture of workers. This case progressed and, in February 2018, the court convicted Pedro Muller and Hector Sibila¹⁸³ for the abduction and torture of 24 workers,

¹⁷⁹ For example, the case of Julio Cobos was categorised as crime against humanity but then declared null.

¹⁸⁰ *Ibid.*, 251.

¹⁸¹ "Ford lawsuit (re Argentina)", *Business & Human Rights Resource Centre*, <https://www.business-humanrights.org/en/latest-news/ford-lawsuit-re-argentina-2/>.

¹⁸² *Ibid.*

¹⁸³ The third defendant had died in the beginning of the investigations.

who had testified during the trial. They were sentenced to ten and twelve years in prison, respectively.¹⁸⁴

This case exemplifies the significant influence companies can have in exacerbating or perpetuating existing conflicts and in exploiting such situations for their benefit. It is now known for a fact, from the work of the commissions and trials, that the military dictatorship in Argentina might not have endured as long without the logistical support and implicit moral endorsement of the companies operating in the region. These companies not only interfered with but also participated in the abuses, ultimately harming their own workers.

3.2 The Lafarge case in Syria/France

The Lafarge case represents a significant turning point, potentially on the verge of setting a historic precedent regarding corporate complicity in crimes against humanity. It highlights the critical issue of how multinational enterprises operating in conflict zones can exacerbate conflicts and contribute to the perpetuation or facilitation of gross human rights violations. Regardless of whether the company ultimately faces charges for complicity, this case has already initiated a thorough examination of the concept of corporate complicity in such crimes, that will undoubtedly pave the way for future litigation in this area.

A criminal complaint was filed before French courts in Paris by 11 former employees together with two NGOs – Sherpa and European Centre for Constitutional and Human Rights (ECCHR), in November 2016, against the parent company Lafarge and its Syrian subsidiary, for engaging in relations with IS and other armed groups and committing illegal activities¹⁸⁵, namely - financing terrorism, complicity in war crimes and crimes against humanity, deliberate endangerment of people, exploitative labour work, undignified working conditions, and forced labour.¹⁸⁶

¹⁸⁴ *Ibid.*

¹⁸⁵ Case report “Lafarge in Syria: accusation of complicity in war crimes and crimes against humanity”, *European Center for Constitutional and Human Rights*, November 2016, https://www.ecchr.eu/fileadmin/Fallbeschreibungen/Case_Report_Lafarge_Syria_ECCHR.pdf.

¹⁸⁶ All of these crimes sanctioned by the French criminal code (articles 421-2-2; 461-2s; 212-1s; 223-1s; 223-1; 225-13, 225-14-1, 225-14-2, respectively).

In March 2011, a civil war erupted in Syria. It started with peaceful protest demanding the president's resignation, but the government used deadly force to fightback the protests and ultimately led to death and destruction all over the country that lasts to this day. This caught the eye of foreign (well-developed) countries that started supporting the civil war and it escalated to more than two sides fighting for or against the government. Extremist jihadist organisations, like the Islamic State (IS) and al-Qaeda, with their own objectives at mind got involved and this brought the conflict to another level.¹⁸⁷ Sadly, we know for a fact that, during this period, both parties to the conflict "have cumulatively committed almost every crime against humanity listed in the Rome Statute, and nearly every war crime applicable in a non-international armed conflict."¹⁸⁸

As of today, there are more than 16.7 million people in need of humanitarian aid across the country, as the country suffered devastating earthquakes in the beginning of 2023, adding to the already needed humanitarian help emerging from the civil war.¹⁸⁹

In this chaotic scenery, as it is common in conflict affected areas, the rule of law was weakened or practically non-existent, which facilitated human rights abuses, not only by the armed groups, government and other non-state actors involved, but also by the hands of the companies operating in Syria, since there was no way of holding them accountable for perpetrating or facilitating abuses.

Lafarge is a French multinational company specialized in cement and other construction materials and one of its branches was operating in Syria when the conflict broke out and its plant kept operating from its opening in 2010 until 2014, long after the conflict had started in 2011. In order to do so, Lafarge allegedly paid, by means of third parties, local

¹⁸⁷ "Why has the Syrian war lasted 12 years?", *BBC News*, May 2, 2023, <https://www.bbc.com/news/world-middle-east-35806229>.

¹⁸⁸ "UN Syria Commission of Inquiry: Those responsible for atrocities during 12 years of violence must be brought to justice", *OHCHR*, March 17, 2023, <https://www.ohchr.org/en/news/2023/03/un-syria-commission-inquiry-those-responsible-atrocities-during-12-years-violence-must#:~:text=Parties%20to%20the%20conflict%20have,into%20the%2013th%20year>.

¹⁸⁹ "Unprecedented number of Syrians in need of aid after 13 years of war", *World Health Organisation – Eastern Mediterranean Region*, March 16, 2024, <https://www.emro.who.int/media/news/unprecedented-number-of-syrians-in-need-of-aid-after-13-years-of-war.html>.

armed groups, including IS, to maintain the factory running, despite UN sanctions upon the terrorist group.¹⁹⁰

Even though the other companies choose to leave the country, this one not only stayed but kept operating, despite the danger it could (and would) cause its employees to work on a warzone. Alongside this, the company allegedly obtained oil and pozzolan from IS to keep the massive production going, as well as sold them cement – given that 80% of IS's funding comes from the sale of natural resources, Lafarge's contribution was probably not insignificant.¹⁹¹ They started controlling the flow of workers and goods. They not only bought their materials from the terrorist organization as well as negotiates the safe passage of their workers and products in exchange from compensation.¹⁹² Despite the warning concerns, the company ignored the need to establish emergency safety protocols and an evacuation plan, resulting in an attack on the plant, in September 2014.¹⁹³

A large amount of witness testimonies was gathered indicating that Lafarge reportedly obligated Syrian employees to continue working, threatening them to be dismissed without compensations if they didn't – and proceeded to honour that promise to those who dared to risk it, resulting in kidnappings of employees in their commute to work. Communications between Lafarge director and their staff indicated that they hired intermediaries to negotiate in order to finance local armed groups, namely IS, to an alleged amount of €13 million.¹⁹⁴

At that time the murders, sexualized violence, kidnappings and other violations against civilians that occurred in Syria were already constituted crimes against humanity and although Lafarge argued that they never had intention of contributing to such crimes, they

¹⁹⁰ *Ibid.*

¹⁹¹ "Lafarge in Syria: Accusations of complicity in grave human rights violations", ECCHR, <https://www.ecchr.eu/en/case/lafarge-in-syria-accusations-of-complicity-in-grave-human-rights-violations/>.

¹⁹² ECCHR and Sherpa, "Landmark Decision in Lafarge Case", *Business & Human Rights Resource Centre*, June 28, 2018, <https://www.business-humanrights.org/en/latest-news/landmark-decision-in-lafarge-case/>.

¹⁹³ "Lafarge in Syria: Accusations of complicity in grave human rights violations", ECCHR, op. cit..

¹⁹⁴ Claire Tixeire, "Can the Lafarge case be a game changer? French multinational company indicted for international crimes in Syria", *Business & Human Rights Resource Centre*, August 31, 2018, <https://www.business-humanrights.org/en/blog/can-the-lafarge-case-be-a-game-changer-french-multinational-company-indicted-for-international-crimes-in-syria/>.

deliberately financed the armed groups that were, knowingly, executing them.¹⁹⁵ Realising that by giving financial means to these groups it would or even could contribute to these crimes being committed did not require much of a logical leap, and for that reason makes them accomplices.

Moreover, the French Supreme Court had already established that complicity in crimes against humanity does not require supporting the ideology of the principal perpetrators, nor is it necessary for the accomplice to know the specific crime was being planned and actually perpetrated, but only the knowledge that crimes are being carried out and that the conduct would contribute to that perpetration¹⁹⁶.

In 2015, Lafarge and Holcim merged, forming Lafarge-Holcim, and the company immediately filed an appeal. The plaintiffs sought the establishment of a compensation fund for former Lafarge Cement Syria (LCS) employees and their families and in October 2018, a portion of the former Lafarge executives' salary was seized, totalling approximately 2.475 million euros.¹⁹⁷

Subsequently, in June 2017, the Paris Public Prosecutor opened an investigation for financing terrorism - the case had caught the attention of the media regarding IS and lead the minister of economy to file a complaint against Lafarge for violating the EU sanctions against Syria. With this, the financing terrorist part of the case became the moving factor for the case.¹⁹⁸

A year later Lafarge was indicted for complicity in crimes against humanity, with the defendants being the Lafarge group itself, its Syrian subsidiary, two senior executives at that time¹⁹⁹ and its current CEO²⁰⁰.

¹⁹⁵ *Ibid.*

¹⁹⁶ Case of the Nazi collaborator “Papon” (Cour de Cassation, Chambre criminelle, January 23, 1997, 96-84.822).

¹⁹⁷ “Lafarge lawsuit (re complicity in crimes against humanity in Syria)”, *Business & Human Rights Resource Centre*, <https://www.business-humanrights.org/en/latest-news/lafarge-lawsuit-re-complicity-in-crimes-against-humanity-in-syria/>.

¹⁹⁸ Liz Alderman, “Lafarge Scandal Points to Difficulty for Businesses in War Zones”, *The New York Times*, April 24, 2017, <https://www.nytimes.com/2017/04/24/business/lafarge-ceo-syria-cement.html>.

¹⁹⁹ Bruno Lafont and Bruno Pescheux.

²⁰⁰ Frédéric Jolibois.

In October 2019, the Paris appeals court dismissed the NGOs request join the case as civil parties. Additionally, in November the court dropped the charges of crimes against humanity. In response, Sherpa and ECCHR appealed to the Supreme Court.²⁰¹

In September 2021, after a thorough review, it overturned the previous dismissal of crimes against humanity charges. Following that, the Paris Court of Appeals reinstated charges of complicity in crimes against humanity, terrorist financing and endangering the lives of others. Lafarge contested this decision and appealed to the Supreme Court.²⁰²

On January 16th of 2024, the Supreme Court rejected this appeal, confirming the charges previous established of complicity in crimes against humanity. However, it dropped the charge of endangering the lives of its former Syrian employees.²⁰³

Later, on February 9th of 2024, French prosecutors recommended that Lafarge and nine of its former managers stand trial on charges of terrorism financing. This request is based on violations of international embargoes prohibiting financial support to terrorist entities such as the Islamic State (IS) and Al-Nusra Front. Alongside this claim, there was a parallel criminal proceeding at the federal court in Brooklyn where Lafarge and its subsidiary plead guilty of financing terrorism, for knowingly and deliberately conspiring to provide material that supported the terrorist organizations. This made Lafarge the first company in the US to be convicted for such charges.²⁰⁴

Considering the activities of transnational corporations around the world, we can say that it is relevant to involve the parent company in complicity cases due to several reasons. It is a possibility that the wrong conduct was known and tolerated by the parent company, perhaps approving or even encouraging the behaviours.²⁰⁵

The doctrine of separate corporate personality states that each member of a corporate group is considered legally autonomous and is not automatically responsible for the actions of another. The behaviour of each company within the group is assessed

²⁰¹ “Lafarge lawsuit (re complicity in crimes against humanity in Syria)”.

²⁰² *Ibid.*

²⁰³ *Ibid.*

²⁰⁴ *Ibid.*

²⁰⁵ Martín, “Unfinished Business: Corporate accountability and ESCRs in transitional justice processes”, 134.

individually, meaning a subsidiary's actions are not attributed to its parent company. Generally, parent company liability can be established, and the corporate veil pierced if the doctrine of separate legal personality is abused to commit fraud or evade legal obligations, or if the parent company's conduct is also negligent or intentional. Efforts to adopt theories like the "enterprise theory" or "agent theory" to hold parent companies liable have largely failed and are normally rejected by most of the domestic courts, for weakening the fundamental principles of company law. Enterprise theory discusses joint and several liability among group members as they operate as a single economic entity, while agent theory holds the principal liable for its agent's actions accordingly to their authority.²⁰⁶

Therefore, the Lafarge case is pioneering because impunity used to rule when it comes to corporate activities in conflict-affected areas. As mentioned before, most of these cases are dismissed on procedural grounds because of complex jurisdictional and procedural difficulties even before a conclusion can be made on the merits, mostly because lack of evidence production. It exemplifies the role that so many companies play in conflict-affected areas, ensuring that terrorist organisations and other groups stay in power and commit human rights abuses as well as war crimes – it is terrorism financed by a company that becomes accomplice to the crimes.

²⁰⁶ *Ibid.*

Conclusion

Although International and Human Rights Law have already recognised the importance of Corporations' responsibilities *vis-à-vis* the States' duties and the connection between corporate involvement and human rights abuses is unquestionable, the challenge of effectively addressing it persists.

Currently, the legal instruments at our disposal are not sufficient to achieve comprehensive justice and effective remedies in post-conflict and authoritarian contexts. Alongside this, International Criminal Law still mainly only covers the actions of individuals and not legal persons, therefore not reaching corporations in their scope.

Faced with this, a holistic approach between all the legal instruments available to tackle Business and Human Rights issues should be complemented with Transitional Justice Mechanisms – as they can and should address the role corporations play in these situations, even though TJ has traditionally been more focused on state-sponsored violence, neglecting corporate accountability, which has been referred to as the "missing piece of the puzzle" in achieving the full potential of justice and remedies post-conflict.²⁰⁷

The work of truth commissions is vital to take this process a step further. Their contribution to identifying corporations involved in human rights abuses is crucial, by documenting the events that occur in their reports and recommend reparations, propelling governments and judicial systems hold corporations accountable. Incorporating economic crimes into the transitional justice sphere is an ambitious task, given the existing challenges, but recent truth commissions highlight the growing recognition of its importance and set a record of how to do it and the benefits of it on these matters.

It is imperative that companies operating in these fragile areas recognize their potential to cause harm and take proactive measures to mitigate such effects. For instance, by governments starting to acknowledge and implement the recommendations for reparations suggested by the TRCs, instead of shielding corporations in their newly made policies and not seeking proper restitution for victims.

²⁰⁷ Juan Pablo Bohoslavsky and Veerle Opgenhaffen, "The Past and Present of Corporate Complicity: Financing the Argentinean Dictatorship," *Harvard Human Rights Journal* 23 (2010): 160.

Both cases analysed above regarding Argentina and Syria/France exemplify the detrimental effects of corporate operations in conflict-affected or dictatorial regimes. In Argentina, Ford was implicated in human rights abuses during the military dictatorship, illustrating how corporate complicity can perpetuate state-sponsored violence. The Lafarge case in Syria demonstrated how a corporation can contribute to conflict by financing and cooperating with armed groups. These cases underscore the critical need for strong legal frameworks and diligent enforcement mechanisms to hold corporations accountable for their actions in conflict zones, thereby promoting justice and preventing future violations. Most of the times the problematic surrounding human rights cases against corporations does not refer only to legal procedures challenges by itself, but essentially it is a question of power and politics.²⁰⁸

Corporations can and do commit or assist in international crimes, individual responsibility is not alone sufficient to address the reality of modern conflicts.²⁰⁹ The “corporate culture” is of great importance in perpetuating the actions and mindset inside a company – therefore needed of punishment too.

We are facing a new generation of crimes related to economic players, fuelled by factors like the competition for resources and economic inequalities.²¹⁰ However, economic interests should not shield companies from the consequences of their actions, especially when the violations at stake are so serious as these.

If the role played by enterprises is already unquestionable, establishing a regulatory framework to acknowledge it should be too. So, when faced with a new generation of crimes, it is required to respond with a new generation of legal framework and attitude to address and mitigate them. Corporations need to move to the other side of the table and join states and individuals on the quest for accountability for gross human rights violations at the international level.

Times are, indeed, changing, but permanent peace cannot be achieved, or societies rebuilt if there is a culture of impunity and amnesties in place of holding perpetrators

²⁰⁸ Pietropaoli, *Business and human rights and transitional justice*, 76.

²⁰⁹ Kyriakakis, “Corporations before International Criminal Courts: Implications for the International Criminal Justice Project”, 231.

²¹⁰ Larissa Van den Herik and Dam-De Jong, “Revitalizing the Antique War Crime of Pillage: The Potential and Pitfalls of Using International Criminal Law to Address Illegal Resource Exploitation During Armed Conflict”, *Criminal Law Forum* 22, no.3, 2011.

accountable for their crimes.²¹¹ To accomplish this, TJ mechanisms present themselves as a viable path to overcome the adversities caused by the limitations of international criminal law jurisdiction and the legal framework deficiency in effectively covering the actions of corporations in armed conflicts and repressive regimes.

²¹¹ See for instance, Oskar Thoms, James Ron and Roland Paris, “The effects of transitional justice mechanisms: A summary of empirical research findings and implications for analysts and practitioners”, *CIPS Working Paper* (Centre for International Policy Studies, 2008): 39.

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